

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



\_\_\_\_\_  
IN THE MATTER OF )  
MSC.SOFTWARE CORPORATION, )  
a corporation. )  
\_\_\_\_\_ )

PUBLIC VERSION

Docket No. 9299

**RESPONDENT MSC.SOFTWARE CORPORATION'S MEMORANDUM  
IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO COMPEL  
COMPLIANCE WITH SUBPOENAS**

**INTRODUCTION**

Complaint Counsel's motion should be denied for the simple reason that there is *nothing to compel at this time*.

Simply put, Complaint Counsel wants to take the depositions of numerous MSC employees, and MSC fully intends to make those employees available for deposition. Yet, MSC also believes that it should not be disadvantaged by one-sided discovery. Complaint Counsel repeatedly demands compliance with Rule 3.31(a) on "conducting discovery simultaneously," but ignores the true essence of this dispute - namely that Complaint Counsel can not ambush MSC witnesses in deposition as a result of its: (1) refusal to provide initial disclosures in accord with Rule 3.31(b) for over two months; (2) failure to provide interrogatory responses on even the contentions in its complaint; and (3) refusal to engage in a face-to-face meeting or otherwise attempt to meaningfully resolve these issues without the need for judicial intervention.

Indeed, MSC has tried repeatedly to bring Complaint Counsel's disclosures and discovery responses up to par and negotiate new dates for the remaining depositions with Complaint Counsel. Despite these efforts by MSC, as recently as just last week, Complaint Counsel refused to meet in

person to discuss these issues and then unilaterally declared an "impasse" over the phone when MSC was unwilling to simply capitulate to Complaint Counsel's "proposal" to go forward with all depositions according to their original schedule without addressing MSC's concerns about documents being withheld and improper interrogatory responses by Complaint Counsel. *See* 1/10/02 Letter from T. Smith to P. McCartney (attached as Exhibit A).

Complaint Counsel's shoe-pounding, Soviet-style "negotiating" should not – *indeed, cannot* – trump MSC's due process rights, including MSC's most basic right to be provided with all relevant information obtained by the FTC and the scope of Complaint Counsel's contentions before subjecting its witnesses to deposition.

Even though Complaint Counsel conducted *eighteen months of one-sided, extensive pre-complaint, third-party investigatory discovery* (taking – according to the court reporter – twenty-seven depositions and gathering untold quantities of verbatim statements), more than three months have passed since the October 9, 2001 filing of the Complaint and *Complaint Counsel still has failed to meet its regulatory obligation* under Rule 3.31(b) to identify all personnel and disclose all documents "likely to have discoverable information relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent." Similarly, MSC's interrogatories seeking information on the core market definition and competitive effects allegations of the Complaint continue to go unanswered by Complaint Counsel.

As has long been the case, the Government must be held to a higher standard of litigation conduct – not a lower one as Complaint Counsel proposes in its effort to launch headlong into depositions of MSC personnel while it drags its heels on its most basic and threshold discovery obligations. The Government "is the representative not of an ordinary party . . . but of a sovereignty

... whose interest ... is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). "As a plaintiff, the government *has an obligation to be forthcoming* with information it possesses which may assist defendants in preparing for trial." *In re Sunrise Secs. Litig.*, 109 B.R. 658, 666 (E.D. Pa. 1990) (citing *United States v. Reynolds*, 345 U.S. 1, 12 (1953)). Accordingly, Complaint Counsel's *selective and untimely production* of documents and transcripts and refusal to provide meaningful interrogatory responses as to the allegations in its own Complaint are particularly unjustified, unfair, and untenable.

Complaint Counsel's continued delays in satisfying even its most basic regulatory disclosure obligations are the root cause of the very delays it now complains of regarding deposition scheduling. Complaint Counsel's motion seeks to turn the normal and logical flow of discovery on its head by requiring MSC to produce its witnesses for deposition while Complaint Counsel sits on the documents most helpful to MSC in the preparation of its witnesses and its case. While perhaps favorable to Complaint Counsel and its desire to conduct this case by ambush, such an approach is not consistent with FTC Rules or common sense.

Unlike Complaint Counsel, MSC continues to attempt to resolve its disputes through a meet-and-confer session instead of prematurely seeking judicial involvement. On Thursday, January 10, 2002 - after initially refusing to modify its responses in any way - Complaint Counsel made unspecified promises to revisit its responses to MSC's discovery requests "on or around" January 18, 2002. Assuming Complaint Counsel's good faith in that regard, MSC fully expects to be able to provide its witnesses for deposition after Complaint Counsel satisfies its disclosure obligations ensuring a simultaneous and orderly flow of discovery. We respectfully submit that the matter of

rescheduling the MSC depositions, if it ever requires judicial involvement, certainly does not require judicial action prior to Complaint Counsel's recently-promised supplementation.

### THE HISTORY OF THE DISPUTE

MSC postponed the depositions of MSC's operating personnel once it became clear that Complaint Counsel intended to conduct discovery not through mutual disclosure, but by ambush. While MSC was willing to accommodate Complaint Counsel's demands for these depositions to take place before MSC even had a chance to complete its own document production, MSC agreed to these depositions on the understanding and expectation that Complaint Counsel's promises of providing third party and other discovery materials in a timely fashion and ahead of the deposition dates. MSC was *not* willing and *not* required to submit witnesses to depositions in which Complaint Counsel was relying upon knowledge learned during the non-public investigation but *not* disclosed to MSC.

Even though Complaint Counsel promised the Administrative Law Judge ("ALJ") and MSC that it "would be happy" to give MSC the discovery it sought, *see* 11/08/01 Hearing Tr. at 38 (attached as Exhibit B),<sup>1</sup> Complaint Counsel has failed to live up to its commitment.

**A. Complaint Counsel's Responses to MSC's Discovery Requests are Superficial, Incomplete, and a Violation of the Commission's Rules of Practice.**

An examination of both the timing and nature of Complaint Counsel's discovery responses demonstrate why Complaint Counsel's motion should be denied.

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<sup>1</sup> At the first pre-hearing conference, Complaint Counsel said "we will be happy to release the documents to MSC." 11/08/01 Hearing Tr. at 38 (attached as Exhibit B).

MSC acquired UAI in April 1999 for \$6 million. MSC acquired CSAR in November 1999 for \$11 million. Complaint Counsel started investigating these transactions as early as January 2000. Over the ensuing eighteen months, the FTC took twenty-seven depositions and untold verbatim statements, collected unknown quantities of third-party materials, and downloaded unknown amounts of information from the Internet and other sources – at least some of which Complaint Counsel relied upon in recommending that the Commission file a complaint in this action.

On October 9, 2001, the FTC filed its Complaint containing three central allegations. *First*, the Complaint alleges that “[o]ne relevant product market in which to assess the likely effects of [the] acquisitions of UAI and CSAR is the licensing or sale of *advanced versions* of Nastran.” Complaint ¶ 21 (attached as Exhibit C). *Second*, the Complaint alleges that, prior to MSC’s acquisitions of Universal Analytics, Inc. (“UAI”) and Computerized Structural Analysis and Research Corporation (“CSAR”), “users of the advanced versions of Nastran offered by MSC, UAI, or CSAR could readily switch between these versions relatively quickly and without spending significant switching costs and time.” *Id.* ¶ 18. *Third*, the Complaint alleges that MSC’s acquisitions of UAI and CSAR “will have the effect of substantially lessening competition and tend[] to create a monopoly in the relevant markets.” *Id.* ¶ 29.

MSC needs – and is entitled – to know *what* Complaint Counsel believes is an “advanced” version of Nastran. “Advanced Nastran” is not a term of art used in this industry. MSC has propounded discovery to learn these things, but Complaint Counsel has steadfastly refused to respond substantively to that discovery.

Even though Complaint Counsel alleges that “users of . . . advanced versions of Nastran . . . could readily switch” between products offered by MSC, UAI, and CSAR, Complaint Counsel did

not identify a *single* alleged Nastran user in its mandatory Initial Disclosures filed on November 6, 2001. The Commission's Rule of Practice 3.31(b) requires Complaint Counsel to disclose the "name . . . , the address and telephone number of *each individual likely to have discoverable information* relevant to the allegations of the Commission's complaint." 16 C.F.R. § 3.31(b)(1) . Instead, Complaint Counsel excluded from its Initial Disclosures several "categories of individuals and organizations." Among those "excluded categories" were all "current and former licensees or end-users of software licensed or sold by [MSC] UAI, and CSAR." Nov. 6, 2001 Complaint Counsel's Initial Disclosures at 2 (attached as Exhibit D).

Thus, notwithstanding its regulatory *duty* to disclose the name of "*each individual* likely to have discoverable information relevant to the allegations of the complaint," Complaint Counsel refused to disclose the names to MSC of *any* customer, including those it alleged could readily switch between versions of Nastran offered by UAI, CSAR, and MSC and - *presumably* - any MSC customer who Complaint Counsel contended was injured as a consequence of the acquisitions. Complaint Counsel's Initial Disclosures named only four individuals - only *one* of whom would later appear on Complaint Counsel's Preliminary Witness List.

During the course of the initial pretrial hearing held on November 8, 2001, counsel for MSC made known MSC's expectation that Complaint Counsel would produce materials gathered from MSC's customers during the course of Complaint Counsel's extensive, eighteen month, *ex parte*, investigation. Complaint Counsel promised the ALJ that as soon as a protective order was in place, Complaint Counsel "would be happy" to give that material to MSC:

Mr. Smith [Counsel for MSC]: "[W]e're supposed to get third party documents and if [Complaint Counsel has] any affidavits, things of that nature . . . we'll be getting those when?"

Mr. McCartney [Complaint Counsel]: "[W]e have to have a protective order . . . *then we will be happy to release the documents to MSC.*"

11/08/01 Hearing Tr. at 38 (attached as Exhibit B).

Unfortunately, it would take nearly *two more months* before Complaint Counsel produced a *single* affidavit or verbatim statement – just three days before the start of the depositions MSC was forced to cancel as a result of Complaint Counsel's delays. To date, Complaint Counsel has not produced *all* of the affidavits and verbatim statements in its possession, claiming generalized but unspecified privileges and refusing to provide a privilege log.<sup>2</sup>

In its continuing, but unsuccessful, effort to understand the bases for Complaint Counsel's allegations in the complaint, on November 21, 2001, MSC propounded eighteen narrowly-drafted interrogatories which were drawn *directly* from the language of the Complaint. *See* Resp't MSC Software Corporation's First Set of Interrogatories (attached as Exhibit F). MSC sought, *inter alia*, to identify what Complaint Counsel contends is an "advanced" version of Nastran;<sup>3</sup> and which

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<sup>2</sup> Complaint Counsel's repeatedly refuses to produce a privilege log substantiating its claims, despite asserting informer's, deliberative process, and governmental privileges. Its refusal makes it impossible for MSC to challenge Complaint Counsel's failure to produce these materials and for the ALJ to evaluate the legitimacy of the claims. (*See, e.g.,* Complaint Counsel's Objections and Resps. to Resp't MSC Software Corp.'s First Set of Interrogs. at 1 (attached as Exhibit E) (stating "Complaint Counsel objects generally to Definitions and Instructions No. 22 . . . to the extent it requires Complaint Counsel to produce a privilege log. Requiring Complaint Counsel to produce such a list is *not* contemplated by the FTC's Rules of Practice"). Actually, the Rules of Practice *expressly* require Complaint Counsel to produce a privilege log. *See* 16 C.F.R. § 3.38A (stating that "[*any*] person withholding material responsive to . . . request for production . . . pursuant to § 3.37 . . . shall, if so directed in the . . . a request for production, submit . . . a schedule of the items withheld . . .").

<sup>3</sup> Interrogatory No. 2:

(continued...)

customers "readily switched" between versions of Nastran offered by UAI, CSAR, and MSC.<sup>4</sup> MSC also sought the identity of all third parties that Complaint Counsel had communicated with regarding MSC's acquisition of UAI and CSAR, because, as noted above, Complaint Counsel refused to disclose them as part of the Initial Disclosures.<sup>5</sup>

In response to MSC's second interrogatory, which sought the identity of each product Complaint Counsel contends is an "advanced version" of Nastran, and how those products could be differentiated from versions of Nastran which were *not* advanced, Complaint Counsel replied: "[v]ersions of Nastran offering higher levels of functionality and wider ranges of features at higher prices [*sic*] level can be described as advanced versions of Nastran." Complaint Counsel's Resps. & Objections to MSC's First Set of Interrogs. at 11 (attached as Exhibit E). Thus, after an eighteen month, one-sided investigation, the best that Complaint Counsel can say about "advanced versions"

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<sup>3</sup> (...continued)

With regard to your allegation in paragraph 21 that "[o]ne relevant product market in which to assess the likely effects of [the] acquisitions of UAI and CSAR is the licensing or sale of advanced versions of Nastran," identify each software product that you contend constitutes an "advanced version[ ] of Nastran."

<sup>4</sup> **Interrogatory No. 6:**

Identify each person who used versions of Nastran offered by MSC, CSAR, and UAI prior to the acquisitions who you contend did "readily switch between these versions without substantial loss of functionality because each version offered similar features and capabilities," as alleged in paragraph 17 of the Complaint, and for each such person, state the reasons why the person switched, the occasion for the person's switching, and identify all evidence relating thereto.

<sup>5</sup> **Interrogatory No. 1:**

Identify each person with whom you have communicated regarding MSC's acquisitions.



of Nastran -- the products at the *heart* of Complaint Counsel's charges -- are that they are those products that are more advanced than those products that are not.

As to how "advanced versions" of Nastran can be differentiated from other versions of Nastran, Complaint Counsel stated only that "there are a variety of versions of Nastran differentiated by, among other characteristics, their particular features, functionality, speed, model size, and price level." *Id.* at 10. Interrogatory No. 2 was drawn *directly* from the allegations of the Complaint. That Complaint Counsel cannot provide any greater detail than the mere *parroting* of the complaint's assertion that "a variety of versions of Nastran are differentiated by, among other characteristics, their particular features, functionality, speed, model size, and price level," is shocking (if correct) and insidious if *not*. See 12/28/01 Letter from T. Smith to P. McCartney at 5 (attached as Exhibit G).

MSC also sought in Interrogatory 1 the identity of "each person with whom [Complaint Counsel] communicated regarding MSC's acquisitions." Complaint Counsel improperly responded that such information could be gleaned from the face of the documents Complaint Counsel produced as part of its Initial Disclosures. This response is a *non-sequitur*. To the extent that the interrogatory calls for Complaint Counsel to describe what was said during communications between the FTC and the customer, that plainly cannot be gathered from documents created by the customer unless those documents directly address those communications. Thus, the answer to MSC's interrogatory cannot be gleaned from the documents. This response is also plainly inadequate insofar as it fails to identify

particular documents and does not identify individuals with whom the FTC communicated but from whom *no* documents were gathered.<sup>6</sup> *Id.* at 4-5.

Notwithstanding the fact that Complaint Counsel did not disclose *a single individual* in response to MSC's Interrogatory No. 1, six days later Complaint Counsel identified *forty* individuals on its Preliminary Witness List.

In addition, Complaint Counsel objected to identifying any exculpatory evidence that was responsive to its interrogatories. *See* Complaint Counsel's Objections and Resps. to Resp't. MSC Software's First Set of Interrogs. at 4 (attached as Exhibit E).

The Supreme Court has made it clear that *defendants* like MSC are entitled to receive the exculpatory evidence the government gathers during the course of its probe.<sup>7</sup> *Brady v. Maryland*,

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<sup>6</sup> "It is well established that an answer to an interrogatory 'must be responsive to the question. It should be complete in itself and should not refer to the pleadings, or to depositions or other documents, or to other interrogatories, at least where such references make it impossible to determine whether an adequate answer has been given without an elaborate comparison of answers.'" *Scaife v. Boenne*, 191 F.R.D. 590, 594 (N.D. Ind. 2000) (quoting *Smith v. Logansport Cmty. Sch. Corp.*, 139 F.R.D. 637, 650 (N.D. Ind. 1991)) (motion to compel granted). Moreover, MSC has made it clear to Complaint Counsel that Commission Rule of Practice 3.35 does not permit Complaint Counsel to simply refer to documents on a wholesale basis as an alternative to responding to interrogatories. *See* 12/28/01 Letter from T. Smith to P. McCartney (attached as Exhibit G).

<sup>7</sup> As the Supreme Court stated: "[I]t is unconscionable to allow [the government] to undertake prosecution and then invoke its governmental privileges *to deprive the accused of anything which might be material to his defense.*" *United States v. Reynolds*, 345 U.S. 1, 12 (1953). *See also In re Sunrise Secs. Litig.*, 109 B.R. 658, 666 (E.D. Pa. 1990) ("As a plaintiff, the government *has an obligation to be forthcoming* with information it possesses which may assist defendants in preparing for trial.") (citing *Reynolds*, 345 U.S. at 12). Moreover, Complaint Counsel has the burden of establishing the legitimacy of its privileges. MSC does not have the burden of proving that Complaint Counsel's documents are not privileged. *See, e.g., In re Lindsey*, 158 F.3d 1263, 1269 (D.C. Cir. 1998); *FTC v. Lukens Steel Co.*, 444 F. Supp. 803, 806 (D.D.C. 1977). Unless Complaint Counsel can specifically justify the application of the

(continued...)

373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment"). The obligation to provide exculpatory evidence applies with *equal* force to Complaint Counsel in FTC adjudicative proceedings. *In re Olin Corp.*, Docket No. 9196 (Nov. 26, 1985) (ordering Complaint Counsel to produce documents that "clearly. . . refute or disprove any of the allegations in the complaint"). Any "suggestion that officials of a law enforcement agency may *deliberately withhold* from respondent a document they believe to be clearly exculpatory is *repugnant* to any notion of fair administration of justice." *Id.*; see also *In re Warner-Lambert Co.*, Docket No. 8850 (Oct. 5, 1973) (requiring production of exculpatory evidence).

Complaint Counsel's responses to MSC's interrogatories are essential to understanding the nature and substance of Complaint Counsel's contentions. Without such information, MSC cannot properly prepare and defend the depositions of its witnesses, gather the information necessary to prepare its case, or even understand the nature of Complaint Counsel's allegations so that Complaint Counsel might properly rebut them. Complaint Counsel's responses to MSC's interrogatories were – like its Initial Disclosures – incomplete, evasive, and in violation of the Commission's Rules of Practice. Complaint Counsel's Objections and Responses to MSC's Interrogatories also showed that Complaint Counsel intends to conduct one-way discovery. Complaint Counsel plainly intends to keep hidden the nature of its contentions, any exculpatory evidence, and the identity of third parties

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<sup>7</sup> (...continued)

privilege(s) asserted, the documents should be ordered produced. Moreover, governmental privileges like the deliberative process privilege are to be narrowly construed. See *Army Times Publ'g Co. v. Department of the Air Force*, 998 F.2d 1067, 1069 (D.C. Cir. 1993); see also *Price v. County of San Diego*, 165 F.R.D. 614, 620 (S.D. Cal. 1996) (the deliberative process privilege "is to be narrowly applied").

with whom it had communicated – except for a select number that Complaint Counsel intends to use to prove its case at trial.<sup>8</sup>

It is well established that Constitutional Due Process requires that parties be given an adequate opportunity to prepare a defense prior to imposing an adverse judgment. *Cf. Chambers v. Mississippi*, 410 U.S. 284 (1973) (due process right to introduce certain evidence). Even apart from Due Process, it is recognized that parties must be afforded an adequate opportunity to obtain, analyze, and present relevant evidence. *See, e.g., Epstein v. MCA, Inc.*, 54 F.3d 1422, 1423 (9th Cir. 1995) (“The Federal Rules of Civil Procedure creates a ‘broad right of discovery’ because ‘wide access’ to relevant facts serves the integrity and fairness of the judicial process by promoting the search for the truth.”) (citation omitted) and *Union Bag-Camp Paper Corp. v. FTC*, 233 F. Supp. 660 (S.D.N.Y. 1964) (noting that “a respondent to the FTC proceeding is afforded broad rights of discovery, defense, rebuttal and cross examination”).

