

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 MOTION TO COMPEL
COMPLAINT COUNSEL TO RESPOND TO WRITTEN DISCOVERY**

Pursuant to Federal Trade Commission Rule of Practice 3.38(a), 16 C.F.R. § 3.38(a), Respondent MSC Software Corporation ("MSC") hereby moves for an Order compelling Complaint Counsel to respond to MSC's First Set of Interrogatories and MSC's First Set of Requests for the Production of Documents and Things.

WHEREFORE, Respondent MSC respectfully requests that an Order be entered compelling Complaint Counsel to respond to MSC's First Set of Interrogatories and MSC's First Set of Requests for the Production of Documents and Things and all such further relief as may be deemed just and proper.

Respectfully submitted,


Jeff 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 15th Street, N.W., 12th Floor
Washington, DC 2002
Counsel for Respondent
MSC Software Corporation

Dated: January 31, 2002

documents to respond to *contention* interrogatories. Complaint Counsel promised adequate responses. Complaint Counsel served its responses on December 12, 2001, and failed to provide substantive responses, relying primarily upon generic references to third-party documents.

MSC raised the serious deficiencies with Complaint Counsel's responses in a December 28, 2001, letter. See 12/28/01 letter from T. Smith to A. McCartney (attached as Exhibit A). In response, Complaint Counsel acknowledged the deficiencies in its responses and stated that it "expect[ed] to be able to supplement [its] Responses to those Interrogatories on or around January 18, 2001." See 1/3/02 letter from K. Cox to T. Smith (attached as Exhibit B). In light of Complaint Counsel's promise to supplement its responses, MSC refrained from filing a motion to compel. A week has now passed and Complaint Counsel has not served supplemental responses to MSC's interrogatories. As a consequence, given the extensive delay in obtaining substantive responses to written discovery, MSC has no choice but to ask the Administrative Law Judge ("ALJ") to intervene and order Complaint Counsel to provide meaningful responses to MSC's discovery.

MSC served its First Set of Requests for the Production of Documents and Things on December 11, 2001. Complaint Counsel's objections and responses to those requests were served on December 21, 2001. MSC detailed the specific deficiencies of Complaint Counsel's responses to its document requests by letter on January 7, 2002. See 1/7/02 letter from T. Smith to A. McCartney (attached as Exhibit C). Complaint Counsel has not responded. Accordingly, MSC must seek Your Honor's assistance to compel Complaint Counsel to respond.

MSC's interrogatories and requests for production were directed at three critical issues in the case:

- ***The “metes and bounds” of the relevant product markets that Complaint Counsel alleges, and the things which differentiate products that are in those relevant markets from those that are not*** (MSC’s First Set of Interrogatories, Nos. 1 - 11, 18 (attached as Exhibit D); MSC’s First Request for the Production of Documents and Things, Nos. 10 - 13, 15 - 18 (attached as Exhibit H));
- ***The specific nature and scope of the anticompetitive effect that Complaint Counsel contends occurred as a result of these consummated acquisitions*** (MSC’s First Set of Interrogatories, Nos. 14 - 17 (attached as Exhibit D); MSC’s First Request for the Production of Documents and Things, Nos. 8, 9, 14 (attached as Exhibit H)); ***and***
- ***The existence of any exculpatory evidence or – in the event Complaint Counsel refused to produce exculpatory evidence – the identity of each person Complaint Counsel communicated with regarding the acquisitions*** (MSC’s First Set of Interrogatories, No. 13 (attached as Exhibit D); MSC’s First Request for the Production of Documents and Things, Nos. 1-4, 6 (attached as Exhibit H)).

Complaint Counsel’s responses and objections to MSC’s First Set of Interrogatories and First Set of Document Requests do not satisfy Complaint Counsel’s obligations to reply fully and completely to MSC’s discovery requests:

- ***Complaint Counsel improperly refuses to answer contention interrogatories:*** Complaint Counsel objects generally to providing facts in response to MSC’s interrogatories – including the facts underlying the allegations in the complaint – prior to the close of discovery. MSC’s contention interrogatories are expressly contemplated by the Commission’s Rules of Practice. Complaint Counsel should be compelled to respond properly to MSC’s interrogatories.
- ***Complaint Counsel improperly relied upon produced documents to respond to MSC’s interrogatories without providing sufficient detail to identify any documents:*** Complaint Counsel said that the responses to MSC’s interrogatories could be found in the nearly fifty boxes of documents produced to date by both sides. Complaint Counsel, however, violated Rule 3.35(c) because it did not provide sufficient detail to allow MSC to identify specific documents. In addition, MSC’s contention interrogatories call for Complaint Counsel’s *contentions* which cannot be learned simply by looking at the documents. Complaint Counsel must be compelled to provide substantive, thorough responses to MSC’s interrogatories.
- ***Complaint Counsel improperly refused to define its alleged relevant product market:*** Despite referring to product market definition as “the critical issue in this case,” Complaint Counsel refuses to specify the metes and bounds of the product

markets alleged in the complaint, or identify those product features and capabilities which differentiate products in the relevant market from those that are not. Complaint Counsel must be compelled to identify which specific products it contends are “advanced versions of Nastran” and how those products are differentiated from other Finite Element Analysis (“FEA”) by their capabilities and features.

- ***Complaint Counsel refuses to identify any competitive effects of the acquisitions at issue:*** Complaint Counsel refuses to identify any specific, actual anticompetitive harm arising from the acquisitions, even though the acquisitions were made more than two years ago. Complaint Counsel refuses to identify any customer who it contends actually paid higher prices or suffered any other anticompetitive harm as a result of the merger. Complaint Counsel must be compelled to identify each specific instance of higher prices or anticompetitive harm (including, but not limited to, decreased innovation) of which it is aware at this point in time – more than two years after the acquisition and after two years of investigation and discovery.
- ***Complaint Counsel is improperly withholding exculpatory evidence:*** Despite its obligation to turn over exculpatory evidence, Complaint Counsel asserts a broad array of privileges over all exculpatory evidence. Complaint Counsel also refuses to identify any individual with whom it communicated about the acquisitions except those disclosed in its Initial Disclosures or Preliminary Witness List. Even though Complaint Counsel was obligated to disclose those individuals likely to have discoverable information on November 6, 2001, Complaint Counsel waited until December 17, 2001, to reveal the names of forty individuals in its Preliminary Witness List. Complaint Counsel must be compelled to immediately produce all exculpatory evidence within its possession and identify everyone with whom it communicated.
- ***Complaint Counsel improperly refuses to produce a privilege log:*** Complaint Counsel asserts the informer’s, deliberative process, investigatory, attorney-client, and work product privileges as grounds for denying MSC a large portion of the requested discovery. Yet Complaint Counsel refuses to provide a privilege log and has done nothing to establish that it is entitled to assert those privileges. Complaint Counsel must be compelled to immediately produce a privilege log and withdraw its privilege assertions as to third parties with whom it has communicated.

I. COMPLAINT COUNSEL’S RESPONSES AND OBJECTIONS TO MSC’S WRITTEN DISCOVERY CONTRAVENE ESTABLISHED LAW

Complaint Counsel seeks to defer responding to MSC’s contention interrogatories until fact discovery is closed or until it serves its expert reports. See Complaint Counsel’s Objections and

Responses to MSC's First Set of Interrogatories, No. 1 (attached as Exhibit D) (stating Complaint Counsel's general objections to MSC's First Set of Interrogatories as "premature insofar as it seeks factual information . . . before discovery has been completed."); 1/3/02 letter from K. Cox to T. Smith (attached as Exhibit B). The modern rules of discovery do not permit Complaint Counsel to surprise MSC with its responses at some later date. Complaint Counsel must inform MSC what it knows today and can supplement at the close of discovery. Indeed it is obligated to do so. See C.F.R. § 3.31(e) (stating "[a] party who has . . . responded to discovery with . . . a response is under a duty to supplement").

The very purpose of modern discovery rules is to prevent trial-by-surprise. "The rules of discovery are designed to narrow and clarify the issues and give the parties mutual knowledge of all relevant facts, thereby preventing surprise." *Dilmore v. Stubbs*, 636 F.2d 966, 969 n.2 (5th Cir. 1981) (noting that modern discovery rules are intended to prevent "trial-by-ambush"); *Shelak v. White Motor Co.*, 581 F.2d 1155, 1159 (5th Cir. 1978) (same); see also *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) (noting the importance of discovery in preventing surprise and narrowing issues for trial). The purpose of discovery is to make a trial "less of a game of blind man's bluff and more a *fair contest* with the *basic issues and facts disclosed* to the fullest practicable extent possible." *United States v. Procter & Gamble*, 356 U.S. 677, 683 (1958).¹

Contention interrogatories – like those MSC served – are a favored mechanism for determining the facts and reducing the threat of surprise. Commission Rule 3.35(b) provides that "an interrogatory otherwise proper is not necessarily objectionable merely because the answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact."

¹ Unless otherwise indicated, all emphasis has been added.

16 C.F.R. § 3.35(b). To the extent that Complaint Counsel had a legitimate basis for filing this Complaint, it must now “provide true, explicit, responsive, complete, and candid answers to interrogatories.” *Hansel v. Shell Oil Corp.*, 169 F.R.D. 303, 305 (E.D. Pa. 1996). Moreover, Complaint Counsel’s answers may not be “vague, evasive, confusing, [or] cryptic.” *Id.* at 304. See also, *Rusty Jones, Inc. v. Béatrice Co.*, 1990 WL 139145, at *2 (N.D. Ill. 1990) (granting motion to compel plaintiff to answer interrogatories relating to bases for allegations in complaint where for “several months before filing the case, Rusty Jones had access to thousands of pages of Beatrice documents” and plaintiff, pursuant to Rule 11, “certainly investigated the case before filing their complaint in order to have some factual basis upon which to base its allegations”).

