PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

ANSYS, INC.'S MOTION TO FILE THE ATTACHED REPLY IN FURTHER SUPPORT OF ITS MOTION TO LIMIT MSC's SUBPOENA *DUCES TECUM*

Third Party, ANSYS' Inc., seeks leave to file the attached Reply in Further Support of Its Motion to Limit MSC's Subpoena *Duces Tecum*. A reply is necessary in order to correct numerous, unsupported distortions of the record made by MSC in its Response, which may improperly influence this tribunal's decision. MSC's distortions of the record are discussed more fully in the ANSYS' Reply.

Respectfully submitted,
KIRKPATRICK & LOCKHART LLP

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Joseph C. Safar, Pa I.D. No. 78205

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Counsel for ANSYS, Inc.

Dated: January 31, 2002

CERTIFICATE OF SERVICE AND ELECTRONIC FILING

The undersigned certifies that on January 31, 2002, I caused a copy of the attached ANSYS, INC.'S MOTION TO FILE THE ATTACHED REPLY IN FURTHER SUPPORT OF ITS MOTION TO LIMIT MSC's SUBPOENA *DUCES TECUM* to be served upon the following persons by hand:

The Honorable D. Michael Chappell
Administrative Law Judge
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

Richard B. Dagen, Assistant Director
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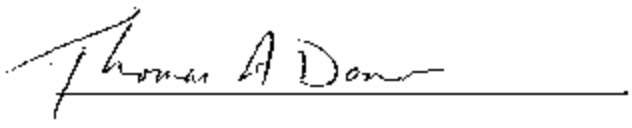
Counsel for ANSYS, INC.



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ORDER

AND NOW, this __ day of _____, 2002, upon consideration of ANSYS Inc.'s Motion to File the Attached Reply in Further Support of It's Motion to Limit MSC's Subpoena *Duces Tecum*, it is hereby ORDERED that said motion is GRANTED.

_____
D. Michael Chappell
Administrative Law Judge

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF	)	
MSC.SOFTWARE CORPORATION,	)	Docket No. 9299
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ANSYS, INC.'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO LIMIT MSC's SUBPOENA *DUCES TECUM* SERVED BY MSC

The disingenuousness of MSC's Response to ANSYS' Motion to Limit Subpoena Duces Tecum compels ANSYS to take the usual step of requesting leave to file a Reply Brief regarding ANSYS' Motion To Limit MSC's Subpoena *Duces Tecum* ("ANSYS' Motion"). Through highly selective use of ellipses and alleged quotations without cited sources, MSC repeatedly distorts the record in a desperate effort to erect a façade of reasonableness to conceal the excessive burden it seeks to impose on ANSYS.[1] MSC's two-faced tactics, however, cannot obscure the undisputed fact that MSC is abusing its subpoena power to harass ANSYS.

A. MSC's Disingenuous Distortions of the Record.

First, MSC's attempt to paint ANSYS as the intransigent party that has switched its position is the consummate case of the pot calling the kettle black. MSC's assertion that ANSYS took a "prior position" that it has "'nothing of relevance' to contribute to this case" (MSC Br. at 1) is simply untrue. ANSYS has always acknowledged, as set forth in ANSYS' Motion, that (i) it has certain categories of information that may be relevant to this case, (ii) it does not object to producing them, and (iii) the tribunal has a right to material information. See,

[1] This tribunal will no doubt take notice of the fact that while ANSYS supports its account with sworn statements and a detailed Rule 3.22 Statement of Counsel, MSC offers no such evidence and instead puts up a smoke screen.

e.g., Third Party ANSYS, Inc.'s Motion to Extend Time To Respond And/or Move To Limit or Quash Subpoena *Duces Tecum* Served By MSC.Software Corporation, at 1-2. The problem is that MSC has made an indiscriminate demand for virtually every document in ANSYS' files, regardless of whether the information therein is material, or merely duplicative, or can readily be obtained in a far more efficient fashion.

Second, MSC disingenuously asserts that ANSYS has only collected four boxes of documents. MSC Br. at p. 9. MSC conveniently ignores sworn testimony that in addition to four boxes of hard copies of documents, ANSYS has also collected 2.13 gigabytes of electronic files (consisting of over 1000 documents and hundreds of emails). Secunda 1/17/02 Aff. at ¶ 8. In fact, ANSYS has already produced and is in the process of producing a substantial volume of documents which provide all of the information the parties need from ANSYS.