MSC has been equally frustrated in its quest for documents. On December 11, 2001 – more than a *month* after Complaint Counsel promised that it would expeditiously provide third party materials gathered during the investigatory phase to MSC – Complaint Counsel produced its first

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<sup>8</sup> On December 28, 2001, MSC sent Complaint Counsel a detailed, twelve-page letter addressing the vast deficiencies in Complaint Counsel’s responses to MSC’s interrogatories. MSC warned Complaint Counsel that it needed “complete responses to these interrogatories so that MSC may proceed with its discovery and prepare its case for trial.” 12/28/01 Letter from T. Smith to P. McCartney (attached as Exhibit G). In addition to the deficiencies previously identified, MSC also explained that Complaint Counsel had inappropriately applied the highest level of confidentiality to its responses, thereby precluding counsel for MSC from showing Complaint Counsel’s responses to its client. Complaint Counsel’s responses are so devoid of facts – let alone information falling within the narrow category of materials subject to heightened protection – that there can be no legitimate basis for such an assertion. The only immediate effect of Complaint Counsel’s designation is that it precludes counsel from showing the responses to MSC and enlisting MSC’s help in preparing a defense.

documents. However, the "affidavits [and] things of that nature" were nowhere among the nineteen partial boxes produced. Moreover, Complaint Counsel's subsequent objections and responses to MSC's first set of document requests made clear that Complaint Counsel had produced "*nearly all,*" but *not all* responsive documents and things.

After promising the ALJ that Complaint Counsel would provide MSC with substantial information, and after Complaint Counsel's Initial Disclosures failed to list a single third party customer, it was not until December 17, 2001, in its Preliminary Witness List, that Complaint Counsel identified *forty individuals*. Only one of the forty - Harry Schaeffer, the CEO of a company poised to enter the market and provide additional competition to MSC - was listed on *both* the Preliminary Witness List and Complaint Counsel's Initial Disclosures.

Complaint Counsel's actions assured that MSC's ability to conduct discovery would be significantly delayed. Interestingly, Complaint Counsel has never explained why it chose to wait until it served its Preliminary Witness List to reveal these names, rather than provide them as part of its Initial Disclosures. Clearly, these potential witnesses had information relevant to the allegations in the Complaint.

As a result, with only two weeks left in December, MSC learned for the first time the names of third parties who may have been cooperating with Complaint Counsel's investigation and who obviously have relevant information. Complaint Counsel successfully prevented MSC from learning this information for more than two months. At the same time, Complaint Counsel was feverishly trying to squeeze in as many depositions of MSC's employees as it could, even as it withheld from MSC information Complaint Counsel had learned from third parties during the investigatory phase.

Complaint Counsel's objections and responses served on December 17, 2001, confirm that Complaint Counsel 1) intended to conceal the identity of those with whom it communicated during the investigative phase, hiding behind assertions of broad-based, unsubstantiated privileges; 2) continued to withhold verbatim statements (if any) made by those individuals who do not appear on Complaint Counsel's Preliminary Witness List; and 3) withheld non-privileged responsive documents. *See* 1/7/02 Letter from T. Smith to P. McCartney (attached as Exhibit H).

On December 27 and 28, with only days to go – including the New Year's holiday – before the first scheduled deposition of an MSC employee, Complaint Counsel produced eight additional boxes of documents. Some of the information contained in these boxes related to customers serviced by the first witness to be deposed, David Beers. Complaint Counsel's production of these documents just before Mr. Beers' scheduled deposition necessarily hampered MSC's ability to prepare for that deposition.

Despite having promised the ALJ on November 8, 2001, that Complaint Counsel would provide MSC with affidavits and deposition transcripts *as soon as* a Protective Order was in place, it would not be until January 2, 2002, before Complaint Counsel produced a single affidavit or verbatim statement. Even then, Complaint Counsel inappropriately limited the verbatim statements produced to *only* those given by individuals appearing on Complaint Counsel's Preliminary Witness List. Although Complaint Counsel produced twenty-one verbatim statements the night before depositions were to start – MSC has learned (from the court reporter involved) that Complaint Counsel took at least as many as twenty-seven transcribed interviews during the course of Complaint Counsel's investigation. Complaint Counsel has not said when it will produce these missing

transcripts, despite the fact that Complaint Counsel is obligated to provide them to MSC under *both* Complaint Counsel's Initial Disclosure obligations and in response to MSC's document requests.

During the course of Mr. Beers' deposition on January 3, 2001, it became clear that Complaint Counsel's questions were framed in reliance upon information that had either been produced to MSC only days or hours before, or on information still not yet produced. MSC reluctantly proceeded with Mr. Beers' deposition – despite Complaint Counsel's many significant discovery failures.

The letter sent by Complaint Counsel on that same day, however, ultimately convinced MSC that Complaint Counsel intended to hide the ball and avoid providing the factual information responsive to MSC's discovery. Complaint Counsel tacitly acknowledged the deficiency of its interrogatory responses in a letter sent to counsel for MSC that stated that "to the extent that [MSC's] letter explains more explicitly the information [MSC] sought, we expect to be able to supplement our responses." See 1/3/02 Letter from K. Cox to T. Smith (attached as Exhibit I). Although Complaint Counsel represented to MSC that it intends to supplement its interrogatory responses "on or around" January 18, 2002, Complaint Counsel's apparent inability to understand the interrogatories – which are drawn directly from the language of the Complaint – casts doubt on the sufficiency of these future responses.

Complaint Counsel's letter did make *one* thing clear: Complaint Counsel intended to delay its supplemental responses until nearly all of the depositions were over. In its letter of January 3, 2002, Complaint Counsel stated that it would be unable to supplement its interrogatory responses *before* January 18, 2002 – after nearly all of the depositions were scheduled to be completed – because it is "required to spend the next two weeks preparing for and conducting . . . depositions."

1/3/02 Letter from K. Cox to T. Smith (attached as Exhibit D). Thus, Complaint Counsel has made it abundantly clear that it intends to wait to reveal its contentions – or the bases for them – until *after* it has deposed MSC's witnesses. It was with great reluctance that MSC has postponed the depositions until Complaint Counsel provides meaningful responses to discovery, but concerns about fundamental fairness left MSC no choice. Complaint Counsel's deliberate delay in responding to MSC's interrogatories until *after* the depositions were nearly concluded would have given Complaint Counsel an unfair advantage.

In a letter to Complaint Counsel on January 10, 2001, MSC explained that it was Complaint Counsel's own tactical release of selected discovery materials that necessitated the postponement of the depositions. MSC told Complaint Counsel that "[i]n both our correspondence and pleadings we have made clear to Complaint Counsel that MSC cannot agree to put forward witnesses while Complaint Counsel refuses to provide documents that are responsive to MSC's requests and/or covered by Complaint Counsel's mandatory initial disclosure obligations and before Complaint Counsel has met its obligation to explain its contentions in response to MSC's interrogatories."

1/10/02 Letter from T. Smith to P. McCartney (attached as Exhibit A).

As stated in the January 10 letter, MSC remains willing to discuss and resolve these matters with Complaint Counsel. Complaint Counsel has steadfastly refused to compromise or to acknowledge its obligations to produce responsive third party materials immediately. Complaint Counsel remains uninterested in negotiating the timing of its depositions. Instead of negotiating in good faith, Complaint Counsel has demanded that the all depositions be completed by January 25, 2002, with no representation that Complaint Counsel will comply with MSC's discovery requests. Good faith negotiating does not consist of unilateral demands that the other side capitulate. As MSC



explained to Complaint Counsel, "[i]f these discussions really are at an impasse, it is one of Complaint Counsel's own creation and results from Complaint Counsel's intransigence and unyielding determination to conduct these proceedings in a one-sided and unfair manner. We repeat what we have told Complaint Counsel all along: MSC remains willing to attempt to resolve *all* of these issues at a meet and confer." 1/10/02 Letter from T. Smith to P. McCartney (attached as Exhibit A).

The foregoing summary amply demonstrates how Complaint Counsel has sought to flout the discovery rules at every opportunity. The discussion above also demonstrates why due process demands that MSC be given adequate responses to its properly propounded discovery before allowing its witnesses to be deposed.<sup>9</sup>

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<sup>9</sup> MSC has a *constitutional* right to due process and a fair hearing. Complaint Counsel's misconduct to date raises serious questions as to whether Complaint Counsel ever intends to afford MSC the meaningful discovery necessary to obtain the fair and impartial hearing MSC is entitled to as part of its Fifth and Fourteenth Amendment rights. Complaint Counsel's willful and persistent defiance of the fundamental precepts underlying government litigation against private parties, fairness and common sense, has fatally undermined the trial schedule agreed to by the parties on November 9, 2001, something that we respectfully suggest be addressed at the scheduled January 31, 2002, status hearing set by the Administrative Law Judge. MSC's agreement with the proposed schedule was based on Complaint Counsel's promise of *extensive* disclosures as part of their mandatory pretrial initial disclosures, which were due on November 5, 2001 and expectation of timely production on Complaint Counsel's investigatory materials and meaningful responses to standard contention interrogatories.

## CONCLUSION

Complaint Counsel's Motion to Compel should be denied. MSC remains willing to resolve this dispute with Complaint Counsel without the ALJ's intervention - and MSC has attempted to do so on several occasions. MSC's continued willingness, however, to work with Complaint Counsel to reach a *mutually* satisfactory solution to this dispute does *not* mean that MSC is willing to tolerate Complaint Counsel's discovery abuses. MSC is willing to discuss such issues with the ALJ at the schedule January 31, 2002, status conference or at a time convenient to the ALJ.

Respectfully submitted,



Tefft W. Smith (Bar No. 458441)

Marimichael O. Skubel (Bar No. 294934)

Michael S. Becker (Bar No. 447432)

Bradford E. Biegon (Bar No. 453766)

Larissa Paule-Carres (Bar No. 467907)

KIRKLAND & ELLIS

655 15<sup>th</sup> Street, N.W.

12<sup>th</sup> Floor

Washington, DC 20005

(202) 879-5000 Telephone

(202) 879-5200 Facsimile

*Counsel for Respondents*

*MSC Software Corporation*

Dated: January 14, 2002

**CERTIFICATE OF SERVICE**

This is to certify that on January 18, 2002, I caused a copy of the attached **Public Version** of Respondent MSC Software Corporation's Memorandum in Opposition to Complaint Counsel's Motion to Compel Compliance with Subpoenas to be served upon the following persons by hand:

Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

Richard B. Dagen, Esquire  
Federal Trade Commission  
601 Pennsylvania Avenue, N.W.  
Washington, DC 20580

Karen Mills, Esquire  
Federal Trade Commission  
601 Pennsylvania Avenue, N.W.  
Washington, DC 20580



David Flowers

**KIRKLAND & ELLIS**  
655 15<sup>th</sup> Street, NW  
Washington, D.C. 20005  
(202) 879-5000 (tel.)  
(202) 879-5200 (fax)

***Counsel for Respondents,***  
**MSC Software Corporation**



# KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

655 Fifteenth Street, N.W.  
Washington, D.C. 20005

202 879-5000

Facsimile:  
202 879-5200

To Call Writer Directly:  
(202) 879-5212

January 10, 2002

## VIA FACSIMILE

P. Abbott McCartney, Esq.  
Federal Trade Commission  
601 Pennsylvania Avenue, N.W.  
Washington, D.C. 20005

Re: MSC Software, Docket No. 9299

Dear Abbott;

Last night we received a letter from Karen Mills which calls into question Complaint Counsel's willingness to attempt to resolve *all* of the parties' outstanding discovery issues in good faith. In both our correspondence pleadings we have made clear to Complaint Counsel that MSC cannot agree to put forward witnesses while Complaint Counsel refuses to provide documents that are responsive to MSC's requests and/or covered by Complaint Counsel's mandatory initial disclosure obligations and before Complaint Counsel has met its obligation to explain its contentions in response to MSC's interrogatories.

Ms. Mills' letter unilaterally declares negotiations at an impasse, because MSC will not capitulate to Complaint Counsel's demands. However, this can hardly be characterized as a "good faith" effort to resolve the parties' disputes. Demanding that MSC produce its deponents before such time as MSC has had an opportunity to review the documents and transcripts Complaint Counsel has gathered over the last *two years* - but produced (in some cases) only *hours* before the first deposition - and before such time as Complaint Counsel has responded meaningfully to MSC's properly-propounded contention interrogatories is unconscionable and a violation of MSC's due process rights.

Ironically, Complaint Counsel just last night demanded MSC return part of the limited discovery it has provided - verbatim witness statements - citing MSC's obligation to pay the court reporter *first* before MSC would be allowed to keep copies of the transcripts. Thus, MSC is even now unable to adequately prepare its deponents for their depositions because Complaint Counsel is recalling the limited discovery it has provided. Moreover, the letter demanding immediate return of the verbatim statements strongly suggests that other such verbatim statements exists which have

KIRKLAND & ELLIS

P. Abbott McCartney, Esq.

January 10, 2002

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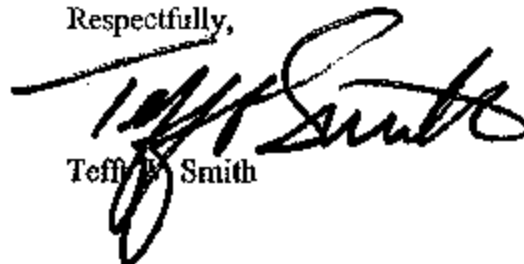
not even been shown to MSC because it tells the court reporter *which* verbatim statements to provide to MSC at the appropriate time (suggesting that others have been excluded from the list of statements to be given to MSC).

As to the recitation of Rule of Practice 3.31(a) as granting Complaint Counsel a license to conduct one-sided discovery, the Rule plainly does not stand for any such proposition. Nor may Complaint Counsel unilaterally assert that discussions are at an impasse when MSC is willing - and, indeed, anxious - to resolve these discovery disputes and has attempted to do so.

If these discussions really are at an impasse, it is one of Complaint Counsel's own creation and results from Complaint Counsel's intransigence and unyielding determination to conduct these proceedings in a one-sided and unfair manner. We repeat what we have told Complaint Counsel all along: MSC remains willing to attempt to resolve *all* of these issues at a meet and confer. While MSC remains willing to cooperate with Complaint Counsel, MSC is *not* willing to surrender its due process rights so that Complaint Counsel may unfairly depose witnesses from whom information has been willfully withheld.

Please contact me tomorrow so that we may arrange a mutually-agreeable time to meet and confer regarding these issues.

Respectfully,

A handwritten signature in black ink, appearing to read "Tiff Smith", written in a cursive style. The signature is positioned above the printed name "Tiff Smith".

Tiff Smith



**In The Matter Of:**

*MSC.SOFTWARE CORPORATION*

*Matter No. D09299*

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*Hearing*

*November 8, 2001*

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*For The Record, Inc.*

*Court Reporting and Litigation Support*

*603 Post Office Road*

*Suite 309*

*Waldorf, MD USA 20602*

*(301) 870-8025 FAX: (301) 870-8333*

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(1) FEDERAL TRADE COMMISSION  
 (2)  
 (3) In the Matter of: )  
 (4) MSC SOFTWARE CORPORATION, ) Docket No. 9299  
 (5) a corporation. )  
 (6)  
 (7) Thursday, November 8, 2001.  
 (8)  
 (9) Room 532  
 (10) Federal Trade Commission  
 (11) 6th & Pennsylvania Ave., NW  
 (12) Washington, D.C. 20580  
 (13)  
 (14) The above-entitled matter came on for pretrial  
 (15) hearing, pursuant to notice, at 2:07 p.m. before D.  
 (16) Michael Chappell, Administrative Law Judge.  
 (17)  
 (18) APPEARANCES:  
 (19)  
 (20) ON BEHALF OF THE FEDERAL TRADE COMMISSION:  
 (21) ABBOTT McCARTNEY, Attorney  
 (22) KENI E. COX, Attorney  
 (23) PEGGY D. BAYER, Attorney  
 (24) KAREN A. MILLS, Attorney  
 (25) PATRICK J. ROACH, Attorney

(1) Federal Trade Commission  
 (2) 6th Street and Pennsylvania Avenue, N.W.  
 (3) Washington, D.C. 20580-0000  
 (4) (202) 326-2695  
 (5)  
 (6) ON BEHALF OF MSC SOFTWARE:  
 (7) TEFFT W. SMITH, Attorney  
 (8) MARIMICHAEL O. SKUBEL, Attorney  
 (9) BRADFORD E. BIEGON, Attorney  
 (10) LARISSA PAULE-GARRIES, Attorney  
 (11) Kirkland & Ellis  
 (12) 855 15th Street, N.W.  
 (13) Washington, D.C. 20005-5793  
 (14) (202) 878-5000  
 (15)  
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 (21)  
 (22)  
 (23)  
 (24)  
 (25)

PROCEEDINGS

(1) )  
 (2) )  
 (3) JUDGE: Start the record, docket 9299. This is  
 (4) the initial prehearing conference in the matter of  
 (5) MSC Software Corporation. How is that pronounced? Is  
 (6) that right?  
 (7) MR. SMITH: We just refer to it, Your Honor, as  
 (8) MSC, just for ease, but MSC Software is how people --  
 (9) usually leave off the dot and just say MSC Software, if  
 (10) you need to, but MSC is how we always refer to it.  
 (11) JUDGE: But your official logo on file in  
 (12) Delaware has the period after it?  
 (13) MR. SMITH: It does have the period to emphasize  
 (14) the Internet .com elements of the company.  
 (15) JUDGE: Thank you. Again it's docket 9299.  
 (16) Madam Reporter, do you have a copy of the style  
 (17) of the case?  
 (18) MADAM REPORTER: Yes, I do.  
 (19) JUDGE: I will now take appearances, starting  
 (20) with the government.  
 (21) MR. McCARTNEY: Thank you, Your Honor, I am  
 (22) Abbott McCartney, counsel supporting the plaintiffs in  
 (23) this matter and I would like to introduce my team, my  
 (24) co-counsel. I have Kent Cox, an attorney here in the  
 (25) Bureau of Competition; Patrick Roach, deputy assistant

(1) director of the Bureau of Competition; Peggy Bayer,  
 (2) another attorney in the Bureau of Competition; and Karen  
 (3) Mills, another attorney in the bureau of competition,  
 (4) and we are being assisted by Dennis Harckerts, research  
 (5) analyst in the bureau.  
 (6) JUDGE: And for the respondents?  
 (7) MR. SMITH: I am Tefft Smith from Kirkland &  
 (8) Ellis, and associated with me is my partner, Marimichael  
 (9) Skubel, and Brad Biegon and Larissa Paule-Carres, who  
 (10) are going to be my court team in defense of this matter.  
 (11) JUDGE: Okay. Now, the main thing we're going  
 (12) to do today is go over the scheduling order. Does  
 (13) everyone hear me? I hear a roar. Can everyone hear  
 (14) okay?  
 (15) MR. SMITH: We can hear just fine.  
 (16) JUDGE: Before we get to the scheduling order, I  
 (17) usually, it's a practice of mine to allow the parties to  
 (18) make a brief statement of your case, if you wish. It's  
 (19) not required, it's totally voluntary. Would the  
 (20) government like to make an opening statement?  
 (21) MR. McCARTNEY: Yes, Your Honor, we would.  
 (22) JUDGE: Proceed. Either from counsel table or  
 (23) the lectern, doesn't matter.  
 (24) MR. McCARTNEY: Thank you, Your Honor. Let me  
 (25) first apologize for being late this afternoon. We were

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[1] create NASTRAN. That was in the late 1960s. And UAI  
[2] was the second contract developer on behalf of NASTRAN  
[3] making further investments and enhancements to NASTRAN.  
[4] After NASTRAN was first developed by NASA, it  
[5] was put in the public domain, and MSC, UAI and CSAR took  
[6] that public domain code and continued to enhance it,  
[7] continued to add features and made it commercially  
[8] available, as well as leasing it or licensing it back to  
[9] the government.

[10] NASTRAN has become a very successful solver, and  
[11] today, it is, for the aerospace and the automobile  
[12] industry, the standard structural analysis solver for  
[13] those industries.

[14] JUDGE: Is it the government's position that  
[15] this is the only product that MSC Software sells?

[16] MR. McCARTNEY: Oh, no, MSC has a portfolio of  
[17] other solvers, of other products used in the engineering  
[18] field.

[19] JUDGE: But we're only concerned with NASTRAN,  
[20] modified NASTRAN?

[21] MR. McCARTNEY: Yes. And when we say UAI  
[22] NASTRAN and CSAR were MSC's closest competitors, we were  
[23] talking about competition among the NASTRAN group.

[24] In regard to competition among NASTRAN  
[25] suppliers, MSC has long been the dominant firm and the

[1] The critical issue in this case will be product  
[2] market definition.

[3] JUDGE: By the way, are these listed companies,  
[4] was that a stock acquisition, or they were private  
[5] companies that were bought?