Contention interrogatories are not only an appropriate – but the best – method of obtaining the underlying bases for Complaint Counsel’s allegations in the Complaint. “It is clear that the *defendants are entitled to know the facts upon which plaintiff’s claim is founded*. Mutual knowledge of the relevant facts is essential to proper litigation.” *Sargent-Welch Scientific Co. v. Ventron Corp.*, 59 F.R.D. 500, 503 (N.D. Ill. 1973) (granting motion to compel antitrust plaintiff to disclose “the factual basis or source of the allegations contained in the complaint”).

Rather than responding to MSC’s contention interrogatories by detailing the bases for its allegations and providing the specific information called for, Complaint Counsel objected generally to doing “Respondent’s work for it [I]t is not Complaint Counsel’s job to act as attorneys or paralegals for Respondent. . . . Respondent’s ability to ascertain answers to the matters addressed in the Interrogatories *from the third party documents* is substantially the same, if not lighter, for Respondent than Complaint Counsel.” Complaint Counsel’s Objections and Responses to MSC’s First Set of Interrogatories, No. 4 (attached as Exhibit D).

Complaint Counsel's objection violates Commission Rule of Practice 3.35(c), 16 C.F.R. § 3.35(c). Rule 3.35(c) *expressly* requires that when documents are referred to in lieu of answering 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." 16 C.F.R. 3.35(c). Referring to an undifferentiated mass of documents in lieu of responding to interrogatories has been rejected as an improper invocation of the rule. *See* Advisory Committee Notes to 1980 Amendment of Federal Rule of Civil Procedure 33(c), 81 FRD 521, 531 (stating that responding to an interrogatory "by directing the interrogating party to a mass of business records. . . [is] *an abuse of the option*"). When "documents are produced under Rule 33(d), they must be accompanied by indices designed to guide the searcher to the documents responsive to the interrogatories." *O'Connor v. Boeing N. Am., Inc.*, 185 F.R.D. 272, 278 (C.D. Cal. 1999).

Moreover, MSC cannot learn Complaint Counsel's *contentions* from looking at documents produced by third parties. Complaint Counsel issued a Complaint with forty-five detailed allegations. Presumably Complaint Counsel had an adequate understanding of what it was alleging – and the facts which it believed supported those allegations – or it would not have filed the Complaint. MSC has asked for those understandings and those facts and is entitled to know them.

Complaint Counsel also improperly refuses to produce a privilege log. *See* Complaint Counsel's Objections and Responses to MSC's First Set of Interrogatories, No. 13 (attached as Exhibit D) (stating that "Complaint Counsel objects generally to Definitions and Instruction No. 22 of Respondent's First Set of Interrogatories to the extent that it requires Complaint Counsel to produce a privilege log"); Complaint Counsel's Objections to MSC's First Request for the Production of Documents and Things, No. 9 (attached as Exhibit E). Yet Complaint Counsel refuses

to identify any third party it communicated with during the investigation who does not appear on its Preliminary Witness List asserting the work product, deliberative process and informant's privileges. See 1/3/02 letter from K. Cox to T. Smith (attached as Exhibit B). Indeed, Complaint Counsel generally asserted these privileges to withhold additional information and documents. See Complaint Counsel's Objections and Responses to MSC's First Set of Interrogatories, Nos. 6-12 (attached as Exhibit D); Complaint Counsel's Objections to MSC's First Request for the Production of Documents and Things, Nos. 3-8 (attached as Exhibit E).

Contrary to Complaint Counsel's assertions, Complaint Counsel is obligated to produce a privilege log. The Commission's Rules of Practice explicitly require Complaint Counsel – as a party to this case – to provide a privilege log for any documents withheld on privilege grounds. See 16 C.F.R. § 3.38A (stating that “*any* person withholding material . . . shall, if so directed in the . . . request for production, submit . . . a schedule of the items withheld”). Complaint Counsel should not only be compelled to produce a privilege log, but if it persists in its refusal to produce one, its privileges should be deemed waived. See *Dorf & Stanton Communication, Inc. v. Molson Breweries*, 100 F.3d 919, 923 (Fed. Cir. 1996) (holding that failure to produce a privilege log demonstrating sufficient grounds for assertion of the privilege waives it).

II. COMPLAINT COUNSEL MUST RESPOND TO MSC'S DISCOVERY REGARDING THE ALLEGED RELEVANT PRODUCT MARKETS

One of the key purposes of MSC's discovery requests was to ascertain the “metes and bounds,” *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966), of Complaint Counsel's alleged relevant product markets for “advanced versions of Nastran” and “FEA solvers for advanced

linear structural analysis.”² “Determination of a relevant product market is a necessary predicate to a finding of a [Section 7] violation.” *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957). Complaint Counsel has even represented to Your Honor that “*the critical issue in this case, we believe, will be product market definition.*” 11/8/01 Hr’g Tr. at 11.

A. Complaint Counsel Refuses to Define what Constitutes an “Advanced” Version of Nastran

Complaint Counsel alleged that one “relevant product market in which to assess the likely effects of Respondent’s acquisition of UAI and CSAR is the licensing or sale of *advanced versions of Nastran.*” Complaint ¶ 21 (attached as Exhibit F). To understand the “metes and bounds” of that allegation, MSC asked Complaint Counsel:

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.”

MSC’s First Set of Interrogatories, No. 2 (attached as Exhibit G). Complaint Counsel responded:

“Versions 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 Objections and Responses to MSC’s First Set of Interrogatories, No. 2 (attached as Exhibit D). 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. Thus, all the response states is

² MSC’s First Set of Interrogatories, Nos. 1 - 11, 18 (attached as Exhibit G); MSC’s First Request for the Production of Documents and Things, Nos. 10 - 13, 15 - 18 (attached as Exhibit H).

that “advanced versions” of Nastran – the products at the heart of Complaint Counsel’s charges – are those versions of Nastran which are more advanced than those versions which are not.

The lack of detail in Complaint Counsel’s market definition stands in sharp contrast to the detail required in other cases. In *In re R. R. Donnelly & Sons Co.*, No. 9243, 1995 WL 461663 (F.T.C. July 21, 1995), for example, the relevant product was defined as “‘high volume publication gravure printing,’ which is approximated by four-color gravure printing jobs with at least five million copies, at least sixteen pages, and fewer than four four-color versions (or the equivalent in one-color versions).” *Id.* at *12. Complaint Counsel is similarly obligated – at this late date in Complaint Counsel’s analytical process – to identify the metes and bounds of its “advanced Nastran” market with similar precision.

MSC’s Interrogatory No. 2 specifically attempts to learn which products are within the alleged market by asking Complaint Counsel to identify the functionalities and features that place a product within the alleged product market for “advanced versions of Nastran.” For each product that Complaint Counsel contends is in the alleged relevant market for “advanced versions of Nastran,” MSC asked Complaint Counsel to

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, [and] the type of input and output file format utilized by that product.

MSC's First Set of Interrogatories, No. 2 (attached as Exhibit G).

Complaint Counsel "responded" by stating 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." However, MSC does not know *Complaint Counsel's contentions* regarding such matters. Complaint Counsel's response puts MSC to the bizarre task of litigating against itself. See 12/28/01 letter from T. Smith to A. McCartney (attached as Exhibit A).

Complaint Counsel told Your Honor that "solvers are differentiated products. They have different levels of power, of performance, they do different types of analyses, they have different price points, they are in different platforms, and *it is so important to recognize the differentiation of these products.*" 11/8/01 Hr'g Tr. at 30. Yet when MSC asked Complaint Counsel how "advanced" versions of Nastran *were differentiated* from other versions of Nastran, Complaint Counsel punted, identifying only those "versions of Nastran offering higher levels of functionality and wider ranges of features at higher prices."

If MSC is to prepare its case, it has to know what functionalities and features Complaint Counsel contend differentiate "advanced versions of Nastran" from other versions of Nastran – just as Complaint Counsel was compelled in *Donnelly* to differentiate which print jobs were differentiated from others to explain Complaint Counsel's view that "high volume" gravure printing was a relevant market.³ Without having this information, MSC cannot ascertain through discovery (i) what products have the required features, functionalities, and prices; (ii) why customers want these products with their functionalities and features at those prices and what choices *they* believe

³ Complaint Counsel's reluctance to specify the markets with precision is understandable – although not permissible – given that in *Donnelly*, once Complaint Counsel precisely identified the parameters of the relevant product market, its case fell apart.

they have; and (iii) which competitors offer products with those features and functionalities at those prices. In short, without this information, MSC cannot conduct discovery or prepare its witnesses, experts, and defenses.

B. Complaint Counsel Refuses to Define What Constitutes an FEA Solver for “Advanced Linear Structural Analysis”

Complaint Counsel also alleged that another relevant product market is the “broader market . . . [for] FEA solvers for advanced linear structural analysis.” Complaint ¶ 21 (attached as Exhibit F). MSC similarly sought to learn how FEA solvers for “advanced” linear structural analysis could be distinguished from those which perform linear structural analysis.

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, [and] the firm or company which sells or licenses it.

MSC’s First Set of Interrogatories, No. 3 (attached as Exhibit G). Complaint Counsel’s response to this Interrogatory has been similarly unrevealing.

