

BEFORE THE
FEDERAL TRADE COMMISSION



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: In the Matter of : FTC Docket No. 9299
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: MSC SOFTWARE :
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**REQUEST OF DARATECH, INC. FOR IN CAMERA TREATMENT
AND MEMORANDUM IN SUPPORT THEREOF**

Daratech, Inc. ("Daratech") is a non-party in this proceeding. It has produced documents subpoenaed by both MSC Software ("MSC") and the Federal Trade Commission ("FTC"). Daratech hereby moves, pursuant to 16 C.F.R. § 3.45(b), for an order granting in camera treatment for certain information produced by it.

Most of the materials produced by Daratech are not confidential. As a consequence, Daratech has not sought protection for those materials under the protective order in this case. However, Daratech has produced a computer disc containing worksheets that contain proprietary trade secret information, including a data base compiled by and belonging to Daratech. As to such worksheets and information, Daratech hereby requests in camera treatment throughout this proceeding, including at any hearing.

1. Background

The worksheets were produced to MSC on a computer disc. They were provided under an express understanding that they would be treated as trade secret under the protective order entered in this proceeding and, therefore, disclosure would be limited to outside counsel, outside independent experts, FTC staff, court reporters and the Administrative Law Judge and his or her staff. See Transmittal Letter of Brian E. Moran, Esq. to Gregg LoCascio, dated April 29, 2002 (a copy of which is attached as Exhibit A hereto); and Affidavit of Bruce L. Jenkins, dated June 10, 2002, para. 6 ("Jenkins Aff.") (a copy of which affidavit is attached as Exhibit B hereto).

The worksheets contain compilations of data amassed by Daratech over several years using surveys and telephone interviews it has conducted with suppliers and customers of computed-aided design, computer-aided manufacturing and computer-aided engineering ("CAD/CAM/CAE"), product data management ("PDM"), product lifecycle management ("PLM"), document/content management ("DM/CM"), supply-chain management ("SCM"), architecture, engineering and construction ("AEC"), plant design and management, and geographic information systems ("GIS") software. Jenkins Aff., para. 4.

Daratech treats not only the underlying data within the worksheets as trade secret but also the form, layout and structure of such worksheets. Jenkins Aff., para. 5. The form, layout and structure of the worksheets reflects Daratech's proprietary and

confidential analytical methods of analyzing, reviewing and compiling the raw data it receives from reporting companies and also reflects Daratech's proprietary and confidential methods of estimating such data for companies that either decline to report such data or report incomplete, inconsistent or ambiguous data. Jenkins Aff., para. 5. Thus, while Daratech does not claim confidentiality with respect to historical sales figures it has otherwise disseminated or published (much of which has separately produced to the FTC without invoking the protective order), it is vehemently opposed to public disclosure of its worksheets from which its historical database information can be derived or ascertained. It is the underlying worksheets and data base that Daratech seeks to protect. As noted above, those worksheets also reflect Daratech's proprietary analytical methodologies. Jenkins Aff., para. 5.

Daratech is a leading market research and consulting firm in the CAE/CAD/CAM industry. Jenkins Aff., para. 10. As such, it enjoys considerable goodwill. It has achieved such stature and goodwill, in large measure, due to the investment it has made in amassing and mining industry data and statistics, which are derived from its own proprietary surveys and collection techniques. Jenkins Aff., para. 10. Daratech's quantitative market projections and estimates are widely respected and cited by industry participants and in the business and trade press. Jenkins Aff., para. 10.

Daratech has invested considerable time and resources in developing and refining its unique, proprietary and confidential methods of gathering, compiling and analyzing

industry statistics and raw data, as well as in the actual carrying out of the gathering, compiling and analyzing of such industry statistics and data. Jenkins Aff., para. 10. Through such efforts, Daratech has created a unique niche or position in the CAD/CAM/CAE marketplace. Id.

Daratech takes considerable precautions to safeguard the confidentiality of its worksheets. Jenkins Aff., para. 11. The access to such information is limited to Daratech employees with a need to know. Id. It is maintained in a secure place. Id. Daratech's offices are locked and alarmed during non-business hours. Id. Visitors are allowed only during normal business hours and by appointment. Id. Visitors must sign in and out and are escorted while on the premises. Id.

Neither the information in the worksheets nor the layout and format of the worksheets is known outside Daratech. Jenkins Aff., para. 12. It would be extremely time-consuming, expensive and difficult for anyone else to acquire, develop and/or duplicate such information. Id. The information is of considerable economic value to Daratech and its competitors. Id.