Third, MSC disingenuously suggests that its antitrust counsel was involved in negotiations over ANSYS' offer for the UAI and CSAR assets only due to "ANSYS' unilateral decision to provide MSC's antitrust counsel a copy of that offer." MSC Br. at p. 19 n.15. ANSYS' first contact with MSC regarding a possible purchase of the assets to be diverted was an inquiry by MSC's antitrust counsel to ANSYS' outside counsel regarding ANSYS' possible interest in such a purchase. See December 20, 2001 letter from Tefft W. Smith to Thomas A. Donovan, attached hereto as Exhibit A. This inquiry came in a telephone call which occurred prior to the service of any subpoena on ANSYS and which was purportedly a courtesy call warning that MSC would be serving a subpoena. When ANSYS' management sent MSC's management an offer, ANSYS' outside counsel extended to MSC's counsel the courtesy of a copy. Then, after MSC's management responded to ANSYS' management regarding the offer and ANSYS' management replied to MSC's management by suggesting a meeting of the business people to discuss the offer, MSC's antitrust counsel replied to ANSYS' outside counsel on behalf of MSC, advising there would be no such meeting. Additionally, MSC's antitrust counsel called ANSYS' outside counsel on December 20, 2001 and directed that all future

communications from ANSYS concerning any offers should be directed to MSC's antitrust counsel. MSC's attempt now to "retreat " from this position and instead invite offers directly to MSC is a suspiciously convenient (and transparent) attempt to gain access to ANSYS' negotiating strategy.

B. MSC's "Two Small Modifications" are Not Small at All.

MSC asserts that "two small modifications whom to ask and what to ask for – to ANSYS' Proposed Search is all that is necessary to provide MSC with the evidence that it needs to prepare its case and present its defense." MSC Br. at 4. In fact, MSC's proposed notifications are enormous in terms of the additional burden they will impose on ANSYS and "small" only in the amount of non-duplicative material information they will provide.

First, MSC's assertion that ANSYS should expand its search beyond the nineteen individuals identified in Mr. Secunda's affidavit is unsupportable. MSC's position is built on rogue speculation about what may be in these individuals' files. ANSYS is required only to conduct a reasonable search. Looking in the files of those individuals to whose files ANSYS would look, in the ordinary course of its business, to obtain relevant information is eminently reasonable. Forcing ANSYS to look in places where it would not expect to find additional, non-duplicative, relevant materials is abusive.

Second, MSC's vague generalizations regarding customer files ANSYS should be required to search is equally unsupportable. Many of the broad customer designations provided by MSC, such as General Motors, DaimlerChrysler and General Electric, are of no meaning without identification of a specific division or department. It is not uncommon for two different divisions or departments within such large corporations to use an ANSYS and an MSC product, respectively, for different purposes with no substitutability. Such parallel but distinct usage

within a multi-faceted organization in which disparate divisions happen to do business under the same name has no competitive significance.

Third, MSC's passing suggestion that ANSYS be required to send an email to all employees residing in the United States asking them to forward any documents responsive to the original, unfocused subpoena is a modification that swallows any attempt to narrow the subpoena. This modification essentially re-expands the search to any document responsive to the subpoena, as drafted, possessed by any employee. While this process would impose enormous burdens on ANSYS, it would not produce substantial, non-duplicative and material information.

Fourth, MSC's assertion that it needs every document related in any way to competition between ANSYS and MSC for new customers is conclusively defeated by MSC's own statements. MSC argues that Mr. Wheeler's statement that ANSYS competes with MSC for new customers is sufficient to "defeat[] Complaint Counsel's primary argument for the existence of an "Advance Nastran" market . . . " MSC Br. at 5. If, as MSC claims, Mr. Wheeler's Affidavit is sufficient to establish MSC's defense (and Mr. Wheeler will be a witness at trial), MSC clearly does not need every document in the company which will do no more than support Mr. Wheeler's Affidavit. MSC's insistence on forcing ANSYS to produce such documents is pure harassment.

Fifth, as part of its proposed "two small modifications" to ANSYS' searches, MSC provides a bullet point list of seven categories of information that that MSC believes captures the "evidence MSC deems critical to its case while minimizing its burden." MSC Br. at 13-14. If this is the evidence that MSC says is critical to its defense, why didn't MSC draft its subpoena narrowly so as to capture only this "critical" evidence in the first place? Much of this information has already been produced by ANSYS. However, even in this supposedly narrow list of "critical" information, MSC cannot resist drawing in broad categories of documents that have no relation to established NASTRAN customers' ability to switch to other solvers. For

instance, MSC demands not only documents related to the acquisition of solver producers, but also documents relating to the acquisition of any Mechanical Computer Aided Engineering company of any sort. And MSC demands financial[2] and pricing information not only for ANSYS' solver sales, but also for every other product or service. MSC Br. at 13-14. MSC's chosen path demonstrates that MSC was never interested in "critical" evidence but instead was interested in harassing ANSYS and bogging down these proceedings.