While ANSYS and Dassault offer FEA solvers that perform some advanced linear structural analysis, they do not offer the same or similar functionality and features of advanced versions of Nastran. Furthermore they may not be available on the same computer platforms as advanced versions of Nastran.

Complaint Counsel’s Objections and Responses to MSC’s First Set of Interrogatories, No. 3 (attached as Exhibit D) Complaint Counsel’s response, like its earlier response about the “advanced” Nastran market, is devoid of any specifics, even though the interrogatory specifically asks for them.

C. Complaint Counsel Refuses to Identify Any Actual Switching Costs

Complaint Counsel alleged that before the acquisition, users switched between “advanced” versions of Nastran offered by MSC, UAI, and CSAR because the products offered similar features and capabilities. *See* Complaint ¶ 17 (attached as Exhibit F). Complaint Counsel also alleged that differences in functionality “discourage switching from advanced versions of Nastran to other solvers,” even in response to price increases. *Id.*

MSC competes with numerous solvers, some of which are sold as stand alone products and some of which are part of more integrated products and Computer Aided Design systems. A central pillar of Complaint Counsel’s case is that users who once switched among MSC, UAI, and CSAR as a way of disciplining MSC’s prices can no longer do so. But it is not at all evident that such switches occurred in the way Complaint Counsel implies. Moreover, major MSC customers have switched to other, non-Nastran solvers, thus disproving Complaint Counsel’s allegations that differences between Nastran and non-Nastran codes prevented such switching (and showing that MSC has significant and *fierce* competition).

To that end, MSC sought to learn the specific bases for Complaint Counsel’s allegations. MSC sought to learn *what* differences in functionality “discouraged” switching and *which* customers switched between the versions of Nastran available. Like the rest of its responses, Complaint Counsel’s answers were unrevealing.

Complaint Counsel did not identify *which* “differences in functionality, computer code, features and capabilities and file formats” discouraged switching to non-Nastran solvers. Instead, Complaint Counsel simply responded that “customers of advanced versions of Nastran *to some extent* are discouraged from switching . . . due to, among other reasons, differences in functionality,

features and file formats.” Complaint Counsel’s Objections and Responses to MSC’s First Set of Interrogatories, No. 7 (attached as Exhibit D). Nor does Complaint Counsel identify the newly-added “other reasons.”

III. COMPLAINT COUNSEL MUST RESPOND TO MSC’S DISCOVERY REGARDING THE ALLEGED ANTICOMPETITIVE EFFECTS

Whether there have been any anticompetitive effects as a result of these acquisitions is the ultimate issue in this case. The acquisitions were consummated over two years ago. If Complaint Counsel’s allegations were correct, there would presumably be substantial post-merger evidence of the specific anticompetitive impact that these acquisitions had on the market. Consequently, MSC asked Complaint Counsel to

[i]dentify 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 of the acquisitions.

MSC’s First Set of Interrogatories, No. 15 (attached as Exhibit G). In response, Complaint Counsel did not identify a *single* instance in which any person paid a higher price for a relevant product after the acquisitions, nor suffered any other *actual* anticompetitive action or effect.

Instead, Complaint Counsel said “MSC’s acquisitions of UAI and CSAR created or enhanced its power to raise or maintain prices above a competitive level” and that “[t]he entire competitive dynamic changed with MSC’s acquisitions.” Complaint Counsel’s Objections and Responses to MSC’s First Set of Interrogatories, No. 15 (attached as Exhibit D). Complaint Counsel also stated that MSC exercised market power when entering into new and renewed license agreements, when MSC customers paid higher prices, when former UAI or CSAR customers no longer could by those

products and when MSC switched some customers to paid-up licenses. But Complaint Counsel offers no *specific instance* as the interrogatory requires.⁴

MSC also asked 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.

MSC's First Set of Interrogatories, No. 16 (attached as Exhibit G). Complaint Counsel's response was again generic and failed to provide any specific instance called for by the interrogatory:

MSC's acquisitions created and enhanced its power to withhold or delay such product enhancements, development, features, and capabilities.

Complaint Counsel's Responses and Objections to Interrogatory No. 16. Complaint Counsel must be compelled to either specify whether MSC has delayed or withheld any product development or enhancement – and if yes, which one – or Complaint Counsel must admit that – at present – it is *not* aware of any such circumstance.

IV. COMPLAINT COUNSEL MUST DISCLOSE EXCULPATORY EVIDENCE

Despite the clear obligation on government representatives such as Complaint Counsel to turn over all evidence in its possession – particularly that which does not support its case – Complaint Counsel has steadfastly refused to produce exculpatory material. Complaint Counsel improperly objects as follows:

Complaint Counsel objects generally to Respondent's First Set of Interrogatories to the extent [*sic*] it seeks identification of *any* exculpatory evidence. Such requests seek attorney work product

⁴ Again, perhaps Complaint Counsel hopes by dodging the question it can hide from the fact that prices have *not* increased because MSC continues to face the same meaningful and fierce competitive threats it faced before the acquisitions.

materials and information that is protected by the informant's, investigatory records, and governmental deliberative process privileges.

Complaint Counsel's Objections and Responses to MSC's First Set of Interrogatories, No. 6 (attached as Exhibit D).

Complaint Counsel's objection to providing exculpatory evidence is not well founded. 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. *United States v. Brady*, 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 8850 (Oct. 5, 1973) (requiring production of exculpatory evidence).

"It 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). "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 Sec. Litig.*, 109 B.R. 658, 666 (E.D. Pa. 1990) (citing *Reynolds*, 345 U.S. at 12).⁵

MSC anticipated that Complaint Counsel would refuse to produce exculpatory evidence and so propounded Interrogatory No. 1, which asked Complaint Counsel to:

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.

MSC’s First Set of Interrogatories, No. 1 (attached is Exhibit G).

MSC recognized that if Complaint Counsel refused to produce exculpatory evidence, it would be necessary to retrace Complaint Counsel’s steps and depose each of the customers and competitors that Complaint Counsel interviewed during the investigation to learn what exculpatory evidence had been provided. MSC also – rightly – assumed Complaint Counsel would choose to reveal only those third parties helpful to its case. Thus by comparing the list of people Complaint Counsel disclosed with the list of those it communicated with, it would be possible to identify those with exculpatory evidence.

⁵ Here, the relief Complaint Counsel seeks is punitive, not just remedial. It asks for divestiture sufficient to create two businesses selling *MSC.Nastran*, instead of recreating the competition lost by two, small firms with inferior codes. The punitive nature of this relief makes this action quasi-criminal in nature and therefore further necessitates the need for Complaint Counsel to provide Brady production to MSC to assure that its Fifth Amendment due process rights are protected to prevent an unconscionable taking of its property.

Complaint Counsel also refused, though, to disclose anyone it communicated with except those disclosed on its Preliminary Witness List. See Complaint Counsel's Objections and Responses to MSC's First Set of Interrogatories, No. 1 (attached as Exhibit D). Complaint Counsel has steadfastly refused to reveal the identity of these third parties by asserting, *inter alia*, the informer's privilege. See 1/3/02 letter from K. Cox to T. Smith (attached as Exhibit B).

Although it is impossible to assess the *exact* contours of Complaint Counsel's privilege assertion because Complaint Counsel refuses to produce a privilege log, it appears that the assertion of the informer's privilege is inappropriate here. As an initial matter, the informer's privilege is not absolute. "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) ("balancing the public interest in protecting the flow of information against the individual's right to prepare a defense"); *id.* at 62. Although the goal of the informer's privilege is to give the government the ability to assure informers that their identities can be kept confidential, when the interests of fairness to a defendant demand that informers identities be disclosed, the government must produce that information. See *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 772 (D.C. Cir. 1965) (noting that this protection is designed to encourage informers to continue to provide information to the government).

The principle mechanism by which the informer's privilege serves the government's interest in gathering information is by preventing retaliation against the informer. But "[t]he informer's privilege has no application where the informer reports *purely lawful activity*." *New York v. Cedar Park Concrete Corp.*, 130 F.R.D. 16, 21 (S.D.N.Y. 1990). The privilege does not apply when the

report concerns *lawful* activities because “law enforcement goals are not furthered and the informer need not fear bodily harm if his identity is disclosed.” *Alliance to End Repression v. Rochford*, 75 F.R.D. 441, 445 (N.D. Ill. 1977). When balancing the parties competing interests, the court considers the respondent’s need for the information and other potential sources for the information, in addition to any possible retaliation against or promises of confidentiality made to the informant.

The policy purposes behind the informer’s privilege are even less in force in an antitrust case. *See Westinghouse*, 351 F.2d at 772. Customers threatened with anticompetitive harm have adequate economic incentive to report antitrust violations to the government and do not need anonymity as an added incentive to do so. *See id.*

In this case, MSC seeks the identity of individuals Complaint Counsel communicated with and who have provided *exculpatory* evidence to the government. Thus, MSC seeks to learn who told the government that MSC has *not* engaged in unlawful activity. Because these individuals have presumably told Complaint Counsel that they see no anticompetitive threat from MSC’s acquisitions, they have no need to fear retaliation from MSC.⁶

The identity of those who gave exculpatory evidence to Complaint Counsel is material to MSC’s defense. Customers are at the very center of the issues presented. For example, when the ALJ asked Complaint Counsel “[h]ow are you going to prove the viability of [UAI and CSAR],” Complaint Counsel responded that “[w]e are going to be presenting you [*sic*] evidence from customers that relied upon . . . UAI and CSAR.” 11/8/01 Hr’g Tr. at 15.