The disclosure of Daratech's worksheets and the revelations gleaned from the form and layout of said worksheets relative to Daratech's proprietary analytical methodologies would cause irreparable harm to Daratech's business and goodwill. Jenkins Aff., para. 13. Daratech's actual and potential competitors would be provided

with free and unfettered access to Daratech's inner workings and analytical methodologies, which methodologies have evolved over several years. *Id.* Such disclosure would damage the considerable goodwill Daratech has generated as the leading market research firm in the CAD/CAM/CAE industry. *Id.*

II. In Camera Treatment Is Warranted Under 16 C.F.R. §3.45(b)

The Commission's rules permit material to be placed in camera and sealed upon a finding that their "public disclosure will likely result in a clearly defined, serious injury." 16 C.F.R. §3.45(b).

The FTC has articulated a three-prong test for qualifying for in camera treatment:

- (1) is the information in question sufficiently secret;
- (2) is the information sufficiently material to the applicant's business; and
- (3) will disclosure result in serious competitive injury.

In re General Foods, 95 F.T.C. 352 (1980). Daratech has met each of these three requirements.

A. The Worksheets Are Trade Secrets

Whether one examines Daratech's worksheets under the Uniform Trade Secrets Act, the Restatement of The Law Of Unfair Competition or the Restatement of Torts, it is clear the worksheets qualify as trade secrets.

The Restatement of the Law of Unfair Competition defines a trade secret as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others." Restatement (3d) §39 (1995 ed.). The foregoing definition is consistent with the definition found in the Uniform Trade Secrets Act. Daratech's worksheets are, in fact, used in its business to analyze and assess the CAD/CAM/CAE market and to publish highly-valued reports containing certain historical market information and statistics. Daratech's customers pay to obtain such information. Jenkins Aff., para. 12. The worksheets, including the underlying data therein, as well as the format, layout and structure thereof, are, in fact, secret. Jenkins Aff., para. 12. Indeed, Daratech takes steps to safeguard such worksheets from public disclosure by limiting access to Daratech employees with a need to know. Jenkins Aff., para. 11.

The Commission has relied on the six factors found in Section 757 of the Restatement of Torts in evaluating whether information qualifies as a trade secret. See In

re Bristol-Meyers Company, 90 F.T.C. 455 (1977). Daratech's worksheets easily qualify under each of those factors.

1. The Extent To Which The Information Is Known Outside The Business

Daratech's worksheets are not made available outside of Daratech. Jenkins Aff., para. 12. Daratech limits access to the worksheets to a limited number of employees, with a need to know. Jenkins Aff., para. 11. The worksheets are formatted and laid-out in a manner distinct from the format of Daratech's published reports. Jenkins Aff., paras. 4-5. Thus, while some of the market information gleaned from Daratech's supplier and consumer surveys finds its way to the public in the form of published statistics, the underlying data in its raw form on the worksheets is not made public. *Id.* In addition, the layout and structure of the worksheets is itself trade secret in that it reflects proprietary analytical methodologies that are not publicly disclosed. *Id.*

2. The Extent To Which It Is Known By Employees and Other Individuals In The Business

As noted above, access to the worksheets is limited to Daratech employees with a need to know. Jenkins Aff., para. 11. This generally consists of two people. *Id.*

3. The Extent Of Measures Taken By Daratech To Safeguard The Secrecy Of The Information

Daratech has taken reasonable steps to limit access to the worksheets and to protect them from disclosure, including keeping those records in a secure place, locking Daratech's offices and controlling access to Daratech's offices. Jenkins Aff., para. 11. Daratech also requires its employees to sign confidentiality agreements. Id.

4. The Value of The Information To The Business And Its Competitors

The worksheets are highly valuable. Jenkins Aff., para. 12. They enable Daratech to compile and analyze market information for purposes of publishing reports and advising clients. Clients pay fees for such reports and services. Id. The worksheets confer a distinct economic or competitive advantage on Daratech over other industry analysts and research firms. Jenkins Aff., para. 12. Daratech's historical data base which it has amassed and mined over a significant period of time has enabled Daratech to acquire special knowledge, know how and experience as well as a historical perspective that is highly valued and constitutes a distinct competitive advantage. Id.

5. The Amount Of Effort Or Money Expended In Developing The Information

Daratech has taken years to develop its historical data base. Jenkins Aff., paras. 4 and 10. It has been assembled from raw data directly collected by Daratech employees using proprietary supplier and customer surveys. Id. Considerable time, money and

resources have gone into collecting and compiling the raw data, creating the worksheets and developing appropriate analytical models. Id.