[6] MR. McCARTNEY: These were UAI and CSAR were  
[7] both privately held companies, but they were stock  
[8] acquisitions, Your Honor. MSC is a publicly traded  
[9] company.

[10] JUDGE: All right.

[11] MR. McCARTNEY: The critical issue in this case,  
[12] we believe, will be product market definition. We  
[13] believe that the evidence will show that high-end or  
[14] advanced versions of NASTRAN is the appropriate product  
[15] market, because MSC, UAI and CSAR all viewed the other  
[16] versions of NASTRAN as their closest competitors.

[17] Furthermore, we will present evidence where  
[18] customers did switch between these various versions of  
[19] NASTRAN, or threatened to switch between various  
[20] versions of NASTRAN on the basis of price and  
[21] price-related variables.

[22] Respondent will argue that users can easily  
[23] switch to non-NASTRAN solvers and that the market  
[24] therefore should be broader than a NASTRAN market. You  
[25] will hear, however, from users, people with experience,

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[1] complaint alleges that MSC had a 90 percent market  
[2] share. In the 1990s, customers began turning to UAI  
[3] NASTRAN and CSAR NASTRAN in response to higher MSC  
[4] prices and a slowness on behalf of MSC to provide new  
[5] features and enhancements that its customers needed.

[6] UAI achieved particular success, Your Honor, by  
[7] offering NASTRAN at a lower price but by being more  
[8] responsive to customers in providing new features and  
[9] enhancements, and it was successful in licensing its  
[10] version of NASTRAN to several different aerospace and  
[11] automobile companies as well as other companies in other  
[12] industries.

[13] CSAR achieved success against MSC because it was  
[14] able to offer an MSC NASTRAN clone, a product that was  
[15] the same as MSC NASTRAN, but at a substantially lower  
[16] price, and it also was successful in securing license  
[17] agreements with large aerospace/automotive companies.

[18] Even firms that never licensed UAI NASTRAN or  
[19] CSAR NASTRAN benefited from this competition, because  
[20] the other users were aware these products were available  
[21] in the marketplace, and used their availability to  
[22] leverage lower prices from MSC, as well as to push MSC  
[23] to make additional enhancements and add new features to  
[24] its NASTRAN product. However, that competition ceased  
[25] in 1999 when MSC acquired UAI and CSAR.

[1] experienced analysts who will explain that the cost of  
[2] switching to a non-NASTRAN solver is, indeed,  
[3] substantial. In order to switch, the user would have to  
[4] incur additional training, they would also have to incur  
[5] the cost of additional time, of on-the-job use of the new  
[6] solver to become proficient in the solver.

[7] Additionally, if they were to switch, they would  
[8] lose their investment in historic data, historic  
[9] analysis that have used NASTRAN. In this industry, they  
[10] typically call it legacy data, legacies files and legacy  
[11] models. That investment would be lost and it's  
[12] important, for example in an aerospace company, an  
[13] automobile company, because they rely upon prior  
[14] analyses when they are designing new products. Users  
[15] who switch would also lose the investment that they have  
[16] in complimentary products that interface with NASTRAN.

[17] Additionally, switching would be difficult  
[18] because there are many collaborative type programs where  
[19] everyone that collaborates is using NASTRAN, so  
[20] therefore, one customer, one user, may not be able to  
[21] switch because the collaborative effort requires that  
[22] they use or the custom of that project requires the use  
[23] of NASTRAN.

[24] Even if one examines a broader market than a  
[25] NASTRAN market, MSC's acquisitions of UAI and CSAR still

Page

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(1) them from UAI and CSAR. Additionally, MSC could have  
(2) relied upon consultants, and MSC has an ongoing, has  
(3) ongoing use of overseas developers that they could have  
(4) turned to if, indeed, they had further development that  
(5) they needed.

(6) ... In this matter, Your Honor, the Commission's  
(7) notice of contemplated relief asks for divestitures that  
(8) will create up to two viable concerns offering a  
(9) competing clone of MSC NASTRAN in order to restore the  
(10) competition that was lost through MSC's acquisitions.

(11) I would be happy to answer any further questions  
(12) you might have, Your Honor.

(13) ... JUDGE: That's all I have for now, thank you.

(14) ... MR. SMITH: Good afternoon, Your Honor.

(15) ... JUDGE: I guess let me ask a couple of things.

(16) ... MR. SMITH: Surely.

(17) ... JUDGE: I want to understand how this works,  
(18) this NASTRAN product. This was open source code that  
(19) MSC developed?

(20) ... MR. SMITH: The NASTRAN original code that was  
(21) developed by NASA was an open source code that was  
(22) available to everyone, and indeed, that original NASTRAN  
(23) code is today still open sourced and available to  
(24) anybody through I think is it University of West  
(25) Virginia ...

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(1) Now, MSC has taken over the years, and this code  
(2) goes back 25 years, that MSC has done and changed and  
(3) altered and had its own version which is called MSC  
(4) NASTRAN.

(5) ... JUDGE: So, is it analogous to Linux, you can  
(6) get it out there, but if you want it to work right, you  
(7) buy, you pay more and buy red hat?

(8) ... MR. SMITH: Well, I don't think that's quite an  
(9) accurate analogy in the sense that MSC NASTRAN is a  
(10) solver system, and of course these things are both  
(11) products and services that are — that go along,  
(12) obviously. You don't just buy the software itself, you

(13) support, technical support, and other things like that.  
(14) ... JUDGE: Do they, when they improve it, let's say  
(15) it was NASTRAN.

(16) ... MR. SMITH: Well, when they improved it, it was  
(17) not put out in open source in the market available for  
(18) people. People had to pay a license to get access to  
(19) MSC NASTRAN.

(20) ... JUDGE: So, they developed a proprietary  
(21) version?

(22) ... MR. SMITH: A proprietary version which can be  
(23) called —

(24) ... JUDGE: And copyrighted or something to protect  
(25) it.

(1) ... MR. SMITH: That's correct. Which they called  
(2) MSC NASTRAN.

(3) ... JUDGE: If they were doing that, then how —  
(4) then UAI and CSAR were selling that same version?

(5) ... MR. SMITH: No, they had gone and had  
(6) purchased — had started with the basic NASTRAN that was  
(7) available publicly, the basic NASTRAN system, which  
(8) would be like a Linux system, and then you would enhance  
(9) it in your own proprietary way. And they enhanced it  
(10) and they called theirs UAI NASTRAN, and there was also a  
(11) CSAR NASTRAN that were developed, and the history of  
(12) those companies is going to be a matter of record, and  
(13) I've — we will — they say that they're going to prove  
(14) through our documents that these companies were viable  
(15) competitors, we're going to prove through CSAR and UAI's  
(16) documents, and the testimony of their people, that in  
(17) fact, these were both declining firms, one of which was  
(18) already in the process of developing an exit strategy,  
(19) and the other had put itself up for market and tried to  
(20) sell itself and had found no partner. And you have to  
(21) remember, put these transactions in context.

(22) ... JUDGE: Well, in June of '99, is it your  
(23) position that there were three distinctly different  
(24) stand-alone proprietary versions of NASTRAN by each of  
(25) these entities?

(1) ... MR. SMITH: Yes. And they competed in a broader  
(2) FEA solver market for all of these different customers  
(3) for the kinds of uses that we were describing earlier  
(4) for the various analytical purposes that solvers are  
(5) used for.

(6) ... So, for example, a classic example that I think  
(7) will be an important piece of evidence before Your Honor  
(8) is Lockheed. We go back to Lockheed. Lockheed held a  
(9) competition in which they had a shoot-out for what was  
(10) going to be a solver that would be recommended. They  
(11) invited all the NASTRAN and all the other solver people  
(12) to participate in that competition. They didn't  
(13) specify. There's no evidence that I am aware of an  
(14) industry standard as it was suggested of NASTRAN product  
(15) for any of these uses.

(16) ... And, so, you're going to see that Ansys, PTC,  
(17) Unigraphics, HKS, these are a lot of the names of other  
(18) people who are competing for providing these kinds of  
(19) solutions to the design problems that are faced by  
(20) automotive, aeronautic and other companies.

(21) ... JUDGE: Well, and I'm just asking  
(22) hypothetically, if I'm Boeing and I — years ago got the  
(23) contract for what's now the C-17, I could, if I wanted a  
(24) product, would I go out and get MSC, UAI or CSAR, I  
(25) could take either one, they were all the same?

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[1] Am I going to ask you to take into account, as I think  
[2] the law requires, that you look at the market realities  
[3] of what competitive impact they were having? Yes, and  
[4] they were declining firms planning to exit the  
[5] marketplace.

[6] Then when we get to the issue of product market  
[7] definition, I believe that the product market definition  
[8] that you are going to end up finding, and that the  
[9] evidence will show, is this finite element analysis  
[10] solver market in which we have a very small percent, and  
[11] there is an interesting element to that. Because these  
[12] customers, and these are not shrinking violet customers,  
[13] these are Lockheed, these are Boeing, these are General  
[14] Motors, these are Ford, Chrysler, Cessna, these are  
[15] Raytheon, these are huge companies, and do you know what  
[16] they have? They do their own internal codes. They have  
[17] their own internal analyses, some of which they then  
[18] even market to others.

[19] And, so, when you look at the market, there is a  
[20] market that's provided by Ansys, but there's also a  
[21] market provided by Lockheed. And all of these other  
[22] players. So, we believe that their market definition,  
[23] which their whole case is premised upon, I mean,  
[24] basically this is -- they're saying we're Microsoft,  
[25] which is just, I mean it's almost laughable. When you

[1] I think our attitude, and response on the legacy effect,  
[2] is that what we have here is a series of ongoing  
[3] projects that these companies have. And these companies  
[4] are constantly having a new project where they're then  
[5] deciding what solver they're going to use for that  
[6] project.

[7] And it is that ongoing sequence of programs that  
[8] assures that you have a continuous competition,  
[9] competitive pressure on you for what you charge for  
[10] anything. So that there is no ability, it's not like in  
[11] the Kodak case where you get them locked in, and they  
[12] can only use you to service a product that they're going  
[13] to have for a long time. There is no classic lock-in  
[14] effect as the law has recognized.

[15] And we believe and we will offer expert  
[16] testimony on that. They mentioned that they're going to  
[17] bring in, and I forget the exact phrase that he used,  
[18] was that he was going to bring in some experienced  
[19] analysts to talk about the switching difficulties. We  
[20] expect that we're going to have testimony from customers  
[21] showing that there are not the kind of switching  
[22] difficulties. And we, in fact, expect to give you a  
[23] physical demonstration with computer screens and  
[24] everything else, to show you exactly how easy it is to  
[25] switch.

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[1] see the size of this company, and everything else, and  
[2] you get this in front of you.

[3] This is a monopoly theory that they're pursuing,  
[4] that we have become a monopolist.

[5] JUDGE: Well, as you define the relevant product  
[6] market, what percentage of that market is there?

[7] MR. SMITH: It depends on how you want to try to  
[8] count it. There's not good data on what is the amount  
[9] of it that is accounted for by internal sourcing, but I  
[10] believe that it is going to be that you will find that  
[11] we -- and however you measure it, we will be within an  
[12] HHI safe harbor, because again, when you look at the  
[13] revenues that existed at the time of the merger of these  
[14] two companies, that we acquired, they're insignificant  
[15] factors in that industry. I mean, virtually they  
[16] will -- they barely make a blip in the marketplace, with  
[17] under a million dollars worth of revenues.

[18] So that in that market, you know, I can't put a  
[19] precise number on it, we've made some attempts to put  
[20] numbers on it in the past, that complaint counsel has  
[21] criticized, for reasons that I will be interested in  
[22] learning, so I don't want to try and put a number on it.  
[23] I guess the thing that I then briefly want to  
[24] turn to, that they talked about, was this so-called --  
[25] they suggested that there was a legacy effect, and here,

[1] And, indeed, one of the best evidence of that is  
[2] the fact that we have a program that we sell called  
[3] PATRAN, which is a preprocessor that you use before you  
[4] get into using the solver, and our preprocessor has  
[5] right in the screen the alternative of using MSC  
[6] NASTRAN, Ansys, all of these other programs. So that  
[7] you can use a preprocessor and select from a range of  
[8] options.

[9] JUDGE: This Ansys you're referring to, is that  
[10] also an FEA solver?

[11] MR. SMITH: It's a solver, an FEA solver, that's  
[12] correct.

[13] JUDGE: Could you spell that?

[14] MR. SMITH: All in caps, A N S Y S.

[15] And, you know, the interesting thing is then  
[16] you're going to get into some of what is, as you know,  
[17] that this is a high-tech industry. This is a very  
[18] dynamic industry right now, and there is a big issue  
[19] going on between linear solutions, which MSC NASTRAN is  
[20] a linear solution, and increasingly emphasis on  
[21] nonlinear solutions, and the need that people have for  
[22] integration between what are CAD, computer-aided  
[23] engineering things, and CAD analyses. And where you're  
[24] having to do more linear and nonlinear analysis jointly.  
[25] And that is where --

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[1] counsel's proposal, and we actually have two alternative  
[2] proposals that we have there, because what we tried to  
[3] do was accommodate complaint counsel's request to delay  
[4] substantially the timing of their initial disclosures,  
[5] and that necessarily would result in a move back of the  
[6] trial date. And yet we then also proposed a — were  
[7] ready to live and would be happy with a schedule that  
[8] meets close to the judge's trial date, May 13th, but  
[9] then therefore does not accommodate complaint counsel's  
[10] desire to delay their initial disclosures.

[11] And we, personally, would prefer to let  
[12] complaint counsel have the additional time, because we  
[13] think then when we get the initial disclosures, they'll  
[14] be more meaningful, because they're seeming to need more  
[15] time to get their case in order. And then in terms —

[16] JUDGE: Just so I can follow this.

[17] MR. SMITH: Yes.

[18] JUDGE: The bracketed date is —

[19] MR. SMITH: Is designed to get to your May trial  
[20] date. If you look at page 4.

[21] JUDGE: And the date above that is the date, if  
[22] you give the government their time.

[23] MR. SMITH: Move the trial back a month.  
[24] Because if you're going to move the original schedule  
[25] back a month, you have to move the trial date back a

[1] MR. SMITH: I just wanted to shift that forward.  
[2] So, for example, if you look at, I think, it is under  
[3] your schedule, at page 4, I think it is, and you're in  
[4] the center column, April 25th, you had "file pretrial  
[5] briefs identifying legal matters," whereas we have in  
[6] our schedule "not provided" for that, we have them up  
[7] earlier. We have a pretrial brief — help me, guys, as  
[8] to what the —

[9] MS. SKUBEL: It's on page 2.

[10] JUDGE: I was with you until I saw "not  
[11] provided" in your spot there.

[12] MR. SMITH: No, I understand. If you look at  
[13] page 2, at the bottom of the page, which has "not  
[14] provided," complaint counsel filing a pretrial brief on  
[15] April 25th, we filing a pretrial brief one week later,  
[16] and then filing, as you go to page 3, a rebuttal on the  
[17] 29th.

[18] And at that time, after they've had our pretrial  
[19] brief, that's when they would be filing their final  
[20] witness list, along with their reply brief, on the 29th.  
[21] And then we would shortly thereafter provide them, ten  
[22] days later, we would provide them our final proposed  
[23] witness list and all of our exhibits as well. Allowing  
[24] us to respond to whatever further rebuttal material they  
[25] have. And that's really the only, what I would call

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[1] month to just allow the various things taking place,  
[2] being realistic about schedules. And the only other  
[3] really significant difference between our proposal and  
[4] the Court's proposal is that we believe, and it's been  
[5] my experience, that we would benefit tremendously from  
[6] pretrial briefing to really set the arguments before we  
[7] have to give our final exhibits and trial lists. And  
[8] that is the one change that I have, if you go through  
[9] the schedule, and you can look through it.

[10] Now, we have discussed —

[11] JUDGE: This would be above and beyond the  
[12] statement of the case?

[13] MR. SMITH: Yes, because I think it's just been  
[14] my experience, you can call it a statement of the case  
[15] or whatever, but I think that a pretrial brief in which  
[16] you really set forth your arguments and the law that you  
[17] say applies to those arguments, is extremely valuable in  
[18] shaping and expediting the trial, as it takes place.

[19] JUDGE: I'm going to have to go back and look at  
[20] the proposed schedule, because I had — it was my  
[21] understanding that we included something like that in  
[22] here. Now maybe it wasn't that clear.

[23] MR. SMITH: You did, you did, but it came after  
[24] all the exhibits. I mean, I can show —

[25] JUDGE: You're wanting to shift the time back.

[1] material change, to the flow of your Honor's proposed  
[2] schedule that we have proposed.

[3] And again, in an accommodation to complaint  
[4] counsel, I am glad to let them have until December 17th.  
[5] I note that they don't want to give me anything until  
[6] January 3rd. I thought I would help them out by making  
[7] them do it before Christmas.

[8] MR. McCARTNEY: Your Honor, we've had several  
[9] conversations with MSC and we've exchanged several —

[10] JUDGE: First of all, are all the dates on here,  
[11] if it says FTC, these are the right dates that you're  
[12] proposing?

[13] MR. McCARTNEY: I haven't — I'm just relying  
[14] upon counsel, but yes, we gave them a calendar, we were  
[15] happy with your May 7th date. I'm not sure what counsel  
[16] refers to by asking for a delay in initial disclosures.

[17] We have given them our initial disclosures, Your Honor.

[18] MR. SMITH: No, I'm talking about the  
[19] preliminary witness list is what it says right here, you  
[20] had originally had them doing it on November 21st, and  
[21] they don't want to do it until January 3rd. And —

[22] MR. McCARTNEY: We believe, Your Honor, that  
[23] there would be an advantage if we had additional time to  
[24] provide witness lists. Many of the third party  
[25] customers, indeed, are corporations, we have to talk

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(1) they've substantially tailored their case, I then can  
(2) substantially tailor mine in response. So, that's  
(3) where — and we do it only within seven days, so that  
(4) we're doing it.

(5) And as you go through, and unfortunately go  
(6) through a calendar, and this thing is — this is, in my  
(7) judgment, on an aggressive schedule, and nobody is going  
(8) to be having long gaps of time where they're not going  
(9) to be doing something. Especially for these kinds of  
(10) administrative merger trials, which tend to be extended.

(11) MR. McCARTNEY: Your Honor, may I supply you  
(12) this, this is a copy of the last proposal that we have  
(13) given to MSC, and I believe that we tried to honor your  
(14) May 7th date and follow your general sequence of dates.  
(15) Some of the variations that we propose is the first  
(16) exchange of the preliminary witness list and then with  
(17) the ripple effect on the simultaneous exchange of  
(18) revised and final witness lists.

(19) And we also provide for later expert reports, we  
(20) believe that is valuable, Your Honor, because the  
(21) experts will have an opportunity to review the evidence  
(22) that's gained in discovery, and be able to offer a more  
(23) complete expert's report, if they are given more time.

(24) Additionally, we believe it's valuable if the  
(25) deadline, the cut-off for depositions of experts be

(1) in the right column.

(2) JUDGE: Do you have a copy for Ms. Artbaurd?

(3) MR. McCARTNEY: Yes.

(4) JUDGE: Okay, the first thing I have to do is  
(5) find out where we have disagreements here. It sounds  
(6) like we have disagreements. We meaning the parties, on  
(7) the designation of experts or the expert report  
(8) deadlines.

(9) MR. SMITH: I am sorry, Your Honor, I was  
(10) distracted. I apologize.

(11) JUDGE: Are you disagreeing on when you need to  
(12) provide expert reports?

(13) MR. SMITH: Yes.

(14) JUDGE: As well as designate experts?

(15) MR. SMITH: Yes.

(16) MR. McCARTNEY: Your Honor, I apologize, we  
(17) recently within the last half hour of when we got here,  
(18) got their schedule, so we have not had a chance to fully  
(19) review it, and I think it's important in preparation for  
(20) trial on both sides that we have later expert reports.  
(21) MSC knows the case they are going to present, there are  
(22) no surprises here.

(23) MR. SMITH: I do not, Your Honor. There are  
(24) lots of surprises here.

(25) MR. McCARTNEY: So, I believe under their

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(1) closer to trial in order that both parties will have  
(2) access to an expert who has had an opportunity to fully  
(3) review the evidence and to be able to set forth his  
(4) final opinion.

(5) JUDGE: You know, I don't mind moving expert  
(6) reports later, but when I was on your side of the bench,  
(7) I wanted them sooner in case I needed to hire someone to  
(8) rebut it.