⁶ In light of Complaint Counsel’s decision to name forty customers in its Preliminary Witness List, it does not seem that Complaint Counsel thinks retaliation is a significant threat.

Nor should MSC be put to the useless and diversionary task of asking each of its customers *not* listed on the Preliminary Witness List if they talked to Complaint Counsel and if they gave Complaint Counsel exculpatory evidence. It is far less burdensome for Complaint Counsel to give MSC a list of everyone that it communicated with. A respondent like MSC “should not have to survey the entire industry to find out who has specific information on these charges if that information is in the hands of the plaintiff.” *United States v. Aluminum Ltd.*, 268 F. Supp. 758, 762 (D.N.J. 1966) (finding that the informer’s privilege did not apply and directing the government to turn over the information at issue).⁷

V. CONCLUSION

Without clear, full, and direct responses to MSC’s discovery requests, MSC will be unable to fully prepare its case and defend itself. It is more than unconscionable to allow a government agency to withhold information from defendants and to refuse to answer properly propounded interrogatories that are designed to clarify the issues, give the parties mutual knowledge of the facts, and prevent surprise.

Complaint Counsel must be immediately compelled to respond fully to MSC’s discovery. Complaint Counsel must also immediately produce a privilege log which properly identifies the information being withheld and the bases for withholding it.

Consequently, Complaint Counsel should be compelled to:

⁷ Complaint Counsel has cited *In re Gillette*, 98 F.T.C. 975 (1981) for the proposition that it is not required to disclose everyone it communicated with. But Complaint Counsel’s reliance upon *Gillette* is misplaced. *Gillette* does not confer an automatic blanket of informer’s privilege upon anyone Complaint Counsel communicated with. In *Gillette*, the Commission found that the Respondent’s generalized request for the identity of those who had communicated with the FTC – had made *no* showing of either a need for, or the or materiality of, the information sought. Here, MSC has more than fully demonstrated the need and materiality of the information it seeks.

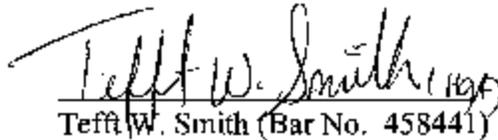
1. Respond in writing and in detail to each of MSC's interrogatories;⁸
2. Respond to MSC's contention interrogatories fully by identifying each specific product which Complaint Counsel considers to be an advanced version of Nastran;
3. Identify how each such identified advanced version of Nastran is differentiated from versions of Nastran which are not advanced, based on the criteria listed in Paragraph 13 of the Complaint;
4. Respond to MSC's contention interrogatories fully by identifying each specific product which Complaint Counsel considers to be an FEA solver for advanced linear structural analysis;
5. Identify how each such identified FEA solver for advanced linear structural analysis is differentiated from versions of Nastran, based on the criteria listed in Paragraph 13 of the Complaint;
6. Identify each anticompetitive harm which Complaint Counsel alleges to have occurred since the acquisitions;
7. Identify each difference in functionality which discouraged users from switching from Nastran to other FEA solvers;
8. Produce all exculpatory evidence in its possession, custody, or control;
9. Identify each person with whom it communicated regarding the acquisitions;
10. Produce a privilege log;
11. Such other relief as the ALJ may deem necessary.

Fairness demands no less than that MSC be given a *legitimate* opportunity to prepare its defense in light of Complaint Counsel's intent to deprive MSC of its property. Indeed the delay caused by Complaint Counsel's failure to respond to MSC's discovery has already terminally impaired MSC's due process right to a fair hearing under the existing trial schedule. Accordingly,

⁸ We have highlighted for Your Honor the key interrogatories that Complaint Counsel failed to answer, but we respectfully request that all of the interrogatories be answered meaningfully as detailed in the letter to Complaint Counsel. See 12/28/01 Letter from T. Smith to A. McCartney (attached as Exhibit A).

MSC will be asking the ALJ to extend the time for MSC to engage in discovery and ultimately the start of the trial.

Respectfully submitted,

A handwritten signature in black ink that reads "Tefft W. Smith" with a stylized flourish at the end.

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 15th Street, N.W., 12th Floor

Washington, DC 20005

(202) 879-5000 (Phone)

(202) 879-5200 (Facsimile)

Counsel for Respondent

MSC Software Corporation

Dated: January 31, 2002

CERTIFICATE OF SERVICE

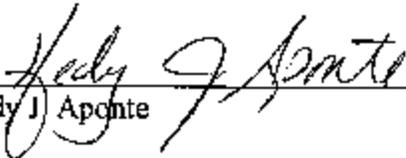
This is to certify that on January 31, 2002, I caused a copy of the attached "Public Version" of Respondent MSC Software Corporation's Motion to Compel Complaint Counsel to Respond to Written Discovery, Memorandum in Support thereof, and Proposed Order to be served upon the following persons by hand:

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

P. Abbott McCartney
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



Hedy J. Aponte

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

Counsel for Respondents,
MSC Software Corporation



44-11111-1001 43322000 2001 10-1-000

KIRKLAND & ELLIS
PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

855 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,¹ 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,

¹ "[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).

KIRKLAND & ELLIS

P. Abbott McCartney, Esq.
Karen Mills, Esq.
December 28, 2001
Page 2

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).

KIRKLAND & ELLIS

P. Abbott McCartney, Esq.
Karen Mills, Esq.
December 28, 2001
Page 3

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.

KIRKLAND & ELLIS

P. Abbott McCartney, Esq.
Karen Mills, Esq.
December 28, 2001
Page 4

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

KIRKLAND & ELLIS

P. Abbott McCartney, Esq.
Karen Mills, Esq.
December 28, 2001
Page 5

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

KIRKLAND & ELLIS

P. Abbott McCartney, Esq.

Karen Mills, Esq.

December 28, 2001

Page 6

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.

KIRKLAND & ELLIS

P. Abbott McCartney, Esq.

Karen Mills, Esq.

December 28, 2001

Page 7

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

KIRKLAND & ELLIS

P. Abbott McCartney, Esq.
Karen Mills, Esq.
December 28, 2001
Page 8

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)

KIRKLAND & ELLIS

P. Abbott McCartney, Esq.

Karen Mills, Esq.

December 28, 2001

Page 9

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 Dassualt 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 Dassualt’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

KIRKLAND & ELLIS

P. Abbott McCartney, Esq.
Karen Mills, Esq.
December 28, 2001
Page 10

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

KIRKLAND & ELLIS

P. Abbott McCartney, Esq.
Karen Mills, Esq.
December 28, 2001
Page 11

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.

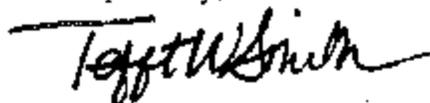
KIRKLAND & ELLIS

P. Abbott McCartney, Esq.
Karen Mills, Esq.
December 28, 2001
Page 12

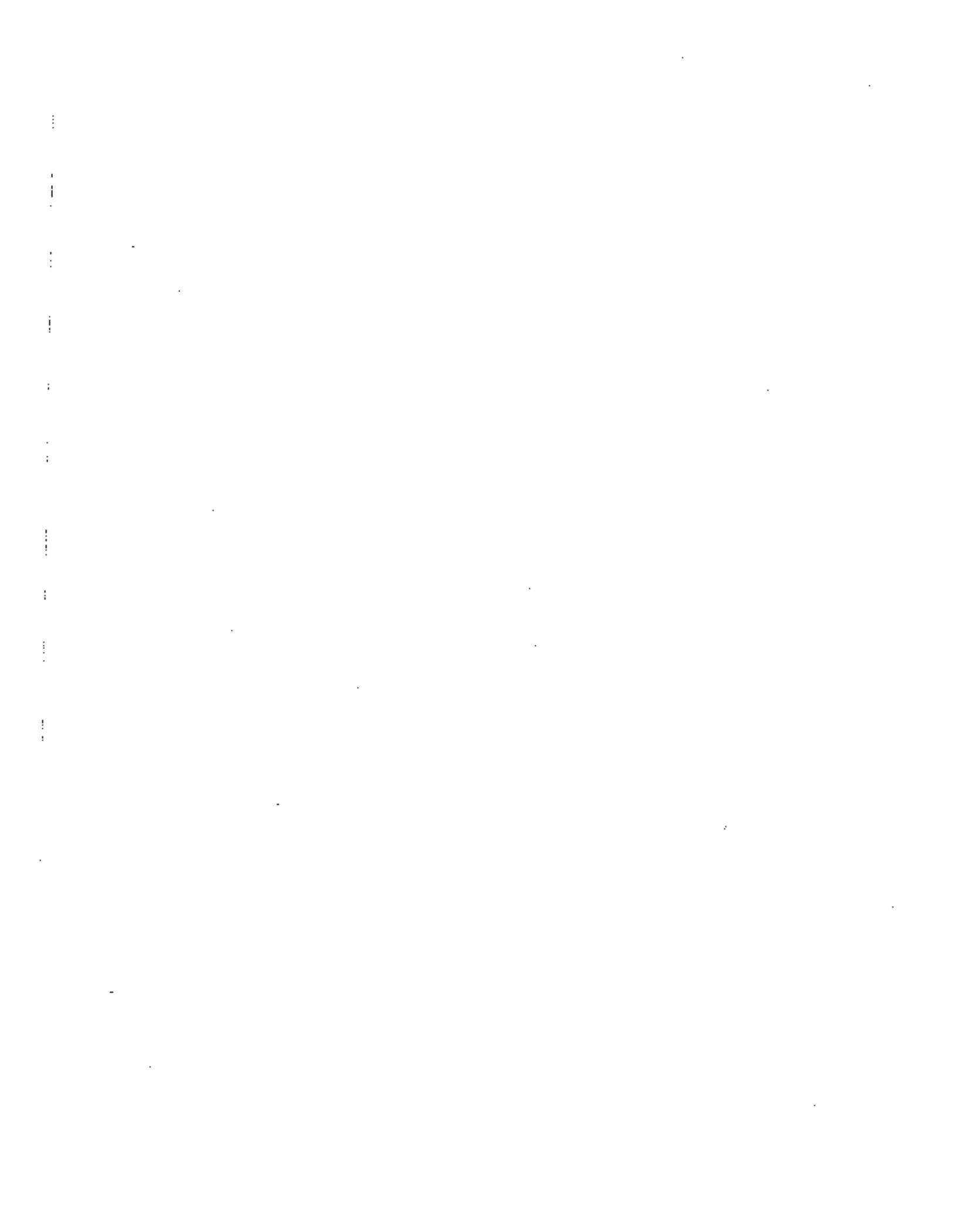
Such designation is inappropriate where the responses called for do not include the topics designated for enhanced protection and is particularly inappropriate here since Complaint Counsel's responses are so brief and generic. We request that these responses be redesignated immediately as non-confidential.

