

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

Docket No. 9299



To: The Honorable D. Michael Chappell
Administrative Law Judge

**COMPLAINT COUNSEL'S MOTION TO COMPEL COMPLIANCE WITH
COMPLAINT COUNSEL'S FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS AND THINGS**

Complaint Counsel moves to compel Respondent to comply with Complaint Counsel's First Request for Production of Documents and Things, served on Respondent November 21, 2001 (attached as Exhibit A), as modified by Complaint Counsel's letter of December 26, 2001 (attached as Exhibit B). Although Respondent recently has begun producing responsive documents in a slow trickle, Complaint Counsel seeks this an order to compel, because Respondent does not appear to be conducting an adequate scope of search for responsive documents, because the pace of production is unacceptably slow, and because Respondent has promised no final response date. Complaint Counsel have been unable to resolve these issues with Respondent despite diligent efforts for more than two months. Further delay in resolution of this issue, and further delay in complete production, will further and unacceptably compromise Complaint Counsel's preparation of its case. Complaint Counsel seeks issuance of an order to compel compliance by Respondent. While Complaint Counsel would be satisfied were Your Honor to resolve the matter based upon the written motion and reply, we are prepared to discuss the issues at a status conference, if that would be helpful.

As Your Honor recognized in the order of January 18, 2002, Respondent had abandoned by that time many of its written objections to the Document Request, dated December 3, 2001 (hereinafter "Respondent's Objections", attached as Exhibit C), and Respondent made many promises to produce responsive documents in its Opposition to Complaint Counsel's previous motion to compel (attached as Exhibit D). Nevertheless, four outstanding issues remained at that time, and this court's January 18, 2002 order encouraged the parties to resolve them by January 25, 2002 (attached as Exhibit E). Immediately after receiving the January 18, 2002, order, Complaint Counsel contacted Respondent to attempt to resolve the remaining disputes. Respondent at first refused to engage in discussions with Complaint Counsel (e-mail from Tefft Smith to McCartney and Mills, January 18, 2002; e-mail from Tefft Smith to McCartney and Mills, January 19, 2002, both attached together as Exhibit F), but after Complaint Counsel filed its emergency Supplemental Motion, (attached hereto as Exhibit G), Respondent did respond to Complaint Counsel's entreaties to discuss the resolution of these issues. By January 25, only one issue had been resolved: In a letter of January 24, 2002, Respondent agreed to produce a privilege log (attached as Exhibit H).

Although this court's January 18, order authorized Complaint Counsel to re-file a motion to compel if the four outstanding issues were not resolved by January 25, Complaint Counsel continued persistently trying to resolve the remaining three issues with Respondent for an additional week. One of the three issues was partially resolved on January 30, when Respondent abandoned its objection to producing the data responsive to the Document Request in the form Complaint Counsel had requested (Exhibit I, Letter from Karen Mills to Marimichael O. Skubel, January 30, 2002 confirming telephone conversation).

Respondent still offers no completion date for the data response, or any other aspect of the document request, however, and Respondent's projected pace of production suggests that full compliance is many weeks, if not months, away. Furthermore, Respondent has not indicated whether it will abandon its general objection to searching backup tapes and comply with Complaint Counsel's very much pared down and focused 15 person scope of search (Exhibit I, Letter from Karen Mills to Marimichael O. Skubel, February 1, 2002).

In addition, two new issues have arisen. First, in the course of negotiating a prioritized production, Respondent shared with Complaint Counsel lists of persons whose files had been searched (fax from Marimichael O. Skubel to Karen Mills, January 25, 2002; fax from Marimichael O. Skubel to Karen Mills, January 28, 2002, attached together as Exhibit K). Complaint Counsel chose from among them certain files to be prioritized in Respondent's production, but in the course of reviewing those lists, also noticed and called to Respondent's attention that the scope of search for responsive documents appeared to be inadequate (see Exhibit I, supra). Complaint Counsel added additional names to the list for both scope of search and priority reasons, and called to Respondent's attention that archived, electronic, and e-mail files of certain former employees also should be searched, but has not heard from Respondent whether Respondent will expand its search. (see Exhibit J, supra).