(9) MR. SMITH: Exactly. My view is that they're —  
(10) I've experienced this in many, many trials, people like  
(11) to hide the expert until the last minute, and indeed in  
(12) their schedule, they've got me giving my expert report  
(13) one week after I get their expert report. And you know  
(14) what these kind of economic expert reports are going to  
(15) be like. It's going to be a lengthy, substantial report  
(16) and I should be able to have access to that at an early  
(17) point, which is exactly what we provided and what Your  
(18) Honor's order originally provided, is that we would get  
(19) their expert report early in the process.

(20) JUDGE: Are these dates different than what is  
(21) on this chart?

(22) MR. McCARTNEY: I'm assuming, relying on  
(23) counsel, the right column. I haven't had a chance to  
(24) review them.

(25) MR. SMITH: We took their proposal and put them

(1) sequence, they have a substantial amount of time from  
(2) our expert report to theirs, your proposal, I believe,  
(3) only has two weeks between the expert reports.

(4) MR. SMITH: There will be —

(5) JUDGE: And with this varied or changed expert  
(6) report date, you can work that in with the May 7th trial  
(7) date?

(8) MR. McCARTNEY: With our proposed dates? Yes,  
(9) Your Honor.

(10) MR. SMITH: Yes, by having us —

(11) JUDGE: Just so I'm clear, we can tweak that  
(12) later, but I want to nail down the trial date. Are you  
(13) both telling me the impediment to the May 7 trial date  
(14) is how quick the government can get disclosure to you?

(15) MR. SMITH: Correct, yes.

(16) JUDGE: Or preliminary witness list?

(17) MR. SMITH: To start the process, correct.

(18) MR. McCARTNEY: Your Honor, they will have  
(19) documents from us as soon as the protective order is in  
(20) and notice has been given to everyone. So, they will  
(21) have that documentation hopefully within several weeks,  
(22) however long it takes, but they should have that  
(23) shortly. So, therefore, the additional time in regard  
(24) to the first preliminary witness list is simply to give  
(25) us additional time to be able to explore with the third

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(1) MR. McCARTNEY: It was roughly a year —  
(2) MR. SMITH: No, it was 14 months ago, Your  
(3) Honor.  
(4) MR. McCARTNEY: It's been over a year.  
(5) JUDGE: So, there has been some discovery going  
(6) on both ways, then?  
(7) MR. SMITH: No, we have had no discovery.  
(8) JUDGE: I don't mean formal discovery. You're  
(9) saying they know stuff and you've been inquiring?  
(10) MR. McCARTNEY: Oh, yes, this matter — there  
(11) have been various discussions over the last several  
(12) months regarding getting the matter to the Commission.  
(13) So, we've talked about our theories and they're aware of  
(14) our case.  
(15) MR. SMITH: In the grossest generalities.  
(16) JUDGE: But both of you are right here telling  
(17) me as far as the summary judgment, we can take this off  
(18) the scheduling order?  
(19) MR. McCARTNEY: We don't anticipate a motion,  
(20) Your Honor.  
(21) MR. SMITH: We left it on the schedule because  
(22) you had it on the schedule, but we left that on the  
(23) schedule.  
(24) JUDGE: Anything else you want to take off other  
(25) than the trial date?

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(1) MR. McCARTNEY: We generally like your approach  
(2) to more simultaneous exchanges of witness lists, exhibit  
(3) lists, of pretrial briefs, of statements of issues in  
(4) contention. We believe that's the appropriate approach  
(5) in this matter. Our issues are, a later initial list  
(6) for fact witnesses and later expert reports and a later  
(7) deadline on the deposition for experts.  
(8) JUDGE: Okay.  
(9) MR. McCARTNEY: We also, if I might raise, Your  
(10) Honor, there's one issue in regard to the proposed  
(11) limits of 50 in regard to document requests, and  
(12) admissions.  
(13) JUDGE: So now you're moving into the additional  
(14) provisions?  
(15) MR. McCARTNEY: Yes, if that might be helpful.  
(16) JUDGE: Go ahead. We can do it now or later.  
(17) If you want to do it now.  
(18) MR. SMITH: Did you want to take a break? That  
(19) was the only issue. I would be happy to do it, whatever  
(20) Your Honor wants to.  
(21) JUDGE: Do you have an objection to any of the  
(22) additional provisions?  
(23) MR. SMITH: No, I thought the 50 interrogatories  
(24) and document requests made sense.  
(25) MR. McCARTNEY: Would you like to hear me on the

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(1) issue, Your Honor?  
(2) JUDGE: Sure.  
(3) MR. McCARTNEY: We believe the Commission's  
(4) rules provide enough flexibility that discovery can  
(5) reduce the days — the days in trial, can reduce trial  
(6) preparation because you can more directly get to the  
(7) issues. If there are any abuses, then the agreed party  
(8) can raise those issues later on.  
(9) Under the Commission's new revised rules, it  
(10) provides for limitations after there's been a finding of  
(11) some abuse in the discovery process. There has been no  
(12) finding at this point in regard to any issue that would  
(13) warrant limiting the number of document requests or the  
(14) request of admissions. And, in particular, on the  
(15) question of admissions, they are a very useful tool to  
(16) try to reduce the number of issues that will need to be  
(17) tried, as well as getting documents introduced,  
(18) particularly third party documents. So, we believe it's  
(19) valuable to have more flexibility there.  
(20) In regard to the interrogatories, the  
(21) Commission's rules now provide a limit of 25, and we're  
(22) happy to follow that limitation.  
(23) JUDGE: So, tell me exactly where you want to  
(24) make a change on the additional provisions.  
(25) MR. McCARTNEY: Your Honor, in our proposal, we

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(1) have revised the additional provisions to include — to  
(2) remove that limitation on discovery. We also, sort of  
(3) taking counsel —  
(4) JUDGE: I guess what I need is I don't see  
(5) anything marked up. This is just the new version that  
(6) you handed me.  
(7) MR. McCARTNEY: Yes, it is.  
(8) JUDGE: But the only change you made in the  
(9) additional provisions is probably in number 3?  
(10) MR. McCARTNEY: Yes, Your Honor. There are a  
(11) couple of points where the language might have changed a  
(12) little bit in regard to the sequencing of discovery in  
(13) regard to who the papers are served on. I think we  
(14) consolidated those all in one paragraph. We've also had  
(15) added a provision, Your Honor, two of them in the effort  
(16) of trying to reduce the amount of issues surrounding  
(17) third party documents. One —  
(18) JUDGE: Well, I can assure you now, there will  
(19) be a limit on request for admissions. It may not be  
(20) what I had in here, but there will be a limit. You can  
(21) trust me on that.  
(22) MR. McCARTNEY: Okay.  
(23) JUDGE: Because I'm not going to have somebody  
(24) serving 400 or some request for admissions on a party.  
(25) It's not going to happen under my watch.

(1) a further obligation to go out and conduct further  
(2) inquiry to determine whether it's appropriately not a  
(3) business record, we might have that obligation. We are  
(4) simply trying to find devices here to help everyone,  
(5) both parties, to get over the third party document issue  
(6) to make everything proceed much quicker.

(7) JUDGE: I'm just trying to find a workable way  
(8) to do this, because that was the example you gave me,  
(9) that you were going to do document authentication, and  
(10) you used third parties as an example.

(11) MR. McCARTNEY: Yes.

(12) JUDGE: And I'm not sure, and why would I accept  
(13) you admitting that an Exxon document is a business  
(14) record? What good does that do me, evidentiary-wise?

(15) MR. McCARTNEY: Your Honor, then it's in essence  
(16) closer to an agreement by the parties, that they both  
(17) agree this is an authentic document and it satisfied any  
(18) business record exception that might be needed for that  
(19) document, therefore Your Honor can go ahead and consider  
(20) that document as part of the record.

(21) JUDGE: So, basically the admitting and the  
(22) request for admission means I'm not going to object on  
(23) that basis?

(24) MR. McCARTNEY: You being the judge?

(25) JUDGE: No, you being the party that got the

(1) document production requests?

(2) MR. McCARTNEY: Yes, Your Honor. And if you  
(3) would like a number, we would propose 100 there.  
(4) Hopefully it will not be necessary, but we're trying to  
(5) provide some flexibility so we don't have to be running  
(6) back to you, Your Honor, for leave of Court to ask for  
(7) more.

(8) MR. SMITH: I was satisfied, 50 seemed more than  
(9) enough to me. But I mean, I don't even think their  
(10) second request asked for 50, so —

(11) JUDGE: So, can we now have the government's  
(12) objections or changes to the additional provisions. Are  
(13) there any by respondent?

(14) MR. SMITH: No, we were comfortable with Your  
(15) Honor's order.

(16) MR. McCARTNEY: And I think in our proposal,  
(17) Your Honor, we make the provision for this pretrial  
(18) conference, 30 days prior to your final pretrial  
(19) conference where there can be a procedure for addressing  
(20) admission of documents and objections so that —

(21) MR. SMITH: Which is in our schedule, too. I  
(22) mean, we adopted that, we didn't have a problem with  
(23) setting a hearing date, when we would resolve those  
(24) things in advance of the trial, so we included that in  
(25) our proposed schedule, because that was something they

(1) RFA.

(2) MR. McCARTNEY: Right, if I've made the request  
(3) for admission, it's our belief that it is an authentic  
(4) business record of the third party and we're just asking  
(5) MSC to agree to it.

(6) JUDGE: Maybe I need to create a category of  
(7) authentication RFAs.

(8) MR. SMITH: I just think that this is a mountain  
(9) over a molehill. But I — Your Honor, I am not going to  
(10) agree to something in the abstract with no idea what the  
(11) documents are.

(12) JUDGE: Well, and I guess he wouldn't either.

(13) MR. SMITH: No. But I didn't ask him to.

(14) JUDGE: Well, then, you have, based on your  
(15) proffer here, you've taken out any limit. If there's  
(16) going to be a limit, give me a number.

(17) MR. McCARTNEY: For document requests, 100?

(18) JUDGE: No, for requests for admissions.

(19) MR. McCARTNEY: Oh, requests for admissions. If  
(20) you want to limit it to 100, but if there was an  
(21) exception for requests for admissions to authenticate  
(22) documents in order to establish business records, that  
(23) would be helpful. That would provide the flexibility  
(24) needed there.

(25) JUDGE: And you also have taken out any limit on

(1) had requested.

(2) JUDGE: Okay, let's move to the protective  
(3) order.

(4) MR. McCARTNEY: Your Honor, we've been —

(5) MR. SMITH: If I could, Your Honor, on the  
(6) protective order, I'm going to ask Larissa Paule-Carres  
(7) who has been working on this matter to address those  
(8) issues. And bottom line is we're very comfortable with  
(9) Your Honor's protective order.

(10) JUDGE: Mr. McCartney is pretty anxious to tell  
(11) me something here.

(12) MR. McCARTNEY: I was going to say, Your Honor,  
(13) we are comfortable with the protective order, the issue  
(14) we've been dealing with is who MSC is going to be  
(15) designating under paragraph 5 of the protective order,  
(16) and this has been unfolding very quickly and last night  
(17) we got a backlog of information about an in-house  
(18) counsel that they chose to insert in paragraph 5. We  
(19) have some questions because the person does not report  
(20) to another attorney, they report to a business person  
(21) that we do have concerns about being included. So,  
(22) therefore, it's unclear what that reporting relationship  
(23) is.

(24) And then there are some additional language that  
(25) MSC is offering in regard to a technical expert they



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[1] JUDGE: Is there some language in the affidavit  
[2] or declaration that would make the government  
[3] comfortable with this in-house attorney being  
[4] designated? For example, some Chinese wall with the  
[5] manager boss?

[6] MR. McCARTNEY: Yes, it's possible. I mean,  
[7] Your Honor, we have situations where she is a new  
[8] employee, we do not know where her job responsibilities,  
[9] how they will evolve. We've got issues as to what she  
[10] might know inadvertently gets passed on to Mr. Mattson,  
[11] the person she reports to, so it's difficult in a  
[12] situation like this to create a Chinese wall that we  
[13] have any confidence would be effective.

[14] JUDGE: Well, just so the parties know, the  
[15] government probably knows this, these agreements that we  
[16] started with are drug companies, and the drug companies,  
[17] the pharma, there's a competitor on every lab -- in  
[18] every lab in DC, and they were so worried about  
[19] competitors seeing information that would give someone  
[20] an unfair advantage. Do we have a lot of competitor  
[21] documents at risk or at issue in this case?

[22] MR. McCARTNEY: No, Your Honor, I think the kind  
[23] of documents we have are third party documents,  
[24] customers of MSC who might be concerned, and we've heard  
[25] some concerns, that if MSC has access to their

[1] participate in the defense of the matter.

[2] MR. McCARTNEY: Your Honor --

[3] JUDGE: As the person that you're going to  
[4] designate, has she been, other than a lawyer, has she  
[5] worked for MSC as a manager, as a salesperson?

[6] MR. SMITH: No, she has not.

[7] MS. PAULE-CARRÉS: She just started working at  
[8] MSC in April of this past year. She was responsible  
[9] primarily for the drafting of contracts, for license  
[10] agreements, OEM agreements, IT agreements, things like  
[11] that. And for ensuring national and international  
[12] compliance of the corporate compliance.

[13] MR. McCARTNEY: And, Your Honor, in regard to  
[14] the issue of negotiating contracts, it does raise the  
[15] issue, is she helping to write a contract for a  
[16] customer, therefore she's going to be involved in what  
[17] the license fee is going to be into that contract. So,  
[18] it does raise areas of concern for us. Plus, the person  
[19] she reports to is Hal Mattson, and his title is senior  
[20] director for the business management and analysis group.  
[21] So, he clearly is in a critical business position.

[22] JUDGE: That's her boss?

[23] MR. McCARTNEY: Yes.

[24] JUDGE: Does she have anyone reporting to her?

[25] MS. PAULE-CARRÉS: I don't believe so. I can

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[1] documents, for example there's a document that says, a  
[2] customer says, we have no leverage, we don't have any  
[3] alternatives, we've got to deal with MSC, so if MSC's  
[4] business people have access to that information, they  
[5] have a better way -- they have a stronger negotiating  
[6] position when they're negotiating a license fee for  
[7] NASTRAN. So --

[8] JUDGE: So, we have third or nonparties whose  
[9] confidential documents are going to be at risk of being  
[10] seen by MSC?

[11] MR. McCARTNEY: Right, there are -- there will  
[12] likely be some third party competitors, but it's more in  
[13] the world of third party customer documents.

[14] JUDGE: Okay. I think the parties --

[15] MR. SMITH: Well, the response to that is that  
[16] the MSC people are not going to have access to that.  
[17] There is an attorney subject to the fact that she could  
[18] be disbarred if she did what they are saying, who is  
[19] willing to sign an agreement and that she will not  
[20] disclose anything to anyone, and the argument that's  
[21] just been made would say that there could never be an  
[22] attorney representative in any case that involves any  
[23] competitive issue, and I have litigated many, many of  
[24] these cases, and I have never seen a person denied the  
[25] right to have a designated in-house counsel lawyer

[1] double check on that.

[2] JUDGE: I think the parties can work something  
[3] out here. That will be acceptable. Of course I'm going  
[4] to have to sign off on it, but I'll see if you guys can  
[5] work it out. If not, then I'll get involved. Is that  
[6] fair enough?

[7] MR. SMITH: Fair enough.

[8] MS. PAULE-CARRÉS: Thank you, Your Honor.

[9] JUDGE: So, why don't we take, according to that  
[10] clock, it's 3:26, what do you need, ten minutes, 15?

[11] MR. McCARTNEY: We're addressing the issue of  
[12] the scheduling order?

[13] JUDGE: And anything else you need to discuss.  
[14] I'm going to go back and look at the calendar, and then  
[15] come back in 10 or 15 minutes.

[16] MR. SMITH: That's fine.

[17] JUDGE: Is there anything that you all need to  
[18] discuss? That's what I'm asking, do the parties need  
[19] more time to conference on some issue that I am not  
[20] aware of?

[21] MR. SMITH: Unless he is willing to give up on  
[22] Linda Danner.

[23] MR. McCARTNEY: If there is, then we'll have to  
[24] raise it when you return.

[25] MR. SMITH: We have tried to talk over --

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[1] going to use that in their case that they are not going  
[2] to give it to you?  
[3] MR. SMITH: The issue is when they are going to  
[4] give it to me, Your Honor. If they are going to give it  
[5] to me the day before the person testifies, that's  
[6] different. That means it's before. I could take their  
[7] deposition, I wouldn't even know it existed until I got  
[8] into discovery with that person. It just delays the  
[9] process. So, I find it hard to understand how an  
[10] affidavit could be work product or privileged.  
[11] JUDGE: Well, and we're speculating here.  
[12] MR. SMITH: I understand. And I —  
[13] JUDGE: You know, and I'm not going to be able  
[14] to decide how many angels can dance on the head of a  
[15] pin, based on what I have in front of me.  
[16] MR. SMITH: I understand.  
[17] JUDGE: When the time comes, I will.  
[18] MR. McCARTNEY: Your Honor —  
[19] JUDGE: It sounds like he's not saying all of  
[20] them are privileged, some may be, but when the time  
[21] comes, I will deal with that.  
[22] MR. McCARTNEY: Yes, Your Honor.  
[23] JUDGE: Here's what we're going to do. I want  
[24] the parties, I have a statutory deadline, I have to get  
[25] this scheduling order signed, I have to issue it, enter

[1] MR. SMITH: No, I'll give them our best shot at  
[2] 9:00 a.m. and they can give us their best shot at 9:00  
[3] a.m., and we can debate it during the day and then we'll  
[4] call a halt at noon so we can write Your Honor's letter.  
[5] MR. McCARTNEY: Your Honor, we've been very  
[6] prompt in exchanging and getting their materials, I feel  
[7] comfortable that when we conclude here we can set up a  
[8] time to talk tomorrow morning and get them the  
[9] materials.  
[10] JUDGE: Okay, and then when I get that, I'm  
[11] going to look at it and then I am going to make a  
[12] decision. I am going to pick the dates and I am going  
[13] to agree or disagree with you and then I am going to  
[14] issue it under the statute.  
[15] MR. SMITH: Understood.  
[16] JUDGE: And, again, I'm talking about the  
[17] scheduling order and the additional provisions.  
[18] As far as the protective order, I don't have a  
[19] requirement to get that out in two days, but if you can  
[20] agree to it and get it to me, I can sign that. I can  
[21] get a protective order out. It's in your hands.  
[22] MR. McCARTNEY: We have for the discussion here,  
[23] Your Honor, we've been talking about the third parties.  
[24] Is there a trial date that you are supplying us, Your  
[25] Honor?

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[1] the order in two days, which with Veteran's Day, that's  
[2] Tuesday. So, by close of business tomorrow, Friday, I  
[3] want the parties to submit to me your best shot at an  
[4] agreed scheduling order, including additional  
[5] provisions. Wherever you differ, explain your  
[6] differences to me in a cover letter.  
[7] So, whatever you agree to, that's fine, but if  
[8] there's something — and I mean differences from the one  
[9] I sent you. Start with the one I sent you.  
[10] MR. SMITH: I understand.  
[11] JUDGE: And work together. And if, for example,  
[12] you're taking out an additional provision on a number of  
[13] requests for admissions, you need to tell me that in a  
[14] cover letter. You need to tell me that that's their  
[15] change and you all object to it. Does everyone  
[16] understand what I want?  
[17] MR. SMITH: I understand what you want, the only  
[18] thing that I would like understood, Your Honor, is if  
[19] you want a best shot and a letter by the end of the day,  
[20] can we set a deadline for when they're going to get us  
[21] their best shot, so can they get us their best shot by  
[22] 9:00 in the morning so that we will have our best shot  
[23] to them by 9:00 in the morning?  
[24] JUDGE: Is it your position you're waiting on  
[25] theirs first?