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, flowing style with a horizontal line above the first few letters.

Tefft 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
Page 2

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



444-10-1001 (REV. 12-22-2014) 401-111

KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

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

202 879-5000

To Call Writer Directly:
(202) 879-5212

Facsimile:
202 879-5200

January 7, 2002

VIA FACSIMILE

Kent Cox, Esq.
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20005

Re: MSC Software, Docket No. 9299

Dear Kent,

Complaint Counsel's January 3, 2002, letter leaves unresolved the fundamental fairness concerns MSC raised regarding Complaint Counsel's deficient responses to MSC's First Set of Interrogatories. *First*, by agreeing to supplement Complaint Counsel's responses, Complaint Counsel has admitted that its responses were inadequate.

Second, Complaint Counsel's statement that "[s]ince 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 or process) and all verbatim statements by witnesses identified on Complaint Counsel's preliminary witness list" not only leaves MSC's concerns unresolved, but is inaccurate and has raised new concerns.

One of MSC's principal objections to Complaint Counsel's responses was Complaint Counsel's reliance upon an undifferentiated reference to documents when asked to explain the contentions made in the Complaint. As MSC made clear, directing MSC to its own documents and those of third parties will *not* disclose the bases for Complaint Counsel's contentions. Thus, the fact that Complaint Counsel now asserts that it has produced "*all* documents . . . received from third parties," does *not* address MSC's concern, nor does it relieve Complaint Counsel of its obligation to respond fully to MSC's interrogatories.

The letter's assertion that *all* third party documents have now been produced is inconsistent with Complaint Counsel's objection to MSC's First Set of Document Requests in which Complaint Counsel stated that "*nearly all* non-privileged documents in its possession" have been produced. Please state whether Complaint Counsel has now produced *all third party documents* - whether

KIRKLAND & ELLIS

Kent Cox, Esq.
January 7, 2002
Page 2

produced from an individual or firm listed on Complaint Counsel Preliminary Witness List or not - and, if not, when such production will be made and whether Complaint Counsel is withholding any third party documents based on an assertion of privilege.

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, 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 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.

Complaint Counsel cannot assert on one hand that it has withheld *nothing* while saying on the other hand that it is withholding information pursuant to the informant's privilege.

Complaint Counsel's letter also states that "while [Complaint Counsel] 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." Since MSC's Interrogatories were drawn *in haec verba* from the Complaint, any suggestion that Complaint Counsel could not understand its own allegations is bizarre and its claim that MSC's letter was clarifying is disingenuous - at best.

Complaint Counsel's letter also fails to address MSC's objection to the over-designation of Complaint Counsel's bland responses as "Restricted Confidential, Attorney Eyes Only." Such a designation exceeds what is allowed by the Protective Order in this case and impedes MSC's ability to participate in its own defense. Please redesignate Complaint Counsel's Objections and Responses to MSC's First Set of Interrogatories immediately.

Complaint Counsel asserts that it must now "spend the next two weeks preparing for and conducting" depositions of MSC's employees and others as a reason for not supplementing its responses more fully. This makes no sense and cannot be justified. The depositions that Complaint Counsel wanted in December were deferred until this month to accommodate the deponents' schedules and allow both sides time to prepare. To the extent that Complaint Counsel was not obligated to spend time during that period preparing for depositions (which are likely to be largely

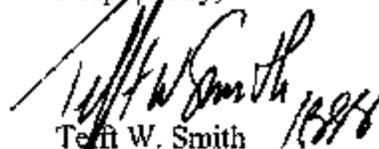
KIRKLAND & ELLIS

Kent Cox, Esq.
January 7, 2002
Page 3

cumulative to the information gathered during the eighteen month Part 2 investigation), presumably Complaint Counsel could have used that time to supplement its responses. Complaint Counsel's decision to delay by two *more* weeks its responses to MSC's interrogatories (assuming they are not equally deficient) means that MSC will be denied the opportunity to learn the meaning of Complaint Counsel's allegations until after the depositions have already been largely completed. This is neither acceptable nor fair and serves only to deny MSC its due process rights. Complaint Counsel's actions have necessitated the cancellation of several depositions and may require further depositions to be cancelled if Complaint Counsel does not cease its misconduct and provide obviously fair and reasonable discovery on a timely basis.

We request that Complaint Counsel immediately confirm that it will promptly provide full and complete responses to MSC's First Set of 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 9, 2002, we will have no recourse but to ask for Judge Chappell's intervention.

Respectfully,


Terri W. Smith



STIK 01/11/03 48-55/620 0201 027-0277

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

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

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

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

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

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

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

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

REDACTED

RESTRICTED CONFIDENTIAL, ATTORNEY EYES ONLY
FTC Docket No. 9299

REDACTED

RESTRICTED CONFIDENTIAL, ATTORNEY EYES ONLY
FTC Docket No. 9299



AL-2782-2004 00000-112 8-12-04 14-0000001

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

RECEIVED
DEC 21 2001

K & E

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

Docket No. 9299

**COMPLAINT COUNSEL'S OBJECTIONS & RESPONSES
TO RESPONDENT MSC.SOFTWARE CORPORATION'S
FIRST SET OF REQUESTS FOR THE PRODUCTION OF
DOCUMENTS AND THINGS**

In accordance with Rule 3.37 (b) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.37 (b), Complaint Counsel hereby provide general and specific objections to Respondent MSC.Software Corporation's First Set of Requests for the Production of Documents and Things ("First Set of Requests for Production"). Following Complaint Counsel's general objections, the full text of each Request is set out below together with the respective specific objection.

**Complaint Counsel's General Objections
to Requests, Definitions, and Instructions**

Complaint Counsel assert the following general objections to Respondent's entire First Set of Requests for Production:

1. Complaint Counsel object generally, on the basis of burden and attorney work product protections, to Respondent's First Set of Requests for Production to the extent that it asks Complaint Counsel to segregate and resubmit materials from Complaint Counsel's investigative files as they relate to specific issues or assertions of fact. Complaint Counsel have produced to

Respondent on December 11 and 21, 2001, as part of our initial disclosure pursuant to 16 C.F.R. § 3.31(b)(2), a copy of all non-privileged documents obtained from third parties during the non-public, Part 2 investigation of this matter that are relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Respondent. With the exception of verbatim statements by persons appearing on Complaint Counsel's witness list, publicly available materials (e.g., government publications, SEC filings, and downloads from the World Wide Web, etc.) and materials provided to Complaint Counsel by MSC, Complaint Counsel have provided to Respondent nearly all non-privileged documents in Complaint Counsel's possession that are responsive to one or more Requests in Respondent's First Set of Requests for Production. Complaint Counsel object to resubmitting identical copies of the same documents as a response to this document Request. Respondent is asking Complaint Counsel to do Respondent's work for it. To the extent that these Requests ask Complaint Counsel to segregate or identify evidence already provided to MSC as such evidence relates to specific issues or assertions of fact they are improperly testimonial in nature and violate work product protections. It is not Complaint Counsel's job to act as attorneys or paralegals for Respondent and to select all of the materials already in Respondent's possession that relate to a particular proposition. The burden of ascertaining particular documents from among such materials that are responsive to individual Requests is substantially the same, if not lighter, for Respondent than for Complaint Counsel.

2. Complaint Counsel object generally to Respondent's First Set of Requests for Production insofar as it calls upon Complaint Counsel to disclose verbatim statements by persons appearing on Complaint Counsel's witness list prior to the expiration of the time for such persons to seek an appropriate protective or *in camera* order. Paragraph 3 of the Amended Protective

Order Governing Discovery Materials requires that, prior to disclosure of such materials, the submitters of the materials be afforded an opportunity to seek an appropriate protective or *in camera* order. Complaint Counsel will provide all verbatim statements by persons appearing on Complaint Counsel's witness list, on or around January 4, after those persons have been afforded an adequate opportunity to seek an appropriate protective or *in camera* order.