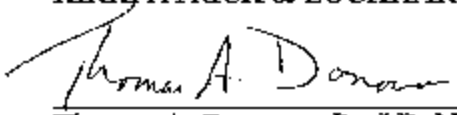
C. MSC Provides No Explanation for Singling Out ANSYS.

The most remarkable aspect of MSC's Response is its utter failure to discuss, let alone refute, the fact that it has singled out ANSYS for service with its overly broad and incredibly burdensome subpoena. As MSC certainly knows, if it were genuinely interested in developing data on the so-called FEA market it seeks to establish (for example in the price cross-electricity studies on which MSC premises its broad demand for pricing information (MSC Br. At 14)), it would, at a minimum, have to seek similar detailed information from all other major FEA developers. MSC admits that it "competes aggressively against . . . Dassault, HKS, SORC, PTC and others . . . " MSC Br. at 8. Under such circumstances, without comparable information from these other producers, ANSYS' information is useless.

[2] ANSYS takes this occasion to correct an inadvertent error in its Motion with respect to profitability information by product. ANSYS' Motion to Limit Subpoena *Duces Tecum* at 18. While ANSYS' normal financial package does not include data on profitability by product, certain planning documents have contained such an evaluation. ANSYS is producing such planning documents as they relate to the ANSYS solver, subject to the strictest confidentiality protections of the protective order in this matter.

There is simply no explanation for MSC's singling out ANSYS except a bad faith effort to harass ANSYS because of its relationship with SAS and in retaliation for ANSYS' offer to purchase the UAI and CSR assets from MSC.

Respectfully submitted,
KIRKPATRICK & LOCKHART LLP



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Counsel for ANSYS, Inc.

Dated: January 31, 2002

EXHIBIT A

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

December 20, 2001

VIA FACSIMILE

Thomas A. Donovan, Esq.
Kirkpatrick & Lockhart LLP
535 Smithfield Street
Pittsburgh, PA 15222-2313

Re: *In the matter of MSC.Software Corporation*, Docket No. 9299 (F.T.C.)

Dear Tom:

As we discussed today, the letter that Mr. Wheeler sent to MSC today is simply more posturing and makes material misstatements.

MSC did not engage in discussions with ANSYS as a "ploy to shield relevant information" from the FTC. To the contrary, I called you (upon referral from ANSYS's General Counsel, David Secunda) to discuss methods of obtaining discovery from ANSYS while minimizing the burden upon our respective clients. In the course of that discussion, I sought to verify my assumption that, with ANSYS's announced alliance with SAS and sales initiatives in the marketplace, ANSYS had *no* interest in the CSAR and UAI codes. You stated that ANSYS "might" be interested and said you would get back to me. You subsequently called and said that ANSYS was "interested" and that ANSYS would present a written proposal. I said on both occasions that I expected that MSC would be interested "*if* a serious proposal was presented, meanings *not* some token payment." The ensuing "offer" speaks for itself.

Notably, in calling to tell me that the "offer" was being transmitted, it was *you* – not us – that sought to shield any discussions as "settlement negotiations" and "privileged" under Federal Rule of Evidence 408. I immediately questioned how that could apply, asking you for legal authority on the point. At no time did I agree that any discussions were privileged.

KIRKLAND & ELLIS

ANSYS's December 11th proposal makes clear why you wanted to claim such a privilege. It is obvious that ANSYS views the UAI and CSAR codes as essentially worthless and competitively insignificant, a fact that cannot be hidden. Mr. Wheeler's latest letter further confirms the fact that, in ANSYS's view, an MSC clone, created at MSC' s expense, and placed under ANSYS's control is worth a mere $500,000. This is powerful evidence of the highly competitive nature of the FEA/CAD market, and the inability of existing players to earn supracompetitive profits.

In any event, while MSC would have preferred to settle this burdensome litigation and spend all of its resources competing in the marketplace, it is clear that ANSYS hopes to impede MSC's ability to compete against ANSYS by joining forces with the FTC. We note the FTC's listing of Mr. Wheeler as a material witness for its case. But, the fact that ANSYS's interests are as a competitor – desiring to disable a competitor, rather than promote consumer welfare – are underscored by your assertion of a "settlement negotiation privilege," for a case in which ANSYS is ***not*** even a party.

We believe this is wrong, and expect to prove so in court.

Terri W. Smith
Counsel for MSC.Software Corporation.

PUBLIC

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The undersigned certifies that on January 31, 2002, I caused a copy of the attached ANSYS, INC.'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO LIMIT MSC's SUBPOENA *DUCES TECUM* SERVED BY MSC to be served upon the following persons by hand:

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Thomas A Dore