[1] JUDGE: I'm going to consider whatever you guys  
[2] submit. You know, you know what I want, I've already  
[3] issued it, I've already given you that.  
[4] MR. McCARTNEY: Yes.  
[5] JUDGE: And I've seen what you've offered. I  
[6] would suggest that that if you want to be hopeful, to  
[7] come a little closer to my date.  
[8] MR. McCARTNEY: And our proposal was your date,  
[9] May 17th.  
[10] JUDGE: I'm talking to everyone. I may be  
[11] looking your way, but I'm talking to everyone.  
[12] MR. McCARTNEY: Okay.  
[13] JUDGE: So, we'll see.  
[14] MR. McCARTNEY: Okay.  
[15] JUDGE: And one other thing, I noticed a flurry  
[16] of letters — to me two is a flurry. I don't need  
[17] letters from counsel. My position is, if I want  
[18] something in a letter, I will ask for it, like I just  
[19] did. Anything else, my position is if it needs to be in  
[20] writing to me, it probably ought to be a motion. Is  
[21] that clear to everyone?  
[22] MR. SMITH: Absolutely.  
[23] MR. McCARTNEY: Yes, Your Honor.  
[24] JUDGE: Anything else?  
[25] MADAM CLERK: Yes. Will you email me your

**Lawyer's Notes**

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001 0077

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

<p style="margin: 0;">In the Matter of</p> <p style="margin: 0;">MSC SOFTWARE CORPORATION, a corporation.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p style="margin: 0;">Docket No. 9299</p>
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**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (hereafter "Commission"), having reason to believe that MSC Software Corporation (hereafter "MSC" or "Respondent") acquired Universal Analytics Inc. (hereafter "UAI") and Computerized Structural Analysis & Research Corporation (hereafter "CSAR") in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

**RESPONDENT MSC SOFTWARE CORPORATION**

1. Respondent is a for-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 2 MacArthur Place, Santa Ana, California 92707.
2. Respondent had approximately \$178 million in annual revenue for the fiscal year ending December 31, 2000. Respondent is a developer and supplier of simulation computer software, including advanced simulation software used by the aerospace, automotive and other manufacturing industries. Respondent has long offered an advanced version of a linear structural analysis engineering software product called "Nastran."
3. Respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

### THE ACQUISITION OF UNIVERSAL ANALYTICS INC.

4. Prior to its acquisition by Respondent, UAI was a privately-held corporation organized, existing and doing business under and by virtue of the laws of the State of California.
5. Since before the early 1970s, UAI had been a developer and supplier of simulation computer software, including advanced simulation software used by the aerospace, automotive and other manufacturing industries. UAI had long offered an advanced version of Nastran in competition with Respondent.
6. On or about June 24, 1999, Respondent acquired UAI for approximately \$8.4 million.

### THE ACQUISITION OF COMPUTERIZED STRUCTURAL ANALYSIS & RESEARCH CORPORATION

7. Prior to its acquisition by Respondent, CSAR was a privately-held corporation organized, existing and doing business under and by virtue of the laws of the State of California.
8. Since before 1986, CSAR had been a developer and supplier of simulation computer software, including advanced simulation software used by the aerospace, automotive and other manufacturing industries. CSAR had long offered an advanced version of Nastran in competition with Respondent.
9. On or about November 4, 1999, Respondent acquired CSAR for approximately \$10 million.

### TRADE AND COMMERCE

10. Developers of new industrial and consumer products may use computer-aided engineering analysis to simulate and evaluate the robustness of new product designs.
11. Computer simulations in the product development process typically utilize an analytical method called "finite element analysis" ("FEA"). FEA simulates how a structure would perform in response to a defined load. With finite element analysis, computerized models of structures are first divided into small elements, which form a finite element model, and then subjected to computer analysis to simulate the structure's performance. The software performing this computer analysis is often called a "solver" or "FEA solver."

12. FEA solvers have been developed to perform many different types of engineering analyses.

13. FEA solvers are differentiated software products with varying features and capabilities. FEA solvers may be differentiated by, among other characteristics, the types of analyses performed, price level, ease of use, speed, size and complexity of problems that can be analyzed, ability to perform system-type analysis, availability of complementary software, type of output and input file format utilized, and computer platform and operating system on which the solver operates. FEA solvers are also differentiated by their record of reliability.

14. "Nastran" is an FEA solver first developed by the U.S. National Aeronautics and Space Administration ("NASA") over 30 years ago to perform structural analysis for NASA projects. In developing Nastran, NASA wanted a solver to perform a broad range of structural analyses and have the capacity to be further developed and enhanced. After the initial development of Nastran, NASA released the Nastran source code into the public domain to allow broader use and commercial development. NASA registered "Nastran" as a U.S. trademark in 1976.

15. MSC, UAI and CSAR obtained the public domain version of Nastran from NASA and for many years have developed and further enhanced Nastran for licensing to commercial and government users. Each has used the Nastran trademark with permission from NASA. At the time of Respondent's acquisitions, the features and capabilities of each of these three advanced versions of Nastran were very similar.

16. The aerospace and automotive industries began using the advanced versions of Nastran in the 1970s for advanced linear structural analysis. Nastran has become the standard linear structural solver in these industries. Certain other manufacturing industries also utilize Nastran for advanced linear structural analysis.

17. Prior to Respondent's acquisitions, users of the advanced versions of Nastran offered by MSC, UAI, or CSAR could readily switch between these versions without substantial loss of functionality because each version offered very similar features and capabilities. Differences in functionality discourage switching from advanced versions of Nastran to other solvers even in response to a significant and nontransitory increase in price.

18. Prior to Respondent's acquisitions, users of the advanced versions of Nastran offered by MSC, UAI, or CSAR could readily switch between these versions relatively quickly and without spending significant switching costs and time. The advanced versions of Nastran were all derived from the same Nastran public domain code, offered very similar features and capabilities, and used generally the same input and output file formats. Differences in computer code, features and capabilities, and file formats discourage switching from advanced versions of Nastran to other solvers even in response to a significant and nontransitory increase in price.

19. Industry practices or the requirements of multi-party development projects sometimes dictate the use of advanced versions of Nastran, thereby discouraging substitution away from advanced versions of Nastran even in response to a significant and nontransitory increase in price.

20. Prior to Respondent's acquisitions, competition between MSC, UAI, and CSAR to license or sell advanced versions of Nastran was direct and vigorous and helped to hold down prices and to promote product innovation. Prior to Respondent's acquisitions, users had switched and had considered switching between these advanced versions of Nastran in response to relative changes in price and other competitive variables including product features, capabilities, and enhancements.

### RELEVANT PRODUCT MARKETS

21. One relevant product market in which to assess the likely effects of Respondent's acquisitions of UAI and CSAR is the licensing or sale of advanced versions of Nastran.

22. Another relevant product market in which to assess the likely effects of Respondent's acquisitions of UAI and CSAR is the broader market consisting of the licensing or sale of FEA solvers for advanced linear structural analysis.

23. Within each of the relevant product markets, separate markets exist for the licensing or sale of the relevant product for specific industries or customer categories, in particular, the aerospace industry and the automotive industry.

### RELEVANT GEOGRAPHIC MARKETS

24. The relevant geographic markets in which to assess the likely effects of Respondent's acquisitions of UAI and CSAR are

- a. the United States; and
- b. the world.

### CONCENTRATION

25. Prior to Respondent's acquisitions, MSC, UAI, and CSAR were the only firms competing in the licensing or sale of advanced versions of Nastran. MSC was the dominant competitor with an estimated market share of 90 percent. The remaining share was roughly split between UAI and CSAR. The market for advanced versions of Nastran prior to the acquisitions

was highly concentrated with a Herfindahl-Hirschman Index ("HHI") exceeding 8100. (An HHI of 1800 characterizes a highly concentrated market.) Respondent's acquisitions of UAI and CSAR, together and individually, substantially increased that concentration so that the HHI is now 10,000.

26. Prior to Respondent's acquisitions, there were few suppliers competing in the licensing or sale of FEA solvers for advanced linear structural analysis other than MSC, UAI, and CSAR. Prior to Respondent's acquisitions, the market for FEA solvers for advanced linear structural analysis was highly concentrated. Respondent's acquisitions of UAI and CSAR, together and individually, substantially increased that concentration.

#### CONDITIONS OF ENTRY

27. Entry into licensing or sale of advanced versions of Nastran would not be timely, likely, or sufficient to prevent the anticompetitive effects. Entry is difficult because of the substantial cost and time needed to develop an advanced version of Nastran, validate simulation results, and establish a reputation for reliability.

28. Entry into the licensing or sale of FEA solvers for advanced linear structural analysis would not be timely, likely, or sufficient to prevent the anticompetitive effects. Entry is difficult because of the substantial cost and time needed to develop an FEA solver for advanced linear structural analysis, validate simulation results, and establish a reputation for reliability.

#### COUNT I

#### THE ACQUISITIONS VIOLATE CLAYTON ACT § 7 AND FTC ACT § 5

29. Respondent's acquisitions of UAI and CSAR, together and individually, have had or will have the effect of substantially lessening competition and tending to create a monopoly in the relevant markets by, among other things:

a. eliminating actual, direct, and substantial competition between MSC, UAI, and CSAR, all of which had the ability and incentive to compete, and before the acquisitions did compete, on price and product development and enhancements;

b. creating or enhancing MSC's power to raise prices above a competitive level or to withhold or delay product development and enhancements, thereby adversely affecting price and product innovation; and

c. preventing other suppliers of engineering software from acquiring UAI and CSAR and increasing competition.

30. Absent the relief described in the attached Notice of Contemplated Relief, Respondent's acquisitions of UAI and CSAR, together and individually, will continue to cause the effects on competition identified above.

31. The effect of Respondent's acquisitions of UAI and CSAR, together and individually, may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

## COUNT II

### **THE ACQUISITIONS CONSTITUTE UNLAWFUL MONOPOLIZATION IN VIOLATION OF FTC ACT § 5**

32. The allegations contained in Paragraphs 1 through 28 are repeated and realleged as though fully set forth here.

33. Respondent has obtained or enhanced monopoly power in the markets for advanced versions of Nastran through the acquisitions.

34. Respondent acted willfully to acquire or enhance monopoly power in the markets for advanced versions of Nastran through the acquisitions.

35. Through the acquisitions, Respondent has engaged in unfair methods of competition in or affecting commerce by monopolizing the markets for advanced versions of Nastran in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

## COUNT III

### **THE ACQUISITIONS CONSTITUTE AN UNLAWFUL ATTEMPT TO MONOPOLIZE IN VIOLATION OF FTC ACT § 5**

36. The allegations contained in Paragraphs 1 through 28 are repeated and realleged as though fully set forth here.

37. Respondent has engaged in an anticompetitive course of conduct by willfully seeking to obtain or enhance monopoly power in the markets for advanced versions of Nastran through the acquisitions.

38. Respondent acted with a specific intent to monopolize, and to destroy competition in, the markets for advanced versions of Nastran through the acquisitions.

39. At the time Respondent acquired UAI and CSAR, it had a dangerous probability of success in monopolizing the markets for advanced versions of Nastran.

40. Through the acquisitions, Respondent has engaged in unfair methods of competition in or affecting commerce by attempting to monopolize the markets for advanced versions of Nastran in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

### NOTICE

Proceedings on the charges asserted against you in this complaint will be held before an Administrative Law Judge (ALJ) of the Federal Trade Commission, under Part 3 of the Commission's Rules of Practice, 16 C.F.R. Part 3. A copy of Part 3 of the Rules is enclosed with this complaint.

You may file an answer to this complaint. Any such answer must be filed within 20 days after service of the complaint on you. If you contest the complaint's allegations of fact, your answer must concisely state the facts constituting each ground of defense, and must specifically admit, deny, explain, or disclaim knowledge of each fact alleged in the complaint. You will be deemed to have admitted any allegations of the complaint that you do not so answer.

If you elect not to contest the allegations of fact set forth in the complaint, your answer shall state that you admit all of the material allegations to be true. Such an answer will constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the ALJ will file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. Such an answer may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice.

If you do not answer within the specified time, you waive your right to appear and contest the allegations of the complaint. The ALJ is then authorized, without further notice to you, to find that the facts are as alleged in the complaint and to enter an initial decision and a cease and desist order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5



days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

A hearing on the complaint will begin on January 9, 2002, at 10 a.m., in Room 532, or such other date as determined by the ALJ. At the hearing, you will have the right to contest the allegations of the complaint and to show cause why a cease and desist order should not be entered against you.

### NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the acquisitions of UAI and CSAR violate Section 7 of the Clayton Act, as amended, or Section 5 of the Federal Trade Commission Act, as amended, as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including but not limited to:

1. An order to create and divest up to two viable on-going businesses each engaged in the licensing or sale of an advanced version of Nastran in competition with MSC Nastran to up to two acquirers acceptable to the Commission, including but not limited to:
  - a. divesting all software, intellectual property, and other assets for the operation of such businesses, including but not limited to the following for MSC Nastran and all MSC Nastran applications, features, enhancements, and library functions for all operating systems and computer platforms: the source code, object libraries, executable programs, test problems, test results, regression test software, development support software, trade secrets, trademarks, patents, know-how, interfaces with complementary software, APIs, manuals, guides, reports, and other documentation;
  - b. facilitating the acquirers' recruitment of Respondent's employees, including but not limited to providing employee lists, personnel files, opportunities to interview and negotiate with the acquirers, eliminating any restrictions on or disincentives to accepting employment with the acquirers, and providing incentives for such employees to accept employment with the acquirers;
  - c. providing Respondent's customer lists and account information to the acquirers;
  - d. allowing Respondent's customers to terminate or rescind contracts or license agreements and to deal with the acquirers, including but not limited to eliminating any restrictions on or disincentives to terminating or rescinding such contracts or license agreements and otherwise refunding or returning consideration paid in advance pursuant to such contracts or license agreements;

- e. furnishing to the acquirers such personnel, information, technical assistance, advice and training as are necessary;
  - f. for a defined period of time, maintaining open architecture for MSC Nastran and all input and output file formats so that users of MSC Nastran would not be impeded or penalized if they switched models, files, or complementary software to the divested versions of Nastran;
  - g. for a defined period of time, not restricting, precluding, or influencing a supplier of complementary software or services from dealing with the acquirers or the acquirers' products;
  - h. for a defined period of time, supporting fully the divested versions of Nastran with Patran and other MSC complementary software products, without charge to the acquirers and on the same basis as MSC Nastran is supported by Patran and other MSC complementary software products; and
  - i. such other or additional relief as is necessary to ensure the creation of up to two viable, competitive, and independent entities offering advanced versions of Nastran with the level of features and capabilities offered by MSC.
2. An order to provide prior notice of any acquisitions of firms engaged in the licensing or sale of advanced versions of Nastran or other solvers for advanced linear structural analysis.
3. Such other or additional relief as is necessary to correct or remedy the violations alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this ninth day of October, 2001, issues its complaint against said Respondent.

By the Commission.

  
Donald S. Clark  
Secretary



UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

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

Docket No. 9299

COMPLAINT COUNSEL'S INITIAL DISCLOSURES

Complaint Counsel hereby submit our initial disclosures to respondent MSC.Software Corporation under § 3.31(b) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel will provide a copy of nonprivileged documents, data compilations, and tangible things in our possession, custody, or control that are, or may be, relevant to the allegations of the complaint, the proposed relief, or Respondent's defenses after Administrative Law Judge D. Michael Chappell enters a protective order in this matter and we have given the required notice to the individuals and organizations that submitted such materials. Complaint counsel exclude information or material subject to privilege, trial preparation material, material that pertains to experts, and material that is obtainable from some other source that is more convenient, less burdensome, or less expensive for Respondent than for Complaint Counsel as provided by Rule 3.31(b).

**I. Persons and Organizations Likely to Have Discoverable Information**

Set forth below are the names and, if known, the addresses and telephone numbers, of persons and organizations likely to have discoverable information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Respondent subject to the limitations

set forth in Rule 3.31(b). Complaint counsel excludes from this list the following categories of individuals and organizations because Respondent already possesses knowledge of their identifying information: (a) present or former officers, directors, employees, agents, investigators or consultants of Respondent or its predecessors, including Universal Analytics Inc. (hereinafter "UAI") and Computerized Structural Analysis & Research Corporation (hereinafter "CSAR"); (b) current and former licensees or end-users of software licensed or sold by Respondent or its predecessors, including UAI and CSAR; (c) current and former suppliers of technology licensed to Respondents or its predecessors, including UAI and CSAR; and (d) current and former valued-added resellers and distributors of software licensed or sold by Respondent or its predecessors, including UAI and CSAR. The names, addresses and telephone numbers of such persons are already in Respondent's possession or are obtainable from some other source that is more convenient, less burdensome or less expensive for Respondent than for Complaint Counsel. As provided in Rule 3.31(b), Complaint Counsel have further excluded from this disclosure information or materials that are privileged, that pertain to hearing preparation as defined in Rule 3.31(c)(3), or that pertain to experts, as defined in Rule 3.31(c)(4). Complaint Counsel will disclose the identity of testifying experts, if any, as provided in the Scheduling Order to be entered in this matter.

Advanced Technology Institute  
5300 International Boulevard  
North Charleston, SC 29418  
(843) 760-3793

Dr. Gerald Graves

Alliant Partners

435 Tasso Street  
Palo Alto, CA 94301  
(650) 325-1541

John Savage

NASA, Office of the General Counsel  
300 E Street, S.W.  
Washington, DC 20546  
(202)358-2065

Alan J. Kennedy, Esquire

Dr. R. Swami Narayanaswami  
501 Country Valley Road  
Westlake Village, CA 91362-5626

Vincent Tricarico, Esquire  
(213) 629-5700

#### **Firms in the CAD/CAE Industry**

Aavid Thermal Technologies, Inc.  
1 Kool Path  
P.O. Box 400  
Laconia, NH 03247-0400  
(603) 224-1117

ADINA R&D Inc.  
71 Elton Avenue  
Watertown, MA 02472  
(617) 926-5199

AEA Technology  
Harwell  
Didcot  
Oxfordshire OX 11 0QJ  
Harwell, England

Algor  
150 Beta Drive  
Pittsburgh, PA 15238-2932  
(412) 967-2700

**Altair**  
1757 Maplelawn Drive  
Troy, MI 48084-4603  
(248) 614-2400

**ANSA**  
200-4170 Still Creek Drive  
Burnaby, BC  
Canada V5C 6C6

**Ansys, Inc.**  
Southpointe  
275 Technology Drive  
Canonsburg, PA 15317  
(724) 746-3304

**Autodesk, Inc.**  
111 McInnis Parkway  
San Rafael, CA 94903  
(415) 507-5000

**AutoFEA Engineering Software Technology, Inc.**  
Norwalk, CA  
(562) 868-0946

**Beta CAE Systems**  
Fragon 6-8  
GR 54624 Thessaloniki  
Greece

**Beta CAE Systems (ANSA)**  
30400 Telegraph Road  
Suite 438  
Bingham Farms, Michigan 48025

**Blue Ridge Numerics, Inc.**  
3315 Berkmar Dr., Suite 2B  
Charlottesville, VA 22902  
(804) 977-2764

**Cadre Analytic**  
2035 201 Ave. S.E.

Sammamish, WA 98075  
(425) 392-4309

CoCreate Software Inc./Hewlett-Packard  
3801 Automation Way, Suite 110  
Fort Collins, CO 80525  
(970) 267-8000

Computational Dynamics  
200 Shepherds Bush Road  
London W6 7NY  
England  
44-20-7471-6200

Concurrent Analysis Corporation  
7100 Balboa Blvd., Suite 807  
Van Nuys, CA 91406  
(818) 996-0053

CSC  
2100 East Grand Ave.  
El Segundo, CA 90245  
(310) 615-0311

Dassault Systemes  
9, Quai Marcel Dassault - B.P. 310  
Suvesnes Cedex 92150  
France  
011-33-1405-5490

DNV Software  
Veritasveien 1  
1322 Hovik  
Norway  
47-67-57-99-00

EADS Matra Datavision  
37, Boulevard de Montmorency  
75016 Paris  
France  
33-1-69-82-24-00

EDS/UGS



5400 Legacy Drive  
Plano, TX 75024-3199  
(972) 604-6000

Engineering Mechanics Research Corporation  
1607 East Big Beaver Road  
Troy, Michigan 48083  
(248) 689-0077

Engineering Software Research & Development, Inc.  
10845 Olive Blvd., Suite 170  
St. Louis, MO 63141  
(314) 983-0649

Engineering Systems International North America  
13399 West Star  
Shelby Township  
Troy, Michigan 48315-2701  
(586) 323-4610

Georgia Tech - CASE Center  
School of Civil & Environmental Engineering  
Atlanta, Georgia 30332-0355  
(404) 894-2260

Hibbitt, Karlsson & Sorensen, Inc.  
1080 Main Street  
Pawtucket, Rhode Island 02860-4847  
(401) 727-4200

International Business Machines Corporation  
New Orchard Road  
Armonk, New York 10504  
(914) 499-1900

Intergraph Corporation  
1 Madison Industrial Park  
Huntsville, AL 35894-0001  
(256) 730-2000