3. Complaint Counsel object generally on the basis of the attorney work product doctrine and the informant's and governmental deliberative process privileges to Respondent's First Set of Requests for Production to the extent it seeks documents revealing persons with whom Complaint Counsel have communicated during the FTC Part 2 law enforcement investigation or this litigation.

4. Complaint Counsel object generally to Respondent's First Set of Requests for Production to the extent it calls for the disclosure of material protected by the attorney work product doctrine.

5. Complaint Counsel object generally to Respondent's First Set of Requests for Production to the extent it calls for the disclosure of material protected by the attorney-client privilege.

6. Complaint Counsel object generally to Respondent's First Set of Requests for Production to the extent it calls for the disclosure of material protected by the governmental deliberative process privilege.

7. Complaint Counsel object generally to Respondent's First Set of Requests for Production to the extent it calls for the disclosure of material protected by the informant's privilege.

8. Complaint Counsel object generally to Respondent's First Set of Requests for Production to the extent it calls for disclosure of material protected by the investigatory records privilege.

9. Complaint Counsel object generally to Definitions and Instructions No. 15 of Respondent's First Set of Requests for Production to the extent it requires Complaint Counsel to produce a privilege log. Requiring Complaint Counsel to produce such a log with respect to government records is not contemplated by the FTC's Rules of Practice and is unnecessarily and unduly burdensome.

10. Complaint Counsel object generally to Definitions and Instructions No. 2 of Respondent's First Set of Requests for Production which defines "you," "yours," "FTC," or "Commission" to include "the Federal Trade Commission, its Commissioners," or any person acting on behalf of the Commission. Rules 3.23(a)(1) and 3.35(a) of the FTC Rules of Practice, 16 C.F.R. §§ 3.23(a)(1) & 3.35(a), provide that discovery is not permitted for information in the possession of the Commissioners, the General Counsel, the office of the Administrative Law Judges, or the Secretary (in his capacity as a custodian or recorder of any such information), or their respective staffs.

11. Complaint Counsel object generally to Definitions and Instructions No. 2 to the extent that its reference to "the Federal Trade Commission . . . or any person acting on behalf of the Commission" would require a search of files maintained by persons who had no connection to the FTC investigation of MSC. The burden and expense of such a search outweigh its likely benefit. *See* Rule 3.31(c)(1), 16 C.F.R. § 3.31(c)(1). On the other hand, the files maintained by the management and staff of the Bureau of Competition and the Bureau of

Economics who have reviewed or worked on the FTC investigation of MSC Software Corporation or this litigation are appropriately subject to search and have been or will be searched for responsive documents.

12. Complaint Counsel object generally to supplying documents readily available to the general public, including information downloaded by Complaint Counsel from MSC's web page and the web pages of other persons, government publications and SEC filings. Such information is as readily obtainable from public sources by Respondent as Complaint Counsel. Identification of the fact that particular public documents are in Complaint Counsel's files would, among other things, reveal an attorney's selection process and improperly divulge attorney opinions, theories and analysis of this case.

13. Complaint Counsel does not concede that Respondent's First Set of Requests for Production consists of only 18 Requests as claimed by Respondent.

14. Complaint Counsel object to Definitions and Instructions No. 18 insofar as it seeks to compel Complaint Counsel to update our responses to an extent not required by the FTC Rules of Practice or the Scheduling Order entered by Administrative Law Judge D. Michael Chappell on November 13, 2001. Any additional non-privileged responsive materials subsequently received by Complaint Counsel will be turned over to counsel for Respondent pursuant to the Rules of Practice and the Scheduling Order.

15. Complaint Counsel's discovery and investigation in this matter are continuing. Complaint Counsel reserves the right to assert additional objections to Respondent's First Set of Requests for Production, and to amend or supplement these objections and responses as necessary.

**Complaint Counsel's Specific Objections to
Respondent's First Set of Requests for Production**

Complaint Counsel object generally to each and every Request on the basis of the general objections presented above. Without waiving these general objections, but without restating them in every response, Complaint Counsel provide the following specific objections and responses after the full text of each Request. The provision of a response to any Request shall not constitute a waiver of any applicable objection, privilege, or right.

Request No. 1:

All documents or things identified in response to MSC's interrogatories.

Objection and Response to Request No. 1

Subject to the foregoing general objections, and with the exception of publicly available materials and materials provided to Complaint Counsel by MSC, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. Complaint counsel will provide any additional responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 2:

All documents and affidavits provided to you by third parties (whether in executed or non-executed form) with regard to MSC's acquisitions of UAI, CSAR, or both.

Objection and Response to Request No. 2

In addition to the foregoing general objections, Complaint Counsel object to identifying each person with whom Complaint Counsel have communicated regarding MSC's acquisitions

and to supplying the requested additional documents on the basis of the attorney work product doctrine and the informant's, investigatory records, and governmental deliberative process privileges. With the exception of verbatim statements by persons appearing on Complaint Counsel's witness list, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. 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 or *in camera* order. Complaint counsel will provide any additional responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 3:

All 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.

Objection and Response to Request No. 3

In addition to the foregoing general objections, Complaint Counsel object to providing all transcripts, statements, recordings and notes of investigatory depositions and discussions with persons that have communicated with the FTC pursuant to its investigation of MSC's acquisitions, on the basis of the attorney work product doctrine and the informant's, investigatory records, and governmental deliberative process privileges. 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 or *in camera* order.

Request No. 4:

Documents and things sufficient to identify all third parties contacted, interviewed, or otherwise communicated to with regard to your investigation of the acquisitions.

Objection and Response to Request No. 4

In addition to the foregoing general objections, Complaint Counsel object to identifying all third parties with whom Complaint Counsel have communicated regarding our investigation of MSC's acquisitions on the basis of the attorney work product doctrine and the informant's, investigatory records, and governmental deliberative process privileges. With the exception of verbatim statements by persons appearing on Complaint Counsel's witness list, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. 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 or *in camera* order. Complaint counsel will provide any additional responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 5:

All analyses, databases (including record layouts), reports, studies, work papers (including all spreadsheets) or other documents, in machine-readable form or hard copy, provided to, prepared by or on behalf of, or reviewed by you in connection with the acquisitions, including, but not limited to, all financial, accounting, econometric, economic, statistical, or other quantitative analyses.

Objection and Response to Request No. 5

In addition to the foregoing general objections, Complaint Counsel object to providing all analyses, databases, reports, studies, work papers or other documents, provided to, prepared by or on behalf of, or reviewed by Complaint Counsel in connection with the acquisitions, on the basis of the attorney work product doctrine and the informant's, investigatory records, attorney-client, and governmental deliberative process privileges. With the exception of publicly available materials, and materials provided to Complaint Counsel by MSC, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. Complaint counsel will provide any additional responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 6:

All documents authored, reviewed, sent to or otherwise related to MSC provided to you by any third party.

Objection and Response to Request No. 6

In addition to the foregoing general objections, Complaint Counsel object to identifying each person with whom Complaint Counsel have communicated regarding MSC on the basis of the attorney work product doctrine and the informant's, investigatory records, and governmental deliberative process privileges. Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. Complaint counsel will provide any additional responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 7:

All documents, including staff reports, staff recommendations, memoranda, studies, or analyses that describe, discuss, or relate to any procompetitive effects from MSC's acquisitions of UAI, CSAR, or both.

Objection and Response to Request No. 7

In addition to the foregoing general objections, Complaint Counsel object to providing staff reports, staff recommendations, memoranda, studies, or analyses or other documents, provided to, prepared by or on behalf of, or reviewed by Complaint Counsel in connection with the acquisitions, on the basis of the attorney work product doctrine and the informant's, investigatory records, attorney-client and governmental deliberative process privileges. With the exception of verbatim statements by persons appearing on Complaint Counsel's witness list, publicly available materials, and materials provided to Complaint Counsel by MSC, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. 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 or *in camera* order. Complaint counsel will provide any additional responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 8:

For each "advanced version[] of Nastran" you contend was or is offered by MSC, all documents relating to any actual, contemplated, or attempted increases in price both prior to and after the dates of which the acquisitions were completed.

Objection and Response to Request No. 8

Subject to the foregoing general objections, and with the exception of verbatim statements by persons appearing on Complaint Counsel's witness list, publicly available materials, and materials provided to Complaint Counsel by MSC, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. 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 or *in camera* order. Complaint counsel will provide any additional responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 9:

For each "advanced version of Nastran" you contend was or is offered by MSC, documents relating to any actual, contemplated, or attempted competition with any "advanced version of Nastran" which you contend was offered by CSAR and UAI.

Objection and Response to Request No. 9

Subject to the foregoing general objections, and with the exception of verbatim statements by persons appearing on Complaint Counsel's witness list, publicly available materials, and materials provided to Complaint Counsel by MSC, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. 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 or *in camera* order. Complaint counsel will provide any additional

responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 10:

All documents relating to any plans concerning any FEA product or service or any product or service compatible with any FEA product or service, including business plans; short term and long range strategic plans and objectives; joint venture, partnering, strategic alliance, and acquisition strategies and plans; budgets, financial statements, and financial projections; personnel recruitment or reassignment plans; plans for new products or product enhancements, features, modules, applications, or services; research or development plans; strategies for product integration; distribution plans and agreements; sales or marketing plans; plans regarding shifting from product pricing that includes service to pricing products and services separately or shifting from commodity pricing of any FEA product toward greater revenue realization from any FEA service whereby customers pay directly for such services, plans and strategies for use of unlimited usage agreements and paid-up licenses; customer support services and customer-funded development plans; analyses of customer satisfaction; and plans for participation in or adoption of the AP209 exchange format standard.