The second new issue that has arisen and which Complaint Counsel seeks this court's assistance to resolve is improper confidentiality designation under the Protective Order of documents produced. Complaint Counsel noticed that each and every page of every document in the first box of documents Respondent produced was marked "CONFIDENTIAL," even though most of the documents, including Respondent's own press releases and analysts' reports, were

not entitled to confidential treatment, suggesting Respondent had not done a good faith evaluation of the confidential nature of documents produced. Later, reportedly in an effort to expedite production of documents, Respondent abandoned any effort to even evaluate what level of confidentiality documents were entitled to, and began to mark each and every page "RESTRICTED CONFIDENTIAL." While Complaint Counsel appreciate that Respondent may have adopted this latter practice to expedite production, and Complaint Counsel appreciate that this approach may give Complaint Counsel the opportunity to review improperly designated documents sooner than otherwise would be the case, Respondent should be required promptly to correct improper confidentiality designations so that Complaint Counsel and this court can use documents properly, with experts, in pleadings, at trial, and in any rulings or decision as contemplated by the Protective Order previously agreed to by Respondent and entered by this court.

Complaint Counsel's first Motion to Compel petitioned this court to order Respondent to produce responsive documents by January 25, 2002, and to prioritize a rolling production by producing: responsive documents of persons scheduled to be deposed (Messers. Beer, Brown, Cully, Curry, Hart, Jones, Louwers, and Riordan); all responsive documents relating to a short list of significant customers handled by the persons scheduled to be deposed (Boeing, all NASA centers, Lockheed, GM, Chrysler, and Ford); and all MSC board minutes. While Complaint Counsel has in good faith complied with Your Honor's direction to attempt to resolve disputed issues voluntarily, January 25, has come and gone, and Respondent still has neither produced these documents nor committed to a production date for any responsive documents.

Complaint Counsel respectfully moves that this court compel Respondent to comply with

the Document Request, and correct confidentiality designations. A draft order is attached as Exhibit I. For the reasons set forth above, and in Complaint Counsel's previously filed Motion to Compel, Complaint Counsel request that this Motion to Compel Compliance with Complaint Counsel's First Request for Production of Documents and Things be granted.

February 5, 2002

Respectfully Submitted,



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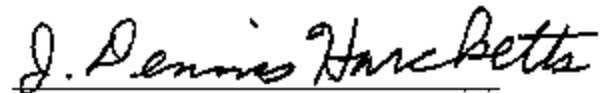
CERTIFICATE OF SERVICE

This is to certify that on February 5, 2002, I caused a copy of Complaint Counsel's Motion to Compel Compliance with Complaint Counsel's First Request for Production of Documents and Things to be served via hand-delivery upon the following persons:

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

Marimichael O. Skubel, Esquire
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Exhibit A

representatives of the foregoing. The terms "subsidiary", "affiliate" and "joint venture" refer to any person in which there is partial (25 percent or more) or total ownership or control by CSAR. When "company" is used in any specification, it includes CSAR for purposes of producing documents, information, and things separately for CSAR.

- D. The term "documents" means all computer files and written, recorded, and graphic materials of every kind in the possession, custody or control of the company. The term "documents" includes electronic correspondence and drafts of documents, copies of documents that are not identical duplicates of the originals, and copies of documents the originals of which are not in the possession, custody or control of the company. The term "computer files" includes information stored in, or accessible through, computer or other information retrieval systems. Unless otherwise specified, the term "documents" excludes bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely transactional nature and also excludes architectural plans and engineering blueprints.
- E. The term "person" includes the company and means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.
- F. The term "relating to" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, stating or in any way referring to.
- G. The term "documents sufficient to show" means documents that are necessary and sufficient to provide the specified information. If summaries, compilations, lists, or synopses are available that provide the information, these may be provided in lieu of the underlying documents.
- H. The terms "and" and "or" have both conjunctive and disjunctive meanings.
- I. The terms "each," "any," and "all" mean "each and every."
- J. The term "including" means including but not limited to.
- K. The singular form of a noun or pronoun includes its plural form, and vice versa; and the present tense of any word includes the past tense, and vice versa.
- L. The term "communication" means any exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished.
- M. The term "agreement" or "contract" means any oral or written contract, arrangement or understanding, whether formal or informal, between two or more persons, together with all modifications or amendments thereto.