International TechneGroup Inc.  
5303 Dupont Circle  
Milford, OH 45150

(513) 576-3900

**INTES Ingenieurgesellschaft für technische Software mbH**  
Schulze-Delitzsch-Str. 16  
D-70565 Stuttgart  
Germany  
49-711-7-84-99-0

**Livermore Software Technology Corporation**  
7374 Las Positas Road  
Livermore, California 94550  
(925) 449-2500

**LMS International**  
Researchpark Z1  
Interleuvenlaan 68  
3001 Leuven  
Belgium  
32-16-384-200

**Finite Element Analysis Ltd**  
Forge House  
610 High Street  
Kingston upon Thames  
Surrey KT1 1HN  
United Kingdom  
44-1-20-8541-1999

**Macro Industries, Inc.**  
1035 Putman Drive  
Suite E  
Huntsville, Alabama 35816  
(256) 721-1120

**MECALOG SARL**  
2 Rue de la Renaissance  
92160 Antony  
France  
33-0-1-55-59-01-90

**Mechanical Dynamics, Inc.**  
2300 Traverwood Dr.  
Ann Arbor, Michigan 48105

**(734) 994-3800**

**Moldflow Corporation  
430 Boston Post Road  
Wayland, MA 01778  
(508) 358-5848**

**Network Analysis, Inc.  
ASU Research Park  
7855 S. River Parkway  
Tempe, AZ 85284  
(480) 756-0512**

**Noran Engineering Inc.  
5182 Katella Avenue  
Suite 201  
Los Alamitos, California 90720-2855  
(562) 799-9911**

**Open Channel Foundation  
1807 W. Sunnyside Ave., Suite 301  
Chicago, Illinois 60640  
(773) 334-8177**

**Parametric Technology Corporation  
140 Kendrick Street  
Needham, MA 02494  
(781) 370-5000**

**SAMTECH Group  
Parc Scientifique du Sart Tilman  
Rue des Chasseurs-Ardennais, 8  
B-4031 Liege (Angleur)  
Belgium  
32-0-4-361-69-69**

**Schaeffer Automated Simulation, LLC  
2029 Century Park East, Suite 800  
Los Angeles, CA 90067**

**Harry Schaeffer  
Richard MacNeal**

Structural Analysis, Inc.  
1405 Weston Lane  
Austin, TX 78733  
(512) 328-8198

TRASYS S.A.  
Avenue Ariane 7 Arianelaan  
B-1200 Brussels  
Belgium  
32-0-2-773-71-11

## **II. Relevant Documents**

Complaint counsel are in possession, custody, or control of documents, data compilations, and tangible things collected while conducting the investigation in this matter that are, or may be, relevant to the allegations of the complaint, to the proposed relief, or to defenses of Respondent. All documents are located at the Federal Trade Commission, Bureau of Competition, 601 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Subject to the limitations set forth in Rule 3.31(b), a copy of nonprivileged documents, data compilations, and tangible things will be provided to you after Administrative Law Judge D. Michael Clappell enters a protective order in this matter and we have provided the required notice to the individuals and organizations that submitted such materials. Complaint Counsel will not provide

a copy of any documents or information produced by Respondent or already within Respondent's possession, custody, or control.

Respectfully submitted,



**Karen A. Mills**  
**Counsel Supporting the Complaint**  
**Bureau of Competition**  
**Federal Trade Commission**  
**Washington, D.C. 20580**  
**(202) 326-2052**  
**Facsimile (202) 326-3496**

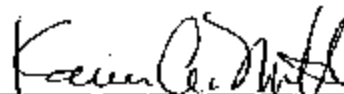
Dated: November 6, 2001

**CERTIFICATE OF SERVICE**

This is to certify that on November 6, 2001, I caused a copy of the attached Complaint Counsel's Initial Disclosures to be served upon the following persons by facsimile transmission and by U.S. first class mail, postage pre-paid:

Marimichael O. Skubel, Esquire  
KIRKLAND & ELLIS  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005  
(202) 879-5034  
Fax (202) 879-5200

Counsel for MSC Software Corporation



Karen A. Mills



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
MSC.SOFTWARE CORPORATION,	)	
a corporation.	)	Docket No. 9299

COMPLAINT COUNSEL'S OBJECTIONS AND RESPONSES  
TO RESPONDENT MSC.SOFTWARE CORPORATION'S  
FIRST SET OF INTERROGATORIES

REDACTED

RESTRICTED CONFIDENTIAL, ATTORNEY EYES ONLY  
FTC Docket No. 9299



**REDACTED**

**RESTRICTED CONFIDENTIAL, ATTORNEY EYES ONLY**  
**FTC Docket No. 9299**

**REDACTED**

**RESTRICTED CONFIDENTIAL, ATTORNEY EYES ONLY**  
**FTC Docket No. 9299**

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**RESTRICTED CONFIDENTIAL, ATTORNEY EYES ONLY**  
**FTC Docket No. 9299**

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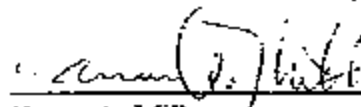
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**FTC Docket No. 9299**

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**Karen A. Mills**  
**Counsel Supporting the Complaint**  
**Bureau of Competition**  
**Federal Trade Commission**  
**Washington, D.C. 20580**  
**(202) 326-2052**  
**Facsimile (202) 326-3496**

**Dated: December 12, 2001**

**RESTRICTED CONFIDENTIAL, ATTORNEY EYES ONLY**  
**FTC Docket No. 9299**



**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

<p style="text-align:center"><b>IN THE MATTER OF</b></p> <p><b>MSC.SOFTWARE CORPORATION,</b></p> <p>a corporation.</p>	)	
	)	
	)	
	)	Docket No. 9299
	)	
	)	

**RESPONDENT MSC.SOFTWARE CORPORATION'S  
FIRST SET OF INTERROGATORIES**

Pursuant to Rule 3.35 of the Commission's Rules of Practice, 16 C.F.R. § 3.35, Respondent MSC.Software Corporation ("MSC"), hereby propounds the following interrogatories, to be answered by no later than 5:00 p.m. on December 11, 2001.

**DEFINITIONS AND INSTRUCTIONS**

The following definitions and instructions shall apply to these interrogatories, unless the context of the interrogatory or response indicates otherwise. If, in responding to these interrogatories, these terms are given a meaning other than that indicated below, the response should specify the meaning that is being given to that term.

1. The term "person" means any natural person, corporation, association, firm, company, partnership, joint venture, trust, estate, or other legal or government entity, whether or not it possesses a separate juristic existence.

2. The terms "you," "yours," "FTC," or "Commission" mean the Federal Trade Commission, its Commissioners, employees, attorneys, accountants, economists, staff, consultants, experts, agents, and representatives, and includes any third party representative or agent, wherever located, who is acting or purporting to act on behalf of the FTC.

3. The terms "MSC Software" or "MSC" refer to MSC Software Corporation, including its directors, officers, employees, and agents.

4. The terms "Universal Analytics" or "UAI" refer to Universal Analytics, Inc., including its directors, officers, employees, and agents.

5. The term "CSAR" refers to Computerized Structural Analysis and Research Corporation, including its directors, officers, employees, and agents.

6. The term "functionality" has the same meaning given to it in paragraph 17 of the Complaint.

7. The term "features and capabilities" has the same meaning given to it in paragraph 18 of the Complaint.

8. The term "very similar" has the same meaning given to it in paragraph 18 of the Complaint.

9. The term "advanced versions of Nastran" has the same meaning given to it in paragraph 21 of the Complaint.

10. The term "FEA solvers for advanced linear structural analysis" has the same meaning given to it in paragraph 22 of the Complaint.

11. The term "acquisitions" means MSC's acquisitions of either UAI or CSAR or both.

12. The term "third party" means any person other than MSC, MSC's subsidiaries and affiliates; UAI, UAI's subsidiaries and affiliates; CSAR, CSAR's subsidiaries and affiliates; or the FTC.

13. The term "documents" means anything that may be considered to be a document or tangible thing within the meaning of Commission Rule of practice 3.34(b), 16 C.F.R.



§ 3.34(b), including writings, communications, drawings, graphs, charts, photographs, phonorecords, discs, computer recordings, electronic mail, and any other data compilations from which information can be obtained.

14. The term "relating to" means referring to, commenting upon or discussing the subject matter of the interrogatory in any respect, either in support of or in contradiction of the contention, statement or allegation identified in the interrogatory.

15. The terms "all evidence relating to" and "all evidence relating thereto" mean the identity of each person with knowledge thereof; all documents relating thereto; and all data, information, and analysis relating thereto.

16. The term "identify" when used in connection with a person requires you to state such person's name; present or last known address; telephone number; email address; and, if a natural person, the name and address of his or her present or last known employer.

17. The term "identify" when used in connection with a document requires you to list every responsive document by production or exhibit number, if applicable, or other information sufficient for Respondent to locate and obtain the document.

18. The term "identify" when used with respect to data, information, or analysis means to state with particularity the fact(s) which are informative and the person(s) and/or documents possessing the information together with the identifying information for the person(s) and/or document(s), unless identified elsewhere.

19. The term "identify" when used with respect to a communication means to state: (a) the date on which such communication occurred; (b) the form of communication (e.g., person-to-person meeting, telephone conference, letter, memorandum, electronic mail, voice message, etc.);

(c) the participants to the communication, including all recipients of written communications and all individuals present, whether participating or not; (d) a description of each topic discussed and the nature of what was communicated in form and substance. If there are no oral communications, the response should include a statement to that effect and which is subject to the requirements that responses to these interrogatories shall be under oath as specified by Commission Rule of Practice 3.35(a)(2), 16 C.F.R. § 3.35(a)(2).

20. Unless the context of the interrogatory indicates otherwise, the use of the singular and plural forms of a word should be read to mean either the singular form of the word or the plural form of the word.

21. The term "exculpatory" means anything that, under the legal principles enunciated in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and its progeny, *see, e.g., In re Warner Lambert Co.*, 83 F.T.C. 819, 820 (1973)(regarding production of exculpatory material in FTC proceedings); constitutes evidence or would likely lead to the discovery of evidence that would be favorable or helpful to MSC's opposition to the Commission's allegations in this case.

22. If you refuse to answer any interrogatory on the ground of privilege or any other immunity or exemption, provide a statement of the claim of privilege, immunity, exemption, or the bases for any claimed privilege, immunity, or exemption, identify all facts relied upon in support of that claim(s), and explain whether the privileged material can be redacted (and if not, why not).

23. These interrogatories are continuing in character and you must supplement your answers pursuant to Commission Rule of Practice 3.31(e), 16 C.F.R. § 3.31(e), which provides that "[a] party is under a duty to seasonably amend a prior response to an interrogatory . . . if the party learns that the response is in some material respect incomplete or incorrect."

## INTERROGATORIES

### Interrogatory No. 1:

Identify each person with whom you have communicated regarding MSC's acquisitions. For each such person, describe what was said about the acquisitions, state the date and duration of all such communications, state whether that person has given you an affidavit or other written statement (whether in final or draft form), and identify all documents and things provided to the FTC by that person and all documents and things provided by the FTC to that person.

### Interrogatory No. 2:

With regard to your allegation in paragraph 21 that "[o]ne relevant product market in which to assess the likely effects of [the] acquisitions of UAI and CSAR is the licensing or sale of advanced versions of Nastran," identify each software product that you contend constitutes an "advanced version[ ] of Nastran." For each such product, identify the computer platform and operating system on which it runs, the firm or company which sells or licenses it, describe in detail (based on the criteria listed in Paragraph 13 of the Complaint) how that product is differentiated from versions of Nastran which you do not consider to be advanced versions of Nastran, including the analyses performed using that product, the price level of that product, the ease of use of that product compared to versions of Nastran which you do not consider to be advanced versions of Nastran, the speed of that product, the size and complexity of problems that can be analyzed using that product, the ability of that product to perform system-type analyses, the availability of complementary software, the type of input and output file format utilized by that product, and identify all evidence (including, but not limited to, exculpatory evidence) relating to the allegation that "[o]ne relevant

product market in which to assess the likely effects of [the] acquisitions of UAI and CSAR is the licensing or sale of advanced versions of Nastran."

**Interrogatory No. 3:**

With regard to your allegations in paragraph 22 that "[a]nother relevant product market in which to assess the likely effects of [the] acquisitions of UAI and CSAR is the broader market consisting of the licensing or sale of FEA solvers for advanced linear structural analysis," identify each software product (whether or not such software is commercially available) that you contend constitutes an "FEA solver for advanced linear structural analysis." For each such product, identify the computer platform and operating system on which each is used, the firm or company which sells or licenses it, and identify all evidence relating to your allegation in paragraph 22 that "[a]nother relevant product market in which to assess the likely effects of [the] acquisitions of UAI and CSAR is the broader market consisting of the licensing or sale of FEA solvers for advanced linear structural analysis."

**Interrogatory No. 4:**

For each software product identified in response to Interrogatory No. 3, describe in detail, based on the criteria listed in Paragraph 13 of the Complaint, how that product is differentiated from other FEA solvers, including, but not limited to, the analyses performed using that product, the price level of that product, the ease of use of that product compared to other FEA solver software products, the speed of that product, the size and complexity of problems that can be analyzed using that product, the ability of that product to perform system-type analyses, the availability of complementary software, the type of input and output file format utilized by that product, the type of computer platform(s) and operating system(s) on which the product operates, and identify all

evidence relating to how each such product is differentiated based upon the criteria enumerated in paragraph 13 of the Complaint.

**Interrogatory No. 5:**

For each advanced version of Nastran sold or licensed by MSC at the time of the acquisitions, identify the features and capabilities and the input and output file formats of the advanced version of Nastran sold or licensed by UAI or CSAR which you contend were very similar to the features and capabilities and the input and output file formats of the advanced version of Nastran sold or licensed by MSC and identify all evidence relating thereto.

**Interrogatory No. 6:**

Identify each person who used versions of Nastran offered by MSC, CSAR, and UAI prior to the acquisitions who you contend did "readily switch between these versions without substantial loss of functionality because each version offered similar features and capabilities," as alleged in paragraph 17 of the Complaint, and for each such person, state the reasons why the person switched, the occasion for the person's switching, and identify all evidence relating thereto.

**Interrogatory No. 7:**

Identify each person using an advanced version of Nastran who was "discouraged from switching" to other solvers due to "[d]ifferences in functionality" in response to a significant and nontransitory increase in price, as alleged in paragraph 17 of the Complaint, identify each occasion on which such person was discouraged, the "differences in functionality," "computer code, features and capabilities, and file formats" which discouraged such switching, and identify all evidence (including, but not limited to, exculpatory evidence) relating thereto.

**Interrogatory No. 8:**

Identify each "industry practice" or "requirement of a multi-party development project" which you contend "sometimes dictate[s] the use of advanced versions of Nastran," as alleged in paragraph 19 of the Complaint, and all evidence (including, but not limited to, exculpatory evidence) relating thereto.

**Interrogatory No. 9:**

Identify each person who you contend has switched or has considered switching among MSC's, UAI's, and CSAR's advanced versions of Nastran in response to relative changes in price or other competitive variables including product features, capabilities, and enhancements, as alleged in paragraph 20 of the Complaint, and identify all evidence (including, but not limited to, exculpatory evidence) relating thereto.

**Interrogatory No. 10:**

For each relevant product market, identify the bases for your contention that there is a separate geographic market consisting of the United States and all evidence (including, but not limited to, exculpatory evidence) relating thereto.

**Interrogatory No. 11:**

For each relevant product and geographic market, identify each firm competing as a seller or licensor in that market, its respective market share prior to the acquisitions, and all evidence relating thereto.

**Interrogatory No. 12:**

For each document produced as part of your mandatory initial disclosures under Rule 3.31, 16 C.F.R. § 3.31, and which are produced in response to Respondent's Requests for the Production of Documents and Things, identify the source and location from which each document was collected and all evidence relating thereto.

**Interrogatory No. 13:**

Identify each person who has made any exculpatory statement or provided exculpatory information about the competitive effects of the acquisitions, the substantive content of each statement or information, and all evidence relating thereto.

**Interrogatory No. 14:**

For each relevant product market in which you contend that the acquisitions has had or will have the effect of substantially lessening competition and tending to create a monopoly as alleged in paragraph 29(a) of the Complaint, state whether your contention is based on a theory of "coordinated interaction" and, if so, identify all evidence relating thereto. For purposes of responding to this Interrogatory, the term "coordinated interaction" is given the same meaning as it is given in section 2.1 of the Department of Justice/FTC *Horizontal Merger Guidelines*.

**Interrogatory No. 15:**

Identify each instance in which any person paid a higher price for any relevant product sold or licensed by MSC or each instance in which there has been any other anticompetitive action or effect as a consequence of the acquisitions and identify all evidence (including, but not limited to, exculpatory evidence) relating thereto.

**Interrogatory No. 16:**

Identify each product development or enhancement for any relevant product sold or licensed by MSC that MSC withheld or delayed as a consequence of the acquisitions and identify all evidence (including, but not limited to, exculpatory evidence) relating thereto.

**Interrogatory No. 17:**

Identify each supplier of software that was interested in acquiring UAI or CSAR and identify all evidence relating thereto.

**Interrogatory No. 18:**

To the extent that you allege in paragraph 25 of the Complaint that "MSC was the dominant competitor with an estimated market share of 90 percent, state whether you calculated the estimated market share alleged in paragraph 25 of the Complaint based upon units sold or revenues and, if calculated by one method rather than the other, state the reasons why and identify all evidence related thereto.

Dated: November 21, 2001



Tefft W. Smith (Bar No. 458441)  
Marimichael O. Skubel (Bar No. 294934)  
Michael S. Becker (Bar No. 447432)  
Bradford E. Biegon (Bar No. 453766)  
Larissa Paule-Carres (Bar No. 467907)  
KIRKLAND & ELLIS  
655 15<sup>th</sup> Street, N.W.  
Washington, D.C. 20005  
(202) 879-5000 (tel.)  
(202) 879-5200 (fax)


*Counsel for Respondents,*  
MSC Software Corporation



**CERTIFICATE OF SERVICE**

This is to certify that on November 21, 2001, I caused a copy of the attached Respondent MSC Software Corporation's First Set of Interrogatories to be served upon the following persons by hand delivery:

Richard B. Dagen, Esquire  
P. Abbott McCartney, Esquire  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

  
\_\_\_\_\_  
Steven B. Jud



# KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

655 Fifteenth Street, N.W.  
Washington, D.C. 20005-5793

Tefft W. Smith  
To Call Writer Directly:  
(202) 879-5212

(202) 879-5000

Facsimile:  
202) 879-5200

December 28, 2001

VIA: Fax and Hand Delivery

P. Abbott McCartney, Esq.  
Karen Mills, Esq.  
Federal Trade Commission  
601 Pennsylvania Avenue, N.W.  
Washington, D.C. 20005

Re: MSC Software Corporation, Docket No. 9299

Dear Abbott and Karen:

Complaint Counsel's Objections and Responses to MSC Software's First Set of Interrogatories are plainly deficient and fail to comply with Complaint Counsel's obligation to provide MSC the essential discovery necessary to allow MSC a fair hearing consistent with its due process rights.

Complaint Counsel "objects" that "it is not Complaint Counsel's job to act as attorneys or paralegals for Respondent" and asserts obviously inapplicable "informants," "investigatory" and other "government" privileges to avoid disclosure of exculpatory evidence. Whatever Complaint Counsel thinks its job may or may not be,<sup>1</sup> one thing is clear: Complaint Counsel cannot continue to "hide the ball" by refusing to respond to narrowly-tailored discovery drawn *directly* from Complaint Counsel's public accusations.

Of further concern for the fairness of these proceedings, Complaint Counsel's latest filings confirm that Complaint Counsel has not been forthcoming in disclosing the *sources* of its claims. Despite a regulatory requirement to disclose the "name, and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the allegations of the Commission's complaint" in its Initial Disclosures, 35 C.F.R. § 3.31(b), due on November 6, 2001, Complaint Counsel waited until its Preliminary Witness List on December 17, 2001, six weeks later,

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<sup>1</sup> "[The Government] is the representative *not* of an ordinary party. . . , but of a sovereignty . . . whose interest . . . is not that it shall win cases, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

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to identify the forty individuals whom it intends to call at trial, only one of whom was listed in Complaint Counsel's Initial Disclosures.

This is not right and raises serious questions about the trial schedule.