6. **The Ease Or Difficulty With Which The Information Could Be Properly Acquired Or Duplicated By Others**

The information is not publicly available. Jenkins Aff., para. 12. In fact, Daratech goes to considerable expense and effort to gather and update its data base through individual supplier and customer surveys and interviews. Jenkins Aff., paras. 4 and 10. In addition, the analytical methodologies employed by Daratech in reviewing the raw data and converting it into useful published reports reflects years of effort and experience. Id.

Thus, by any definition, the worksheets and the data base information therein qualify as trade secrets. Accordingly, the first prong of the FTC's test for in camera treatment is easily met.

B. **The Worksheets Are Sufficiently Material To Daratech's Business**

The second prong of the FTC's test is also readily satisfied. The worksheets are vital to Daratech's business. Daratech's business is critically dependent on having clients subscribe to its various services and publications. Jenkins Aff., para. 4. The marketability of such services and publications largely depends on the quality of the market information that Daratech collects and Daratech's analysis thereof. Id.

C. **Daratech Would Suffer Serious Competitive Injury From Disclosure of The Worksheets**

Daratech competes with other industry analysts, market research firms, consultants and economists. Jenkins Aff., paras. 12-13. As a consequence of Daratech's investment in collecting, compiling and analyzing raw market information and data, Daratech has succeeded in becoming the leading market research firm in the CAE/CAD/CAM industry. Jenkins Aff., para. 10. That position would be seriously injured if competing firms were to obtain access to Daratech's raw data and worksheets, as well as its proprietary analytical methodologies. Jenkins Aff., para. 13.

D. **Public Disclosure of The Worksheets Would Deny Daratech The Benefits Of The Protective Order**

As the Commission has itself recognized, "[t]here can be no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible". *In re. H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961).

The Commission has also recognized that where "documents were tendered and received upon the express condition that they be placed *in camera*, there is no room for the exercise of any rule since good faith would demand that the condition be kept." *Id.* Here, Daratech produced its worksheets on the express condition that they be treated as confidential under the protective order in this proceeding. Jenkins Aff., para. 6. It was agreed that access would be limited to outside counsel, independent outside experts, FTC staff, court reporters, the Administrative Law Judge and his or her staff. *Id.* Daratech

expressly invoked the protection of such protective order. Daratech is not aware of any opposition to in camera treatment on the part of either MSC or the FTC staff, both of whom expressed their consent to treat the worksheets as confidential under the protective order.

Accordingly, good faith dictates that said confidentiality be extended to the hearing in this proceeding and that a formal in camera order be issued.

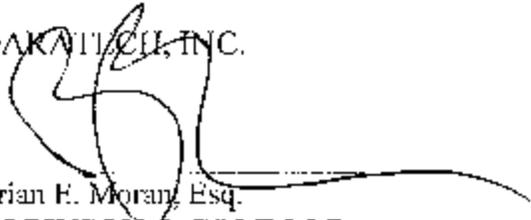
A form of proposed order is attached as Exhibit C hereto for the convenience of the Administrative Law Judge.

Respectfully submitted,

Dated June 10, 2002

DAKATI/COLE, INC.

By:

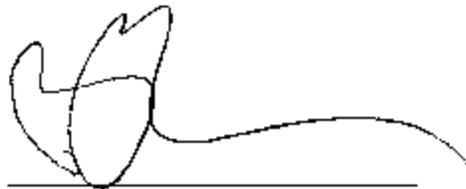


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Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing request for in camera treatment and the accompanying affidavit of Bruce L. Jenkins was served by regular first class U.S. mail, postage-prepaid upon Gregg LoCascio, Esq. of Kirkland & Ellis, 655 Fifteenth Street, NW, Washington D.C. 20005, and P. Abbott McCartney, Esq. of the Federal Trade Commission, Bureau of Competition, 601 Pennsylvania Avenue, NW, Washington D.C. 20580 this 10th day of June, 2002.

A handwritten signature in black ink, appearing to read "Brian E. Moran", written over a horizontal line.

Brian E. Moran

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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April 29, 2002

Gregg F. LoCascio, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5793

Re: **In the Matter of MSC Software Corp.**
F.T.C. Docket No. 9299 (the "FTC Proceeding")

Dear Mr. Locascio:

This firm represents Daratech, Inc. ("Daratech"). Daratech is in receipt of the subpoena you served on it in the FTC Proceeding.

Daratech wishes to avail itself of the "Amended Protective Order Governing Discovery Materials" entered in the FTC Proceeding on December 6, 2001 (the "Confidentiality Order"), a copy of which was forwarded to us by your office.