- N. The term "plans" means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.
- O. The term "relevant product" and "relevant service" as used herein means Nastran and FEA software and any services provided in connection with or relating to either Nastran or FEA software, including maintenance, bug fixes, updates, initialization, media, transfer, product development or enhancement, customer-funded development, training, and hot line and 1-800 consultation.
- P. The term "Nastran" means all software products, regardless of platform on which the software operates, based in whole or in part on the Nastran code or Nastran kernel developed originally either by the National Aeronautical and Space Administration ("NASA") or by any person acting pursuant to a development contract with NASA, and includes any program released into the public domain by NASA or the University of Georgia; all value-added enhancements, features, modules, applications, applications programming interfaces, programming languages, and Direct Matrix Abstraction Programming ("DMAP") for any Nastran product; all products that integrate or combine Nastran with any other product; and all services relating to Nastran, including maintenance, bug fixes, updates, initialization, media, transfer, product development or enhancement, customer-funded development, training, and hot line and 1-800 consultation for Nastran products. The term also includes Nastran for Windows, MSC.FEA, Dytran, MARC, Flight Loads, Astros, Gensa, Akusmod, Working Model, Elfini, GPS, Cosmos, or any other solver licensed or sold by MSC.
- Q. The term "FEA software" means all software products offering finite element analysis, including Nastran, regardless of platform on which the software operates, and includes all value-added enhancements, features, modules, applications, applications programming interfaces, and programming languages for the software, all products that integrate or combine the FEA software with any other product, and all services relating to maintenance, bug fixes, updates, initialization, media, transfer, product development or enhancement, training, and hot line and 1-800 consultation for FEA products.
- R. The term "minimum viable scale" means the smallest amount of production at which average costs equal the price currently charged for the relevant product. It should be noted that minimum viable scale differs from the concept of minimum efficient scale, which is the smallest scale at which average costs are minimized.
- S. The term "non-recoverable costs" means the acquisition costs of tangible and intangible assets necessary to manufacture and sell the relevant product that cannot be recovered through the redeployment of these assets for other uses.

INSTRUCTIONS

1. Except for privileged material, the company shall produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. Except for privileged material, the company shall not mask, cut, expunge, edit or delete any responsive document or portion thereof in any manner.
2. All references to year refer to calendar year. Unless otherwise specified, each of the specifications calls for documents and information dated, generated, received, or in effect after January 1, 1995. The company shall supplement, amend, or correct the disclosure and responses to these requests on a continuing basis, within 20 days of ascertaining that it possesses any additional responsive information. This request shall be deemed continuing in nature.
3. The geographic scope of search is the world.
4. Unless otherwise indicated, in lieu of original hard-copy documents or electronically-stored documents, the company must submit legible copies. However, if the coloring of any document communicates substantive information, the company must submit the original document or a like-colored photocopy. Electronic documents shall be produced, including documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off company premises. Electronic mail messages shall also be provided, even if only available on backup or archive tapes or disks. Computer files shall be printed and produced in hard copy or produced in machine-readable form (provided that Complaint Counsel determine prior to submission that it would be in a format that allows the agency to use the computer files), together with instructions and all other materials necessary to use or interpret the data.
5. Magnetic media shall be submitted in the following forms and formats:
 - a. Magnetic storage media. The FTC will accept: (1) 9-track computer tapes recorded in ASCII or EBCDIC format at either 1600 or 6250 BPI; (2) 3.5-inch microcomputer floppy diskettes, high-density, double-sided, formatted for IBM compatible computers (1.44 MB capacity); (3) Iomega ZIP disks formatted for IBM compatible PCs (100 or 250 MB capacity); (4) CD-R74 CD-ROM readable disks formatted to ISO 9660 specifications (650 MB capacity); (5) Iomega DITTO mini data cartridges (2000 MB capacity). The FTC will accept 4mm & 8mm DAT and other cassette, mini-cartridge, cartridge, and DAT/helical scan tapes by pre-authorization only. In all events, files provided on 4mm DAT cassettes must not be compressed or otherwise altered by proprietary backup programs. Where data is to be transferred from a UNIX system the FTC will accept data provided

on 8mm DAT created using TAR or DD.

b. File and record structures.