MSC's concerns with each of Complaint Counsel's General and Specific Objections and Responses is detailed below.

### General Objections

*General Objection No. 1:* Complaint Counsel's objection to providing factual information "before discovery has been completed and the case fully developed" is not well founded. MSC is entitled to know the facts as Complaint Counsel presently understands them, especially in light of the forty-paragraph Complaint that has been filed in this case after eighteen months of investigative efforts.

Since MSC's interrogatories are plainly drawn from the numbered allegations in the Complaint, MSC is entitled to know the facts that support the detailed allegations that Complaint Counsel has made. Complaint Counsel's action threatens to deprive MSC of its due process rights. MSC must know these facts now so that it may properly conduct its own discovery and prepare its case.

This objection is also inconsistent with General Objection No. 20, in which Complaint Counsel reserves the right to supplement its responses. Complaint Counsel's reservation is a requirement under the Rules; if Complaint Counsel learns new facts during discovery it must supplement its responses.

*General Objections Nos. 2 and 3:* Complaint Counsel's objection that the burden of identifying the evidence supporting the allegations in the Complaint is the same for Complaint Counsel as it is for MSC is simply *not* true. The FTC conducted an eighteen month investigation in which it supposedly talked to numerous MSC competitors and customers and gathered a wide array of information from them. Clearly Complaint Counsel weighed and sifted the evidence before recommending litigation to the Commission and before drafting its Complaint. Thus, the burden of identifying this evidence for Complaint Counsel is virtually nonexistent (especially compared to MSC's burden of sifting through more than forty boxes of documents gathered and produced in this matter so far).

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MSC is plainly entitled under the Rules to propound contention interrogatories and Complaint Counsel is also plainly required to respond fully to them. Complaint Counsel's undifferentiated designation of documents previously-produced by MSC and third parties as its responses to MSC's narrowly-focused interrogatories is inappropriate. See 16 C.F.R. § 3.35 (requiring that, when documents are referred to answer an interrogatory, "[t]he specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained"). MSC cannot reconstruct either the information gathered from third parties or glean which facts Complaint Counsel relied upon in framing its allegations by simply reviewing the documents. Neither the documents previously produced by MSC nor those produced by third parties will identify Complaint Counsel's interpretation of those documents and the bases for Complaint Counsel's contentions in the Complaint, which MSC has denied.

*General Objection No. 4:* Complaint Counsel's objection that "it is not Complaint Counsel's job to act as attorneys or paralegals for Respondent and select all of the materials supporting a particular proposition" is spurious. This objection relies upon Complaint Counsel's production of its documents responsive to the mandatory initial disclosure requirements and those previously produced by MSC. In short, rather than answer the interrogatories, the objection directs Respondent to sift through the boxes of documents produced in the case. The most flagrant example is Complaint Counsel's response to Interrogatory No. 18, which asks for the methodology used to calculate MSC's marketshare as alleged in the Complaint. Complaint Counsel's response says that MSC can learn the answer to this question by consulting its own documents, employees, licensees, and customers.

Commission Rule of Practice 3.35 does not permit Complaint Counsel simply to refer to documents on a wholesale basis as an alternative to responding to interrogatories. First, Rule 3.35 applies to the responding party's *own* documents, *not* third party documents. See 15 C.F.R. § 3.35 (permitting a responding party to answer interrogatories by referring to documents when "the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served"). Second, even if third party documents held by the FTC were subject to the Rule, then Complaint Counsel must still specify *which* documents contain the response to the interrogatory.

*General Objection No. 5:* We are unaware of any third party who has formally objected to the Protective Order. Thus we assume that no information has been withheld on this ground. Please confirm if our understanding is incorrect.

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*General Objection No. 6:* Complaint Counsel's objection to providing exculpatory evidence is not well founded. An administrative agency must disclose exculpatory evidence in a civil proceeding under the principles enunciated in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and its progeny. See, e.g., *In re Warner Lambert Co.*, 83 F.T.C. 819, 820 (1973)(mandating disclosure of exculpatory evidence). To the extent that Complaint Counsel contends that it is under no such obligation, please identify any authority which supports Complaint Counsel's position.

*General Objection Nos. 7-13:* Complaint Counsel's objection to producing information regarding the identity of persons with whom it has communicated based upon the work product doctrine and informants, deliberative process, and investigatory privileges is not well founded. To the extent that Complaint Counsel is withholding information responsive to MSC's interrogatories based on these privileges, identify the nature of the material withheld and the authority which supports Complaint Counsel's assertion of such immunity or privilege as to that information. We are aware of no procedure or rule that excuses Complaint Counsel from producing a privilege log. Please identify any authority which Complaint Counsel contends supports the position that Complaint Counsel is not obligated to produce a privilege log.

*General Objection No. 17:* We do not understand Complaint Counsel's objection as to the absence of a time period. Please identify the basis for this objection and we will endeavor to resolve it.

MSC's responses to Complaint Counsel's General Objections apply to each response to MSC's interrogatories to the extent that Complaint Counsel has incorporated its General Objections into each response by reference.

### *Specific Responses and Objections*

*Response No. 1:* This response is deficient. Interrogatory No. 1 calls for the identify of "each person with whom you have communicated regarding MSC's acquisitions. For each such person, describe what was said about the acquisitions, state the date and duration of all such communications, state whether that person has given Complaint Counsel an affidavit or other written statement (whether in final or draft form)."

Complaint Counsel improperly responded that such information could be gleaned from the face of the documents Complaint Counsel produced as part of its Initial Disclosures. This response is a *non-sequitur*. To the extent that the interrogatory calls for Complaint Counsel to describe what was said during communications between the FTC and the customer, that plainly cannot be gathered

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from documents created by the customer unless those documents directly address those communications. Thus, the answer to MSC's interrogatory cannot be gleaned from the documents. This response is also plainly inadequate insofar as it fails to identify particular documents and does not identify individuals with whom the FTC communicated but from whom *no* documents were gathered.

Complaint Counsel also states that it will "supply any verbatim statements by persons appearing on Complaint Counsel's witness list." Please state Complaint Counsel's justification for withholding such documents and *not* identifying any such individuals in its Initial Disclosures and state when such statements will be provided. Further, please state whether such "verbatim statements" exist for individuals not appearing on Complaint Counsel's witness list, why these individuals were *not* disclosed in its Initial Disclosures, and when such statements will be provided. In addition, our preliminary search of the documents produced so far reveals *no* affidavits or deposition transcripts. Please confirm that Complaint Counsel does *not* have any deposition transcripts or affidavits, or provide them to us immediately.

*Response No. 2:* This response is deficient. Interrogatory No. 2 calls for specific, detailed information including the identity of "each software product that you contend constitutes an 'advanced version[ ] of Nastran.'" The interrogatory further calls for the identity of the computer platform and operating system on which such software runs, the firm or company which sells or licenses it, a detailed description (based on the criteria listed in Paragraph 13 of the Complaint) of how that product is differentiated from versions of Nastran which Complaint Counsel does *not* consider to be advanced versions of Nastran, including the analyses performed using that product, the price level of that product, the ease of use of that product compared to versions of Nastran which Complaint Counsel does *not* consider to be advanced versions of Nastran, the speed of that product, the size and complexity of problems that can be analyzed using that product, the ability of that product to perform system-type analyses, the availability of complementary software, and the type of input and output file format utilized by that product.

This interrogatory is drawn directly from the allegations of the Complaint. That Complaint Counsel cannot provide any greater detail than the mere parroting of the complaint's assertion that "a variety of versions of Nastran are differentiated by, among other characteristics, their particular features, functionality, speed, model size, and price level" is shocking (if correct) and insidious if *not*.

Complaint Counsel does state that "[v]ersions of Nastran offering higher levels of functionality and wider ranges of features at higher price levels can be described as advanced

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versions of Nastran." But the response does not identify a benchmark against which these "higher" levels of functionality, price, and features can be measured, nor does the response identify which products Complaint Counsel contends fall within such a definition.

Complaint Counsel further stated that "[h]aving acquired UAI and CSAR, MSC already knows the level of functionality and range of features and price levels that distinguish these solvers." What MSC does not know, is *Complaint Counsel's contentions* regarding such matters. Complaint Counsel's response puts MSC to the bizarre task of litigating against itself. These answers are *not responsive* and raise serious due process concerns.

*Response No. 3:* This response is deficient as it relies upon a comparison with "advanced versions of Nastran" which Complaint Counsel has failed to identify in response to other Interrogatories. The response is also deficient because it fails to identify the advanced product, the computer platform, and operating system on which each FEA solver for advanced linear structural analysis is used and the firm or company which sells or licenses it.

Moreover, Complaint Counsel's response is vague as to why it believes that there is a broader market consisting of FEA solvers for advanced linear structural analysis. For example, the response simply says the functions and features that are *not* the same. Complaint Counsel, however, does not articulate *which* features and how they differ. Complaint Counsel's response provides *no* facts, let alone the evidence that was required. In fact, Complaint Counsel's response suggests that it does *not* believe that a separate FEA solver market exists. If that is the case, please confirm this; if not please state so.

*Response No. 4:* This response is deficient. Complaint Counsel has done nothing more than incorporate by reference its response to Interrogatory No. 3. As a consequence, Complaint Counsel has failed to state how each product it identified in response to Interrogatory No. 3 is differentiated from other FEA solvers, including, but not limited to, the analyses performed using that product, the price level of that product, the case of use of that product compared to other FEA solver software products, the speed of that product, the size and complexity of problems that can be analyzed using that product, the ability of that product to perform system-type analyses, the availability of complementary software, the type of input and output file format utilized by that product, and the type of computer platform(s) and operating system(s) on which the product operates. Instead, Complaint Counsel incorporated by reference its statement in response to Interrogatory No. 3 that "ANSYS and Dassault offer FEA solvers for advanced linear structural analysis." This is *not* the information called for by the interrogatory.



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*Response to Interrogatory No. 5:* This response is deficient. Interrogatory No. 5 calls for Complaint Counsel's contentions regarding the identity of the features and capabilities and the input and output file formats of the advanced version of Nastran sold or licensed by UAI or CSAR which *Complaint Counsel contends* were very similar to the features and capabilities and the input and output file formats of the advanced version of Nastran sold or licensed by MSC. Directing MSC to look at its own and third party documents to determine which advanced versions of Nastran offered by CSAR, UAI, and MSC possessed these features does not address the substance of Complaint Counsel's contentions or how the features and capabilities offered by the three products were similar.

*Response No. 6:* This response is deficient. In addition to asking Complaint Counsel to identify those users of versions of Nastran offered by MSC, CSAR, and UAI prior to the acquisitions who Complaint Counsel contends readily switched between these versions without substantial loss of functionality, the interrogatory asked Complaint Counsel to identify the reasons *why*. The response is completely silent as to this key point.

Moreover, the response given is so lacking in specifics as to be non-responsive. Although the response lists several large corporations, it fails to list either the specific business unit or division which Complaint Counsel contends is responsive to the request and fails to identify the specific individual. Interrogatory No. 6 asks Complaint Counsel to identify those individuals whom it contends "readily switch[ed]" between versions of Nastran. Because the interrogatory asked for the identity of each such person, Instruction No. 16 required Complaint Counsel to "state such person's name; present or last known address; telephone number; email address; and, if a natural person, the name and address of his or her present or last known employer." Complaint Counsel has not only failed to do this, Complaint Counsel's references to "various units of NASA, various Lockheed companies, and several units within the Department of Defense," is so vague as to be non-responsive and suggests again that Complaint Counsel is hiding the ball.

*Response No. 7:* The response is deficient. The interrogatory calls for the identity of each person using an advanced version of Nastran who was "discouraged from switching" to other solvers due to "[d]ifferences in functionality" in response to a significant and nontransitory increase in price and to identify the "differences in functionality," "computer code, features and capabilities, and file formats" which discouraged such switching. Complaint Counsel's response was that "[c]ustomers needing Nastran are discouraged from using other solvers because they cannot find the same functionality, features, and file formats in other products." This merely repeats the bare allegation of the Complaint and the language of the interrogatory itself. Moreover, what does it mean that "customers of advanced versions of Nastran to some extent are discouraged from switching?" Did some customers switch readily? Or does it mean that customers did not switch readily, but switched

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anyway? This ambiguity highlights the deficiencies of Complaint Counsel's responses. The purpose of discovery is to clarify the issues that need to be litigated, not to obfuscate them.

The response fails to identify any individual who was "discouraged from switching," as required by the interrogatory. Because the interrogatory asked for the identity of each such person, Instruction No. 16 required Complaint Counsel to "state such person's name; present or last known address; telephone number; email address; and, if a natural person, the name and address of his or her present or last known employer." Complaint Counsel failed to do this. If Complaint Counsel knows of no such individual, admit it.

*Response No. 8:* This response is deficient. The interrogatory asked Complaint Counsel to identify each "industry practice" or "requirement of a multi-party development project" which Complaint Counsel contends "sometimes dictate[s] the use of advanced versions of Nastran," as alleged in paragraph 19 of the Complaint. Complaint Counsel's response says only that "such industry practices or requirements of a [sic] multi-party development projects include various NASA projects, such as the International Space Station, and military aircraft projects, such as the Joint Strike Fighter." The response does *not* identify the particular NASA projects or the particular project requirement and suggests that Complaint Counsel is aware of other so-called "practices" but chooses not to disclose. Please provide the information called for by the interrogatory. If Complaint Counsel is aware of no such practice or requirement, admit it

*Response No. 9:* This response is deficient. In addition to identifying particular private customers whose identity is responsive to the interrogatory, the response also identifies "several units within the Department of Defense." If Complaint Counsel is aware of any other such "units," their identity is called for by the interrogatory. The response is also deficient because it fails to identify any persons. Because the interrogatory asked for the identity of each such person, Instruction No. 16 required Complaint Counsel to "state such person's name; present or last known address; telephone number; email address; and, if a natural person, the name and address of his or her present or last known employer." Complaint Counsel failed to do this. Finally, the response mentions "various other instances" where customers did not switch because MSC lowered its prices. Complaint Counsel's failure to identify such individuals is another example of its apparent "hide-the-ball" strategy.

*Response No. 10:* This response is deficient. The interrogatory asks Complaint Counsel to identify the bases for its contention that there is a separate geographic market consisting of the United States. Instruction No. 18 requires Complaint Counsel to "state with particularity the fact(s)

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which are informative and the person(s) and/or documents possessing the information together with the identifying information for the person(s) and/or document(s), unless identified elsewhere.”

Complaint Counsel's response says only that “[t]here *may* also be a U.S. market for particular end uses where regulatory or other demand preferences would be U.S. specific.” Please state whether Complaint Counsel has a reason to believe that such regulatory or demand preferences exists; if so, Complaint Counsel's bases for making such a statement; and the fact(s) which are informative and the person(s) and/or documents possessing the information together with the identifying information for the person(s) and/or document(s) as required by Instruction No. 18.

*Response No. 11:* This response is deficient. The interrogatory asks Complaint Counsel to identify each firm competing as a seller or licensor in each of the relevant geographic markets alleged in the Complaint. The response implies, but does not state, that MSC and Dassault are the only firms which compete in the U.S. and world markets. Please confirm whether that is Complaint Counsel's contention and, if so, state the fact(s) which are informative and the person(s) and/or documents possessing the information together with the identifying information for the person(s) and/or document(s), as required by Instruction No. 18. Moreover, Complaint Counsel was required to provide marketshare information and it did not. Complaint Counsel's statement that MSC's marketshare is substantially greater than ANSYS' and Dassault's is a non-answer.

In addition, Complaint Counsel stated that a foreign supplier may face difficulty supplying U.S. customers because of language, etc. Who are the foreign suppliers who faced such problems? Which customers found these foreign suppliers not to be effective? Or is the statement that foreign suppliers “may face” difficulty purely conjecture on Complaint Counsel's part? Any information (if it exists) known by Complaint Counsel, but not disclosed, is important to preparing MSC's defense.

*Response No. 12:* This response is deficient. A mere examination of the document will not necessarily determine its source, particularly if more than one copy of the document has been produced. For example, a document produced from one person's files may be addressed to his or her predecessor and, thus, would not identify who is the person currently responsible for the area covered by the letter. If Complaint Counsel does not have such information, it must admit it. If it does (and it typically does), it *must* be provided.

*Response No. 13:* This response is deficient. As noted earlier, Complaint Counsel has an obligation to produce exculpatory information. Moreover, the identification of MSC's own documents, current and former employees, licensees, and customers and third party documents will

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*not* reveal the identity of any individual to whom the FTC spoke but from whom no documents were obtained.

*Response No. 14:* This response is deficient. To the extent that it is Complaint Counsel's contention that the acquisitions increased the possibility of coordinated interaction within the "boarder [*sic*] market or markets for FEA solvers for advanced linear structural analysis," Complaint Counsel provides *no* evidence relating to this contention, as required by the interrogatory. Please identify the fact(s) which are informative and the documents possessing the information that support Complaint Counsel's allegation that coordinated interaction may be possible.

*Response No. 15:* This response is deficient. The interrogatory asks Complaint Counsel to identify each instance in which any person paid a higher price for any relevant product sold or licensed by MSC or each instance in which there has been any other anticompetitive action or effect as a consequence of the acquisitions. Instead of responding directly to the question, Complaint Counsel has engaged in a lengthy, self-serving diatribe concerning hypothetical and generic comments about higher prices and anticompetitive effect.

The response is deficient because it fails to identify *any* person(s) who paid a higher price for any relevant product sold or licensed by MSC. Because the interrogatory asked for the identity of each such person, Instruction No. 16 required Complaint Counsel to "state such person's name; present or last known address; telephone number; email address; and, if a natural person, the name and address of his or her present or last known employer." Complaint Counsel failed to do this. The response is deficient because it fails to identify each instance in which there has been any other anticompetitive action or effect as a consequence of the acquisitions. *No* specific instances, however, were identified as called for by the interrogatory. If Complaint Counsel contends such instances occurred, state the fact(s) which are informative and the person(s) and/or documents possessing the information together with the identifying information for the person(s) and/or document(s), as required by Instruction No. 18. If Complaint Counsel has no such information, it must so admit.

MSC must have this information – now – so that it may test Complaint Counsel's contentions through timely and effective discovery.

*Response No. 16:* This response is deficient. The interrogatory asks Complaint Counsel to identify each product development or enhancement for any relevant product sold or licensed by MSC that MSC withheld or delayed as a consequence of the acquisitions. Complaint Counsel's response is confined to unsupported and generic assertions. The interrogatory calls upon Complaint Counsel

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to identify specific instances. If Complaint Counsel is aware of none, Complaint Counsel is obligated to so admit.

*Response No. 17:* This response is deficient. Although the response states that "there is evidence that . . . CAD and CAE vendors *may have had* an interest at various times" in acquiring either UAI or CSAR, the response fails to identify any such evidence as called for by the interrogatory. Did the companies listed *actually* have an interest or is this Complaint Counsel's speculation? If this is speculation, please admit it. Instruction No. 15 requires Complaint Counsel to state the "identity of each person with knowledge thereof; all documents relating thereto; and all data, information, and analysis relating" to any interest by supplier of software in acquiring UAI or CSAR.

*Response No. 18:* This response is deficient. As noted earlier, the interrogatory calls for the *methodology Complaint Counsel used* to calculate marketshare. That information may *not* be obtained from an examination of MSC's documents or those of third parties.

### Initial Disclosures

In light of the inadequacy of Complaint Counsel's answers to eighteen narrowly-drawn interrogatories and its Preliminary Witness List identifying forty individuals, it is now clear that Complaint Counsel's Initial Disclosures are inadequate. Commission Rule 3.31 requires Complaint Counsel to disclose the "name, and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the allegations of the Commission's complaint." 16 C.F.R. § 3.31(b). Clearly, Complaint Counsel's ability to assemble a Preliminary Witness List containing forty individual's names – only one of which was listed in the Initial Disclosures – without additional post-investigation discovery, suggests that these names were withheld. As such, MSC's ability to conduct discovery and prepare its defenses have been impeded and will continue to be impeded as long as Complaint Counsel persists in trying to hide the ball in derogation of MSC's due process rights to the discovery needed to allow MSC to have a *fair* hearing as required by the FTC Act.

### Designation of Responses as Restricted Confidential – Attorney Eyes Only

Complaint Counsel's designation of its interrogatory responses as "Restricted Confidential – Attorney Eyes Only" is over broad. As the Joint Protective Order filed in this case states, "this particularly restrictive designation is to be utilized for a limited number of documents" related to a limited number of topics. Complaint Counsel has extended this designation to its entire response.