Daratech considers the information sought by MSC to be trade secret as a matter of common law and under Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f) and Commission Rule of Practice § 4.10(a)(2), 16 C.F.R. § 4.10(a)(2). Daratech regards not only the data found in its worksheets to be trade secret but also the form and layout of such spreadsheets. The form and layout reflects Daratech's proprietary and confidential methodologies of analyzing, reviewing and compiling the data it obtains from reporting companies.



Law Offices

BOSTON

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STAMFORD

GREENWICH

NEW YORK

WASHINGTON, D.C.

Accordingly, Daratech insists that the use of any information it provides in response to the subpoena be limited to the FTC Proceeding and that access to such information be confined to outside counsel, outside independent experts, FTC staff, court reporters, the Administrative Law Judge and his or her staff. In addition, to the extent that any information provided by Daratech is incorporated in any expert reports or other papers or filings, care must be exercised to maintain such information under seal and limit its disclosure to

ROBINSON & COLE^{LLP}

Gregg F. LoCascio, Esq.
April 29, 2002
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outside counsel, FTC staff, court reporters, the Administrative Law Judge and his or her staff and the outside independent experts you have expressly identified to Daratech, i.e., Jim Kearn of Charles River Associates, John Hille, an FTC staff economist, Jerry Hausman, an MIT economist, and Pablo Spiller, an economist at the University of California.

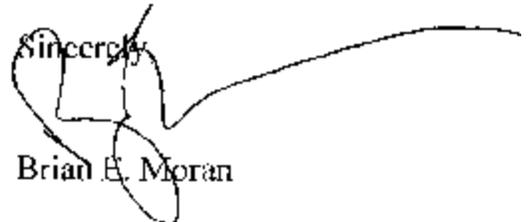
If any other outside independent experts are retained either by MSC or the FTC to whom either you or the FTC intends to disclose Daratech's trade secret information, Daratech insists that the names of such individuals (and either their bio or curriculum vitae) be provided so that Daratech may have an opportunity to object to said disclosure or to question their "independence", if appropriate to do so.

Daratech also expects the parties not only to restrict access to such materials but to maintain a log identifying anyone who is provided access and the date and time of such access. Daratech also expects the parties to take appropriate steps to apprise each person to whom access is provided of the confidentiality of the materials and to obtain their written acknowledgement and agreement to be bound by the Confidentiality Order.

Accordingly, the computer disc containing the requested discovery materials has been labelled "HIGHLY CONFIDENTIAL" and "Restricted Confidential, Attorney Eyes Only, FTC Docket No. 9299."

Please acknowledge on behalf of MSC and Kirkland & Ellis your agreement to the terms of this letter. I also respectfully request that if this information is made available to the FTC, a request be made of the Commission to acknowledge and agree, in writing, to be similarly bound by the confidentiality terms and obligations stated herein.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

Brian E. Moran

BEM:cjn



product lifecycle management (“PLM”), document/content management (“DM/CM”), supply-chain management (“SCM”), architecture, engineering and construction (“AEC”), plant design and management, and geographic information systems (“GIS”) industries.

4. As part of its business over more than 18 years, Daratech regularly issues surveys to various software developer industry participants. Daratech then periodically publishes forecast and historical industry data or statistics, including aggregated data and individual company data. As a consequence of such efforts, Daratech has amassed a proprietary database of market research devoted to the CAD/CAM/CAE, PDM, PLM, DM/CM, SCM, AEC, plant design/management and GIS industries.

5. Daratech compiles and analyzes its survey results on worksheets. Daratech regards the contents of its worksheets, database and survey results as proprietary and trade secret. In addition, Daratech treats the form and layout and structure of both its data collection surveys and its worksheets as trade secret. The form, layout and structure reflect Daratech’s proprietary and confidential methods of compiling, reviewing and analyzing the data it obtains from reporting companies, and also reflect Daratech’s proprietary and confidential methods of estimating such data for companies that either decline to report such data or report incomplete, inconsistent or ambiguous data.

6. Daratech produced its worksheets pursuant to an express understanding that they would be treated as confidential under the protective order entered in this proceeding. It was agreed that access to the worksheets would be limited to outside counsel, outside independent experts, FTC staff, court reporters and the Administrative

Law Judge and his or her staff. It was also agreed that care would be taken to keep the worksheets (and the information therein) under seal.

7. Daratech also sought and obtained MSC's commitment to provide advance notice as to the identity of any outside independent experts to assure that they were, in fact, "independent." Daratech was notified of Jim Kearn of Charles River Associates, John Hilke, an FTC staff economist, Jerry Hausman, an MIT economist, and Pablo Spiller, an economist at the University of California. Daratech voiced no objection to any of the foregoing.