Objection and Response to Request No. 10

Subject to the foregoing general objections, and with the exception of verbatim statements by persons appearing on Complaint Counsel's witness list, publicly available materials, and materials provided to Complaint Counsel by MSC, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. 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 or *in camera* order. Complaint counsel will provide any additional responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 11:

All documents relating to competition in the design, development, enhancement, research, manufacturing, distribution, licensing, marketing, sale, support or service of any FEA solver product or service, including all documents relating to the market share or competitive position of the company or any of its competitors; the relative strengths or weaknesses of any person producing or selling any product or service competing with any FEA solver product or service; the relative strengths and weaknesses and differences in capabilities, features, enhancements, and modules between or among any FEA solver products or services; any actual or potential conditions affecting the supply, demand, entry, cost, price, quality, features, enhancements, modules, or applications relating to any FEA solver product or service; efforts to win customers or sales from other companies, or the loss of customers or revenues due to competition or sales by other companies; the effects of competition from any supplier of any FEA solver products or services, including MSC, UAI and CSAR, on sales, pricing, revenues, customers, development, features, enhancements, modules, or applications; customers' use of in-house codes, traditional methods of product testing, or prototyping; and lock-in effects or switching costs, including the use of unlimited usage agreements and paid-up licenses.

Objection and Response to Request No. 11

Subject to the foregoing general objections, and with the exception of verbatim statements by persons appearing on Complaint Counsel's witness list, publicly available materials, and materials provided to Complaint Counsel by MSC, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. 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 or *in camera* order. Complaint counsel will provide any additional responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 12:

All documents relating to switching, including shifts in utilization, between or among any FEA solver product or service and any other product or service, including the relative ease or difficulty of switching; the estimated, projected or actual costs incurred by users to switch; the time required to switch; the degree of switching possible; the effect on a user's price from switching or shifting utilization or threatening to switch or shift or the availability of the opportunity to switch or shift; the cost of switching attributable to lost productivity while gaining proficiency in the new FEA solver product or service or from use of a less than optimum FEA solver product or service; the cost of and time required for training; the cost of and time required for translating or converting existing files, models, routines, commands, DMAP alters, or other legacy materials to the new FEA solver product or service; the effect of switching on customer or collaborator relationships; the effect of unlimited usage contracts or paid up licenses on switching; the possible loss or cost of complementary software used with the FEA solver product or service; the availability and effect of translators and AP209 exchange format standards; and governmental, customer, contractual, or industry or collaborator requirements, preferences, or practices requiring use of or production of analyses or results in any particular software format.

Objection and Response to Request No. 12

Subject to the foregoing general objections, and with the exception of verbatim statements by persons appearing on Complaint Counsel's witness list, publicly available materials, and materials provided to Complaint Counsel by MSC, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. 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 or *in camera* order. Complaint counsel will provide any additional responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 13:

All documents relating to actual, attempted, or potential entry into the market for any relevant product or service, including all documents relating to the timeliness, conditions, costs, attractiveness, likelihood, or competitive significance of any such entry; the effects of unlimited usage contracts, paid up licenses, or any existing contracts by existing firms upon such entry; the requirements for such entry including research and development, planning and design, production requirements, distribution systems, service requirements, patents, licenses, trademarks, sales and marketing activities, securing a sufficient customer base to achieve minimum viable scale, personnel and staffing, and any necessary governmental and customer approvals, and the time necessary to meet each such requirement; the effects of open or closed software architecture and applications programming interfaces and the availability of translators, AP209 exchange format standards, trademarks, copyrights, patents, or other technology upon such entry; the total costs required for such entry, including the amount of such costs that would be recoverable if the entrant were unsuccessful or elected to exit the licensing or sale of the product or service; and the methods and amount of time necessary to recover such costs; and the total non-recoverable costs entailed in satisfying the requirements for entry; and the minimum viable scale, the minimum and optimum number of products or services, requirements for multi-product, or vertically integrated operations, or other factors required to attain any available cost savings or other efficiencies necessary to compete successfully in the licensing or sale of such relevant products or services.

Objection and Response to Request No. 13

Subject to the foregoing general objections, and with the exception of verbatim statements by persons appearing on Complaint Counsel's witness list, publicly available materials, and materials provided to Complaint Counsel by MSC, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. 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 or *in camera* order. Complaint counsel will provide any additional responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 14:

All documents relating to any plans of, interest in, or efforts undertaken by any person for any acquisition, divestiture, joint venture, alliance, or merger of any kind involving the licensing or sale of any FEA solver product or service, including any acquisition, joint venture, alliance, or merger of any kind related to FEA solvers; and the divestiture or sale by any person of any former assets, intellectual property, employees, contracts, customer relations, or going concerns related to FEA solvers.

Objection and Response to Request No. 14

Subject to the foregoing general objections, and with the exception of verbatim statements by persons appearing on Complaint Counsel's witness list, publicly available materials, and materials provided to Complaint Counsel by MSC, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. 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 or *in camera* order. Complaint counsel will provide any additional responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 15:

Documents sufficient to show each type of finite element analysis you contend is performed by any person, the purpose or reason each such person performs that analysis; the name of each FEA solver used by that person; whether that person has licensed, purchased, or developed in-house each such FEA solver used to perform such analysis; and whether (and if so, which one) each such person has identified an FEA solver as that person's core, standard, principal, preferred, or recommended FEA solver.

Objection and Response to Request No. 15

Subject to the foregoing general objections, and with the exception of verbatim statements by persons appearing on Complaint Counsel's witness list, publicly available materials, and materials provided to Complaint Counsel by MSC, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. 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 or *in camera* order. Complaint counsel will provide any additional responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 16:

All documents that analyze, describe, recommend, criticize or characterize any FEA solver or its costs including the features, enhancements, modules or applications of any FEA solver; the general or specific uses of any FEA solver, including the specific problems or types of analyses for which the solver is used; the cost, including the price, of any FEA solver, its features, enhancements, modules, or applications; the training time and costs associated with utilizing any FEA solver; the productivity loss or time required to become proficient with any FEA solver; the results or methodologies employed on any benchmarking, verification or validation studies or testing of any FEA solver; whether any other software program could be a substitute for or lead to decreased use of any FEA solver, in general, or for any specific problems or types of analyses; the costs associated with acquiring or using software that is complementary with any FEA solver; trends in pricing, comparisons of prices of different FEA solvers, or price changes over time; changes in utilization of FEA solvers or trends in changes in utilization of FEA solvers.

Objection and Response to Request No. 16

Subject to the foregoing general objections, and with the exception of verbatim statements by persons appearing on Complaint Counsel's witness list, publicly available

materials, and materials provided to Complaint Counsel by MSC, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. 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 or *in camera* order. Complaint counsel will provide any additional responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 17:

For each third party you have contacted, all documents relating to that person's actual or projected costs, benefits, or difficulties of switching some or all usage between any Nastran program and any other software program, including productivity loss or time required to become proficient; time and costs associated with training; translations of legacy models, input or output files, or commands; verification and qualification of existing work; compatibility or incompatibility with other software; loss of complimentary software, including any DMAP routines; or diminished productivity, capability, functionality, or level of service and support.

Objection and Response to Request No. 17

Subject to the foregoing general objections, and with the exception of verbatim statements by persons appearing on Complaint Counsel's witness list, publicly available materials, and materials provided to Complaint Counsel by MSC, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request. 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 or *in camera* order. Complaint counsel will provide any additional

responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.

Request No. 18:

For each third party you have contacted, all documents relating to that person's analysis or evaluation of the comparative costs and benefits of leasing or purchasing any commercially available FEA solver, feature, enhancement, module, or application and developing in-house an FEA solver, feature, enhancement, module, or application.

Objection and Response to Request No. 18

Subject to the foregoing general objections, and with the exception of verbatim statements by persons appearing on Complaint Counsel's witness list, publicly available materials, and materials provided to Complaint Counsel by MSC, Complaint Counsel have provided to Respondent nearly all non-privileged documents that are responsive to this Request.

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 or *in camera* order. Complaint counsel will provide any additional responsive documents, subject to the above privileges and qualifications, on the return date of the First Set of Requests for Production.



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 21, 2001

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

<p style="text-align: center;">In the Matter of</p> <p style="text-align: center;">MSC.SOFTWARE CORPORATION, a corporation.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 9299</p>
---	---	------------------------

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, or 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

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 15th 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

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

IN THE MATTER OF)	
)	
MSC.SFTWARE CORPORATION,)	Docket No. 9299
)	
a corporation.)	
)	

**RESPONDENT MSC.SFTWARE CORPORATION'S FIRST SET
OF REQUESTS FOR THE PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to Rule 3.37 of the Commission's Rules of Practice, 16 C.F.R. § 3.37, Respondent MSC.Software Corporation ("MSC"), hereby propounds the following requests for the production of documents and things.

DEFINITIONS AND INSTRUCTIONS

The following definitions and instructions shall apply to these requests for the production of documents and things, unless the context of the request or response indicates otherwise. If, in responding to these requests, 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 term "user," 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.

5. The term "customer" 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, who has purchased, leased, licensed, or sub-licensed any product made, sold, licensed, leased, or otherwise transferred by MSC.

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

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

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

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

10. The term "FEA solver" has the same meaning given to it in paragraph 22 of the Complaint.

11. 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.

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, phono-records, discs, computer recordings, electronic mail, and any other data compilations from which information can be obtained.