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Such designation is inappropriate where the responses called for do not include the topics designated for enhanced protection and is particularly inappropriate here since Complaint Counsel's responses are so brief and generic. We request that these responses be redesignated immediately as non-confidential.

Finally, we request that Complaint Counsel immediately confirm that it will promptly provide full and complete responses to these interrogatories so that MSC may proceed with its discovery and prepare its case for trial. Should we be unable to resolve these issues by January 3, 2002, we will have no recourse but to ask for Judge Chappell's intervention.

Respectfully,

A handwritten signature in black ink, appearing to read "Tefft W. Smith". The signature is written in a cursive, somewhat stylized font.

Tefft W. Smith



# KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

855 Fifteenth Street, N.W.  
Washington, D.C. 20005

To Call Writer Directly:  
(202) 879-5212

202 879-5000

Facsimile:  
202 879-5200

January 7, 2002

## VIA FACSIMILE

P. Abbott McCartney, Esq.  
Karen Mills, Esq.  
Federal Trade Commission  
601 Pennsylvania Avenue, N.W.  
Washington, D.C. 20005

Re: MSC Software, Docket No. 9299

Dear Abbott and Karen:

Complaint Counsel's Objections to MSC Software's First Set of Requests for the Production of Documents and Things - particularly when viewed in light of Complaint Counsel's deficient Initial Disclosures and Interrogatory Responses - raise troubling questions about Complaint Counsel's candor and willingness to comply with the FTC's commitment and delegation to provide MSC with a fair hearing consistent with its due process rights governing discovery.

As already outlined in our December 28, 2001 letter regarding the substantial deficiencies in Complaint Counsel's "responses" to MSC's First Set of Interrogatories, it is quite clear Complaint Counsel intends to conceal crucial information from MSC in an effort to hide deficiencies in its case, secrete exculpatory information away from public view, and preclude MSC from effectively preparing its defense.

MSC still does *not* have documents and information that should have been disclosed as part of Complaint Counsel's Initial Disclosures in *November*, even as Complaint Counsel pursues its aggressive, one-sided discovery. Also troubling is Complaint Counsel's *unilateral* decision to withhold verbatim statements (if any) made by those individuals who do not appear on Complaint Counsel's Preliminary Witness List and Complaint Counsel's acknowledgment that it is still holding non-privileged responsive documents. See, e.g., Complaint Counsel's Response to Request No. 1.

Notably, no explanation has been offered for the delay in producing the verbatim statements that Complaint Counsel has chosen to dole out. Despite an express Commission requirement to turn over these statements as part of its Initial Disclosures, Complaint Counsel apparently *waited* until



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*December 17*, when it submitted its Preliminary Witness List to MSC, to *even begin* the process of providing the interviewees with a copy of the Protective Order (entered on November 27, 2001), thus further delaying the disclosures. *Even then*, Complaint Counsel waited until January 2, 2002, to provide copies of the statements. It is obvious that Complaint Counsel sifted through the information it gathered, cherry-picked the witnesses it would reveal, and gradually produced their transcripts. Even now, MSC still does not know the identity of those with whom Complaint Counsel communicated other than those appearing on the Preliminary Witness List.

MSC's response to each of Complaint Counsel's General and Specific Objections is provided below.

### General Objections

*General Objection No. 1:* The objection is not well founded. MSC has *not* asked Complaint Counsel to segregate and resubmit materials previously provided – nor does it expect Complaint Counsel to do so. At issue is Complaint Counsel's decision to unilaterally limit production of materials to those which *it* believes are *relevant*. Complaint Counsel's obligations to produce documents is *not* limited to only those documents which were obtained from third parties during the investigatory phase and which are "*relevant* to the allegations of the complaint, to the proposed relief, or to the defenses of Respondent." Relevance – whether to the complaint's allegations, the proposed relief, and MSC's defenses – is *not* the measure of what Complaint Counsel must produce. Rather, Complaint Counsel is obligated to provide each document responsive to the request. Complaint Counsel may not *unilaterally* limit the scope of documents it provides.

For example, the Objection improperly states Complaint Counsel's intention to provide *only* those "verbatim statements" of individuals listed on its Preliminary Witness List. However, Complaint Counsel may *not* choose what it will provide and what it will *not* provide, while hiding evidence behind an impermissibly broad assertion of alleged privileges. Each of MSC's requests is narrowly-drawn and reasonably calculated to lead to the discovery of admissible evidence. Indeed, Complaint Counsel did *not* even object that responding to MSC's requests would be unduly burdensome or were *not* reasonably calculated to lead to the discovery of admissible evidence. Thus, Complaint Counsel may *not* simply opt to cut-off MSC's right to fair discovery.

The Objection also states that Complaint Counsel has "provided to Respondent *nearly all* non-privileged documents." This statement implies that Complaint Counsel is holding on to documents produced by third parties that are *not* privileged and others over which Complaint

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Counsel is asserting some privilege. Please identify what documents have been withheld, why they are being withheld, and when they will be produced.

As to any third party document over which Complaint Counsel asserts a privilege, please identify Complaint Counsel's basis for asserting a privilege over a document provided to it by a third party. Regardless of the reasons why Complaint Counsel continues to withhold documents, it is deeply troubling that Complaint Counsel continues to conceal documents - *three months after* Complaint Counsel's Initial Disclosures were due.

*General Objection No. 2:* This objection is not well founded. Complaint Counsel has had since November 27, 2001, to provide any person with whom it communicated a copy of the Protective Order in this case. Complaint Counsel's decision to wait until it served MSC with its Preliminary Witness List before giving individuals the opportunity to object to the Protective Order is *unconscionable*. *First*, the delay is inexplicable given the tight schedule governing this case. *Second*, the decision to refuse to provide verbatim statements from those with whom Complaint Counsel secretly communicated is likewise unjustified and inconsistent with Complaint Counsel's obligation to produce exculpatory evidence.

*General Objection No. 3:* This objection is not well founded. Complaint Counsel has failed to meet its burden of establishing the basis for an assertion of privilege regarding the identity of third parties with whom Complaint Counsel has communicated. The informant's privilege is a qualified one and Complaint Counsel has offered no basis - either in its Objections to MSC's Document Requests or in its earlier Objections to MSC's Interrogatories - for invoking the privilege. Complaint Counsel's objection is particularly inapt with regard to the identities of anyone that Complaint Counsel communicated with who offered exculpatory evidence or support for MSC's acquisition's of UAI and CSAR. Please provide the requested documents and state whether you have withheld any documents on this grounds.

In its Objection to MSC's Interrogatory No. 1, which sought the identity of "each person with whom you have communicated regarding MSC's acquisitions," Complaint Counsel stated that "[r]espondent will be able to ascertain from the face of the documents or other identifying characteristics the persons that Complaint Counsel have communicated with." *If* Complaint Counsel has actually provided MSC with *all* documents received from third parties (as stated in Kent Cox's letter), and MSC can identify *every* third party with whom Complaint Counsel communicated from those documents, then Complaint Counsel has waived its informant's privilege and Complaint

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Counsel must now withdraw any objection to both MSC's First Set of Interrogatories and MSC's First Set of Document Requests based on the informant's privilege.

If Complaint Counsel has withheld documents on this ground, please state the bases for the claimed privilege and all facts relied upon in support of that claim(s), including the document date, author(s), recipient(s), subject matter, its present location, and the request to which the document is responsive and explain whether the privileged material can be redacted (and if not, why not) as required by Instruction No. 15.

*General Objection No. 4:* To the extent that this objection asserts work product privilege with regard to documents prepared by, or in conjunction with, third parties, it is not well founded. Please state whether materials have been withheld from MSC based on this privilege and provide a statement of the claim of privilege, immunity, exemption, or the bases for the claimed privilege and all facts relied upon in support of that claim(s), including the document date, author(s), recipient(s), subject matter, its present location, and the request to which the document is responsive and explain whether the privileged material can be redacted (and if not, why not) as required by Instruction No. 15.

*General Objection No. 5:* To the extent that this objection asserts the attorney-client communication privilege with regard to documents prepared by, or in conjunction with, third parties, it is not well founded. Please state whether materials have been withheld from MSC based on this privilege and provide a statement of the claim of privilege, immunity, exemption, or the bases for the claimed privilege and all facts relied upon in support of that claim(s), including the document date, author(s), recipient(s), subject matter, its present location, and the request to which the document is responsive and explain whether the privileged material can be redacted (and if not, why not) as required by Instruction No. 15.

*General Objection No. 6:* To the extent that this objection asserts a deliberative process privilege with regard to documents prepared by, or in conjunction with third parties, it is not well founded. Please state whether materials have been withheld from MSC based on this privilege and provide a statement of the claim of privilege, immunity, exemption, or the bases for the claimed privilege and all facts relied upon in support of that claim(s), including the document date, author(s), recipient(s), subject matter, its present location, and the request to which the document is responsive and explain whether the privileged material can be redacted (and if not, why not) as required by Instruction No. 15.

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*General Objection No. 7:* This objection appears to be duplicative in scope to General Objection No. 3. If Complaint Counsel has a separate basis for making this objection, please state so. In any event, Complaint Counsel has failed to establish that it is entitled to assert this qualified privilege and, therefore, the objection is not well founded. Please state whether materials have been withheld from MSC based on this privilege and provide a statement of the claim of privilege, immunity, exemption, or the bases for the claimed privilege and all facts relied upon in support of that claim(s), including the document date, author(s), recipient(s), subject matter, its present location, and the request to which the document is responsive and explain whether the privileged material can be redacted (and if not, why not) as required by Instruction No. 15.

*General Objection No. 8:* Please state whether materials have been withheld from MSC based on this privilege and provide a statement of the claim of privilege, immunity, exemption, or the bases for the claimed privilege and all facts relied upon in support of that claim(s), including the document date, author(s), recipient(s), subject matter, its present location, and the request to which the document is responsive and explain whether the privileged material can be redacted (and if not, why not) as required by Instruction No. 15.

*General Objection No. 9:* Complaint Counsel's objection to Instruction No. 15 is not well founded. Complaint Counsel has broadly asserted a number of privileges - many of which appear specious - as grounds for withholding material necessary to MSC's defense. Complaint Counsel's refusal to provide a privilege log deprives MSC of any opportunity to assess the breadth of Complaint Counsel's assertions of privilege - let alone assess the legitimacy of Complaint Counsel's assertion of its privileges. In particular, Complaint Counsel's admission that it has submitted "nearly all" responsive documents which are "non-privileged" raises serious concerns regarding the degree to which Complaint Counsel has deliberately withheld documents from production. This concern is heightened by the general inadequacy of Complaint Counsel's earlier Interrogatory "responses."

*General Objection No. 11:* Please clarify whether - and if not, when - documents held by the management and staff of the Bureau of Competition and the Bureau of Economics responsive to these Requests have been - or will be - produced.

*General Objection No. 12:* This objection is not well founded. To the extent Complaint Counsel has documents responsive to MSC's requests, they must be produced (unless *properly* privileged), regardless of their source, public or private. MSC will move to preclude use at trial of *any* document's in Complaint Counsel's possession, custody, or control which has not been

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produced and which is responsive to MSC's requests, whether the origin of that document(s) is public or private. If any such documents exist, produce them immediately.

*General Objection No. 14:* To the extent that Complaint Counsel receives addition material and elects to assert a privilege over that material, MSC expects Complaint Counsel to update its privilege log.

*General Objection No. 15:* This objection is *not* well founded. Complaint Counsel is obligated to state its objections now so that they may be resolved by the parties or the Judge, if necessary. Complaint Counsel is not at liberty to think up excuses for not providing discovery as it goes along. Complaint Counsel had adequate time to formulate its boilerplate objections. This is a further demonstration of Complaint Counsel's deliberate effort to deny MSC its right to due process and a fair proceeding.

### Specific Objections

Although Complaint Counsel enumerates "specific objections" to MSC's requests, they are generally boilerplate in nature and repeated uniformly throughout. Therefore, MSC will address these "objections" as a group.

In response to Request Nos. 1-2 and 4-18, Complaint Counsel "objects" that it has "provided nearly all non-privileged documents responsive to this Request." This objection is deficient insofar as it fails to explain why these documents have not been previously produced. Nor is it clear that Complaint Counsel will produce *all* non-privileged documents responsive to MSC's requests. Complaint Counsel may *not* selectively pick and choose which documents to produce or wait until it is most convenient to Complaint Counsel - or most disadvantageous to MSC - to produce these documents.

Complaint Counsel's delay is particularly egregious in light of Complaint Counsel's aggressive insistence upon taking the depositions of MSC employees even before these documents have been produced. Complaint Counsel insisted upon forging ahead with depositions even as it delayed production of critical verbatim statements. Complaint Counsel waited until January 2, 2002, the *day before* MSC's first employee was to be deposed, to produce *any* verbatim statements (which is avowedly an incomplete collection). The dates of these depositions had been negotiated well in advance and MSC anticipated - indeed MSC had been promised by Complaint Counsel - that by the time of these depositions Complaint Counsel would have fulfilled its obligation to turn over

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documents. Regrettably, MSC has necessarily been impeded in its ability to prepare for these depositions and has been compelled, in the interested of fairness, to cancel a number of these depositions.

Significantly, Complaint Counsel does *not* raise this "objection" in response to Request No. 3 which seeks "[a]ll transcripts (including electronic versions), video recordings, and audio recordings of investigatory depositions, interviews, statements, notes relating to any discussions held during such depositions or interviews statements taken or obtained by the FTC pursuant to its investigation of MSC's acquisitions."

Complaint Counsel's omission of this "objection" to this request is telling. Complaint Counsel obviously cannot claim that it has produced nearly all non-privileged responsive documents because Complaint Counsel is holding onto transcripts and other recordings of interviews and conversations that it refuses to turn over. This is an illegitimate effort to conceal information which Complaint Counsel must feel is injurious to its case (given the forty individuals named in Complaint Counsel's Preliminary Witness List, it is hard to believe that it is holding anything *adverse* to MSC in reserve). This also is the only request in which Complaint Counsel does *not* state that it will turn over additional responsive documents on the return date.

Litigation commenced and prosecuted by agents of the Federal Government is *not* a game for the benefit of the "home team." It is supposed to be a search for the truth and justice. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("[The Government] is the representative *not* of an ordinary party . . . but of a sovereignty . . . whose interest . . . is not that it shall win cases, but that justice shall be done"). MSC is protected by due process guarantees that mandate it be given a fair and adequate opportunity to defend itself. *Cf. Chambers v. Mississippi*, 410 U.S. 284 (1973) (due process right to introduce certain evidence); *Epstein v. MCA, Inc.*, 54 F.3d 1422 (9<sup>th</sup> Cir. 1995) ("The Federal Rules of Civil Procedure creates a "broad right of discovery" because "wide access to relevant facts serves the integrity and fairness of the judicial process by promoting the search for the truth.").

In response to Request Nos. 2-5 and 7-18, Complaint Counsel "objects" that "Complaint Counsel will provide all verbatim statements by persons appearing on Complaint Counsel's witness list after those persons have been afforded an adequate opportunity to seek an appropriate protective order." This objection is deficient and demonstrates again Complaint Counsel's attempt to thwart MSC's discovery and efforts to seek a fair hearing. By this objection, Complaint Counsel declares its intent to litigate from the shadows and hide from MSC's and the public's sight information that

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would show the lack of merit to Complaint Counsel's case. Complaint Counsel has arrogated to itself the right to decide which discovery it will provide and what it will hide. Complaint Counsel may not *unilaterally* limit its production of verbatim statements - and other responsive information - to those witnesses it has chosen to call at trial because Complaint Counsel believes that those witnesses will be most damaging to MSC. If Complaint Counsel has other verbatim statements - as this objection strongly suggests - produce them immediately.

This "objection" raises an additional point. The assertion that third parties must have time to seek an appropriate protective order suggests that Complaint Counsel has controlled the timing of notification to such third parties in a way that maximizes the delay in disclosing this important information to MSC. Had third parties been given notice of Complaint Counsel's intent to disclose their identity in *November*, when the Protective Order was first entered, the time for third parties to object would have long since passed. Instead, Complaint Counsel appears to have waited strategically to delay the production of such statements until January. MSC notes that these actions are consistent with Complaint Counsel's originally proposed schedule - a schedule *rejected* by Judge Chappell. Thus, Complaint Counsel has taken by fiat what it could *not* gain by argument.

Moreover, the fact that Complaint Counsel sent the notification to only those whom it intended to call at trial, suggests that other previously "interviewed" witnesses were not given an opportunity to agree or object to the disclosure of their identities to MSC. This suggests that Complaint Counsel's selective *exclusion* of verbatim statements has nothing to do with protecting these so-called "informants," but has more to do with impairing MSC's ability to obtain a fair hearing.

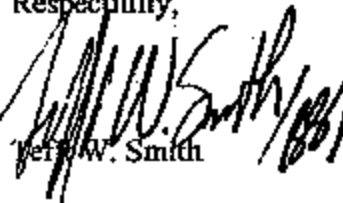
Complaint Counsel also "objects" in response to every Request - *except for No. 3* - that it will produce additional responsive documents on the return date. Inasmuch as these documents should have been produced as part of Complaint Counsel's Initial Disclosures, these documents must be produced without further delay. In addition, please state the amount of such additional production so that we may plan, particularly in light of the current tight trial schedule. (As we have noted elsewhere, given Complaint Counsel's misconduct, the current trial schedule is unworkable and cannot be complied with consistent with MSC's due process rights to a fair hearing, something we expect to take up with the Administrative Law Judge shortly.)

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We request that Complaint Counsel immediately confirm that it will promptly provide full and complete responses to these requests so that MSC may proceed with its discovery and prepare its case for trial. Should we be unable to resolve these issues by January 9, 2002, we will have no recourse but to ask for Judge Chappell's intervention.

Respectfully,



Jeffrey W. Smith







UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Kent Cox  
Attorney  
Bureau of Competition

Direct Dial  
(202) 326-2058

Via Fax & First Class Mail  
January 3, 2002

Tefft W. Smith, Esquire  
KIRKLAND & ELLIS  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005

Re: Docket No. 9299

Dear Mr. Smith:

I am writing in reply to your letter of December 28, 2001, concerning Complaint Counsel's Objections And Responses to Respondent MSC Software Corporation's First Set of Interrogatories ("MSC's First Set of Interrogatories"). While we do not concede that our Initial Disclosures or Responses to MSC's First Set of Interrogatories were in any way deficient, and do not believe that a motion to compel would be warranted or successful, we do want to inform you that we expect to be able to supplement our Responses to the Interrogatories on or around January 18, 2002. Since supplying our Responses and Initial Disclosures, Complaint Counsel have provided to you all documents that we have received from third parties in response to investigative subpoenas (or voluntarily in lieu of process) and all verbatim statements by witnesses identified on Complaint Counsel's preliminary witness list. In addition, MSC can expect to receive further information responsive to some of its interrogatories in the form of expert reports on the dates specified in the Scheduling Order.

A number of circumstances will enable us to supplement our Responses at the time indicated. As to persons identified on Complaint Counsel's Preliminary Witness List, some of the privileges applicable when we first responded to MSC's First Set of Interrogatories no longer obtain, and this will allow us to elaborate in a number of instances. Furthermore, while we made a good faith effort to respond to MSC's extremely broad First Set of Interrogatories as we understood them, to the extent your letter explains more explicitly the information you sought, we expect to be able to supplement our Responses.

Tefft W. Smith, Esquire

January 3, 2002

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Specifically, we intend to provide supplemental responses to each of the interrogatories. However, we have already fully supplemented our response to your Interrogatory No.1, which by its terms asks that we "[i]dentify each person with whom [Complaint Counsel] have communicated regarding MSC's acquisitions." We have already listed numerous such persons on Complaint Counsel's Preliminary Witness List and have provided all verbatim statements of the listed witnesses that are in our possession. Any further identification of persons with whom we have communicated regarding MSC's acquisitions is privileged under the work product, deliberative process and informants privileges. *See generally Harper & Row, Publishers, Inc., Dkts. 9217, 9218, 9219, 9220, 9221, 9222, Commission Interlocutory Order, (June 27, 1990).*

Because you refused to make witnesses represented by your firm available for deposition in December, we are required to spend the next two weeks preparing for and conducting those depositions, in addition to working on the other items detailed in the Scheduling Order. Nonetheless, it is our intention to file a supplemental response to MSC's First Set of Interrogatories on or around January 18, 2002, in the manner described above.

Sincerely,



Kent Cox

Complaint Counsel