8. In response to a separate subpoena issued by the FTC, Daratech produced materials as to which it did not invoke the extra protection of the protective order. Daratech offered to produce its worksheets on a computer disc for the FTC under the same conditions as those to which MSC had agreed.

9. The FTC was agreeable to treating the worksheets as trade secret and subjecting them to in camera treatment. The FTC only objected, on logistical grounds, to maintaining logs documenting who was provided access and the date and time of said access.

10. Daratech has invested considerable time and resources in developing and refining its unique, proprietary and confidential methods of gathering, compiling and analyzing industry statistics and data, as well as in the actual carrying out of gathering, compiling and analyzing of such industry statistics and data. Through such efforts,

Daratech has created a unique niche or position in the CAD/CAM/CAE marketplace. Daratech is considered one of the leading market research firms in the industry. In particular, its quantitative market projections and estimates are widely respected and cited by industry participants and the business and trade press. Daratech has achieved such stature, in large measure, through its unique, proprietary methods of gathering, compiling and analyzing its survey results.

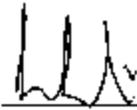
11. Daratech takes considerable precautions to safeguard the confidentiality of its worksheets. The access to such information (including electronic access) is limited to Daratech employees. This information is maintained in a secure place within Daratech's offices. The computer network on which this data is maintained is physically not connected to any outside network such as the Internet, and is thus impossible to access by anyone outside Daratech's offices. Access to Daratech's offices is strictly controlled. Such offices are locked and alarmed during non-business hours. Visitors are allowed only during normal business hours and by appointment. Visitors must sign in upon entry and sign out upon leaving, and are escorted by one or more Daratech employees at all times while on Daratech premises.

12. Neither the information in the worksheets nor the layout and format of the worksheets is known outside Daratech. It would be extremely time-consuming, expensive and difficult for anyone else to acquire, develop and/or duplicate such information. Both the information in the worksheets and the layout and format of the worksheets is of considerable economic value to Daratech and its competitors.

Daratech's historical data base, compiled over more than ten years, is highly valuable. It confers on Daratech knowledge, experiences and a historical perspective that distinguish it from other industry consultants, market research firms, analysts and economists. It enables Daratech to bring such experience to bear on consulting and market research assignments.

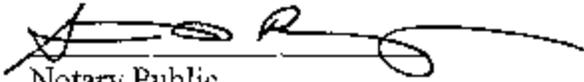
13. The disclosure of both Daratech's worksheets and the historical data base therein, as well as the consequential revelation concerning the form and layout or structure of said worksheets and Daratech's analytical methodologies, would cause irreparable harm to Daratech's business and goodwill. Daratech's actual and potential competitors would be provided with free and unfettered access to Daratech's proprietary data base, inner workings and analytical methodologies, which methodologies have evolved and been validated and refined over many years. In addition, Daratech's actual and potential competitors would be provided with free and unfettered access to the contents of Daratech's proprietary database, including sensitive and confidential data about individual companies surveyed and analyzed by Daratech, which disclosure would damage the considerable goodwill Daratech has generated as a leading market research firm in the CAD/CAM/CAE industry.

14. Daratech requests that the in camera treatment of its worksheets be indeterminate in length, inasmuch as the value of the information and its trade secret nature is not limited in time.



Bruce L. Jenkins

Sworn to before me this
10th day of June, 2002.


Notary Public

My Commission Expires: 10-13-06

would likely cause a clearly defined, serious injury to Daratech in that said material is secret and of significant commercial value to Daratech and competing industry analysts, market research firms, consultants and economists.

2. Daratech has made the requisite showing that the information in question is not known outside Daratech, the information is disclosed within Daratech only to employees with a need to know, Daratech has taken reasonable measures to safeguard and preserve the confidentiality of said information, the information is of significant value to Daratech and its competitors, Daratech has expended considerable time, money and resources to develop the Database and Methodologies, and it would be extremely difficult for competitors to develop or duplicate the information on their own using legitimate means.

3. In view of the fact the computer disc was provided by Daratech under the express condition that it be treated as confidential under the protective order in this proceeding and, as such, access thereto would be limited to outside counsel, outside independent experts, FTC staff, court reporters, and the Administrative Law Judge and his or her staff, it would now be unfair to deprive Daratech of such protection.

4. It is also noted that neither the Respondent nor the FTC has objected to the continued treatment of the information in question as confidential under the protective order.

5. Given the continuing trade secret nature of the Database and Methodologies, the computer disc and the information therein shall be accorded in camera treatment for an indeterminate amount of time.

So Ordered

Dated: _____, 2002

The Honorable _____
Administrative Law Judge