14. You are to produce entire documents including all attachments, cover letters, memoranda, and appendices. Copies of the same document which differ in any respect from an original (because, by way of example, only, handwritten or printed notations have been added) should also be produced.

15. If you refuse to answer any request 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 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).

16. To the extent you assert a claim of privilege or other immunity with respect to a portion of the contents of any document or thing, you are to provide a copy of the document with the portion over which you claim privilege or immunity redacted, and the material redacted is to be listed separately on a schedule of withheld and redacted documents. *See Schreiber v. Society for Savs.*

Bancorp, Inc., 11 F.3d 217 (D.C. Cir. 1993) (noting obligation to redact privileged materials rather than withholding the entire document).

17. These requests cover all documents and things in your possession, custody, or control except for documents that MSC produced to the FTC. If documents responsive to any request have been destroyed, state when and where such documents were destroyed, identify the person who directed that such documents be destroyed, and state the reasons that the documents were destroyed.

18. These requests are continuing in character and you must supplement your answers pursuant to Commission Rule of Practice 3.31(e)(2), 16 C.F.R. § 3.31(e)(2), which provides that “[a] party is under a duty seasonably to amend a prior response to . . . [a] request for production, . . . if the party learns that the response is in some material respect incomplete or incorrect.”

REQUESTS

Request No. 1:

All documents or things identified in response to MSC's Interrogatories.

Request No. 2:

All documents and affidavits provided to you by third parties (whether in executed or non-executed form) with regard to MSC's acquisitions of UAI, CSAR, or both.

Request No. 3:

All 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.

Request No. 4:

Documents and things sufficient to identify all third parties contacted, interviewed, or otherwise communicated to with regard to your investigation of the acquisitions.

Request No. 5:

All analyses, databases (including record layouts), reports, studies, work papers (including all spreadsheets) or other documents, in machine-readable form or hard copy, provided to, prepared by or on behalf of, or reviewed by you in connection with the acquisitions, including, but not limited to, all financial, accounting, econometric, economic, statistical, or other quantitative analyses.

Request No. 6:

All documents authored, reviewed, sent to or otherwise related to MSC provided to you by any third party.

Request No. 7:

All documents, including staff reports, staff recommendations, memoranda, studies, or analyses that describe, discuss, or relate to any procompetitive effects from MSC's acquisitions of UAI, CSAR, or both.

Request No. 8:

For each "advanced version[] of Nastran" you contend was or is offered by MSC, all documents relating to any actual, contemplated, or attempted increases in price both prior to and after the dates of which the acquisitions were completed.

Request No. 9:

For each "advanced version of Nastran" you contend was or is offered by MSC, documents relating to any actual, contemplated, or attempted competition with any "advanced version of Nastran" which you contend was offered by CSAR and UAI.

Request No. 10:

All documents relating to any plans concerning any FEA product or service or any product or service compatible with any FEA product or service, including business plans; short term and long range strategic plans and objectives; joint venture, partnering, strategic alliance, and acquisition strategies and plans; budgets, financial statements, and financial projections; personnel recruitment or reassignment plans; plans for new products or product enhancements, features, modules, applications, or services; research or development plans; strategies for product integration;

distribution plans and agreements; sales or marketing plans; plans regarding shifting from product pricing that includes service to pricing products and services separately or shifting from commodity pricing of any FEA product toward greater revenue realization from any FEA service whereby customers pay directly for such services, plans and strategies for use of unlimited usage agreements and paid-up licenses; customer support services and customer-funded development plans; analyses of customer satisfaction; and plans for participation in or adoption of the AP209 exchange format standard.

Request No. 11:

All documents relating to competition in the design, development, enhancement, research, manufacturing, distribution, licensing, marketing, sale, support or service of any FEA solver product or service, including all documents relating to the market share or competitive position of the company or any of its competitors; the relative strengths or weaknesses of any person producing or selling any product or service competing with any FEA solver product or service; the relative strengths and weaknesses and differences in capabilities, features, enhancements, and modules between or among any FEA solver products or services; any actual or potential conditions affecting the supply, demand, entry, cost, price, quality, features, enhancements, modules, or applications relating to any FEA solver product or service; efforts to win customers or sales from other companies, or the loss of customers or revenues due to competition or sales by other companies; the effects of competition from any supplier of any FEA solver products or services, including MSC, UAI and CSAR, on sales, pricing, revenues, customers, development, features, enhancements, modules, or applications; customers' use of in-house codes, traditional methods of product testing,

or prototyping; and lock-in effects or switching costs, including the use of unlimited usage agreements and paid-up licenses.

Request No. 12:

All documents relating to switching, including shifts in utilization, between or among any FEA solver product or service and any other product or service, including the relative ease or difficulty of switching; the estimated, projected or actual costs incurred by users to switch; the time required to switch; the degree of switching possible; the effect on a user's price from switching or shifting utilization or threatening to switch or shift or the availability of the opportunity to switch or shift; the cost of switching attributable to lost productivity while gaining proficiency in the new FEA solver product or service or from use of a less than optimum FEA solver product or service; the cost of and time required for training; the cost of and time required for translating or converting existing files, models, routines, commands, DMAP alters, or other legacy materials to the new FEA solver product or service; the effect of switching on customer or collaborator relationships; the effect of unlimited usage contracts or paid up licenses on switching; the possible loss or cost of complementary software used with the FEA solver product or service; the availability and effect of translators and AP209 exchange format standards; and governmental, customer, contractual, or industry or collaborator requirements, preferences, or practices requiring use of or production of analyses or results in any particular software format.

Request No. 13:

All documents relating to actual, attempted, or potential entry into the market for any relevant product or service, including all documents relating to the timeliness, conditions, costs, attractiveness, likelihood, or competitive significance of any such entry; the effects of unlimited usage contracts, paid up licenses, or any existing contracts by existing firms upon such entry; the requirements for such entry including research and development, planning and design, production requirements, distribution systems, service requirements, patents, licenses, trademarks, sales and marketing activities, securing a sufficient customer base to achieve minimum viable scale, personnel and staffing, and any necessary governmental and customer approvals, and the time necessary to meet each such requirement; the effects of open or closed software architecture and applications programming interfaces and the availability of translators, AP209 exchange format standards, trademarks, copyrights, patents, or other technology upon such entry; the total costs required for such entry, including the amount of such costs that would be recoverable if the entrant were unsuccessful or elected to exit the licensing or sale of the product or service; and the methods and amount of time necessary to recover such costs; and the total non-recoverable costs entailed in satisfying the requirements for entry; and the minimum viable scale, the minimum and optimum number of products or services, requirements for multi-product, or vertically integrated operations, or other factors required to attain any available cost savings or other efficiencies necessary to compete successfully in the licensing or sale of such relevant products or services.

Request No. 14:

All documents relating to any plans of, interest in, or efforts undertaken by any person for any acquisition, divestiture, joint venture, alliance, or merger of any kind involving the licensing or sale of any FEA solver product or service, including any acquisition, joint venture, alliance, or merger of any kind related to FEA solvers; and the divestiture or sale by any person of any former assets, intellectual property, employees, contracts, customer relations, or going concerns related to FEA solvers.

Request No. 15:

Documents sufficient to show each type of finite element analysis you contend is performed by any person, the purpose or reason each such person performs that analysis; the name of each FEA solver used by that person; whether that person has licensed, purchased, or developed in-house each such FEA solver used to perform such analysis; and whether (and if so, which one) each such person has identified an FEA solver as that person's core, standard, principal, preferred, or recommended FEA solver.

Request No. 16:

All documents that analyze, describe, recommend, criticize or characterize any FEA solver or its costs including the features, enhancements, modules or applications of any FEA solver; the general or specific uses of any FEA solver, including the specific problems or types of analyses for which the solver is used; the cost, including the price, of any FEA solver, its features, enhancements, modules, or applications; the training time and costs associated with utilizing any FEA solver; the productivity loss or time required to become proficient with any FEA solver; the results or methodologies employed on any benchmarking, verification or validation studies or testing of any

FEA solver; whether any other software program could be a substitute for or lead to decreased use of any FEA solver, in general, or for any specific problems or types of analyses; the costs associated with acquiring or using software that is complementary with any FEA solver; trends in pricing, comparisons of prices of different FEA solvers, or price changes over time; changes in utilization of FEA solvers or trends in changes in utilization of FEA solvers.

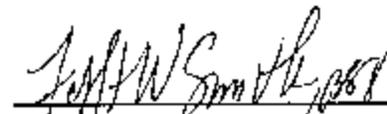
Request No. 17:

For each third party you have contacted, all documents relating to that person's actual or projected costs, benefits, or difficulties of switching some or all usage between any Nastran program and any other software program, including productivity loss or time required to become proficient; time and costs associated with training; translations of legacy models, input or output files, or commands; verification and qualification of existing work; compatibility or incompatibility with other software; loss of complimentary software, including any DMAP routines; or diminished productivity, capability, functionality, or level of service and support.

Request No. 18:

For each third party you have contacted, all documents relating to that person's analysis or evaluation of the comparative costs and benefits of leasing or purchasing any commercially available FEA solver, feature, enhancement, module, or application and developing in-house an FEA solver, feature, enhancement, module, or application.

Dated: December 11, 2001



Jeff 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 15th 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 Tuesday, December 11, 2001, I caused a copy of the attached Respondent *MSC Software Corporations's* First Set of Requests for the Production of Documents and Things to be served upon the following persons via facsimile and via hand delivery:

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



David Shotlander

2001 DEC 11 10:00 AM
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580