(i) Magnetically-recorded information from centralized non-microcomputer-based systems:

(a) File structures. The FTC will accept sequential files only. All other file structures must be converted into sequential format.

(b) Record structures. The FTC will accept fixed length records only. All data in the record is to be provided as it would appear in printed format: *i.e.*, numbers unpacked, decimal points and signs printed.

(ii) Magnetically-recorded information from microcomputers. Microcomputer-based data: word-processing documents should be in DOS-text (ASCII), WordPerfect 8 or earlier version, or Microsoft Word 2000 or earlier version format. Spreadsheets should be in Microsoft Excel 2000 (.xls) or earlier version, or Lotus-compatible (.wk1) format. Database files should be in Microsoft Access 2000 (.mdb) or earlier version, or dBase-compatible (.dbf), version 4 or earlier, format. Database or spreadsheet files also may be submitted after conversion to ASCII delimited, comma separated format, with field names as the first record, or to or fixed length fields accompanied by a record layout. Graphic images must be in TIFF 4 format, compressed and unencrypted. Other proprietary software formats for word processing documents, spreadsheets, databases, graphics and other data files will be accepted by pre-authorization only. For microcomputer files that are too large for one disk, files may be provided in a compressed ZIP format.

c. Documentation.

(i) Data must be accompanied by the following information:

(a) full path name of the file; and

(b) the identity of the media on which on which it resides, e.g. the identity of the cd, zip disk or floppy that holds the file. In the case of complex files or directories of files, all component files that are part of a given directory must be specified with their full path names. Where necessary, the subdirectories that must be created in order to successfully read these submitted files must be provided.

- (ii) Files must be accompanied by the following information: (a) filename; (b) the identity of the particular storage media on which the file resides; (c) the position of the file on the media.
- (iii) For all sequential files, the documentation also must include:
 - (a) the number of records contained in the file;
 - (b) the record length and block size ; and
 - (c) the record layout, including the name of each element, the element's size in bytes, and the element's data type.

The documentation should be included in the same package as the storage media, along with a printout of the first 100 records in report format.

- d. Shipping. Magnetic media should be carefully packed to avoid damage, and must be shipped clearly marked: **MAGNETIC MEDIA DO NOT X-RAY.**
 - e. Virus Checks: Media will be scanned for computer viruses. Infected media will be returned for replacement.
6. As to Specification No. 22, submit all data from MSC's Oracle or other data bases in machine readable form in Excel (.xls) 2000 or prior version, or Lotus-compatible (.wk1) format, or in ASCII delimited, comma separated or fixed length field format, with field names as the first record. Additionally, Complaint Counsel wishes to consult prior to submission of responses to Specification Nos. 3 and 22 to assure that the machine readable data are in a format that allows use of the computer files.
 7. Except where otherwise indicated, MSC shall respond to each specification separately for MSC, UAI, and CSAR by producing documents, information, and things based upon their original source. For example, when "company" is used in the specifications it means producing documents, information, and things separately for MSC, UAI, and CSAR.
 8. The company shall mark each submitted page or sheet with its corporate identification, *i.e.*, MSC, and with consecutive document control numbers. Where documents are from the former files of UAI or CSAR, the company shall either mark each submitted page with the further corporate identification, *i.e.*, "MSC-UAI," and "MSC-CSAR" or supply a log identifying such files or documents.
 9. Responsive documents from each person's files shall be produced together in file folders that segregate the person's files. Documents responsive to Specification No. 16 shall be produced in file folders segregated by customer and in chronological order within each

customer file.

10. For each box containing responsive documents the company shall:
 - a. number each box; and
 - b. mark each box with the name(s) of the person(s) whose files are contained in that box, with the name of the company originally creating the files, *i.e.*, MSC, UAI, or CSAR, and the corresponding consecutive document control numbers for each such person's documents.
11. Where identical copies are found in more than one person's files, the company must produce one copy from each person's files, or otherwise identify the person from whom identical copies of the document are found.
12. If the company has produced documents responsive to this request in the course of the pre-complaint investigation of this matter, FTC File No. 001-0077, those documents need not be produced again, unless identical copies are found in more than one person's files. In such a case, the company must produce or identify from each person's files all identical copies of documents previously produced in the pre-complaint investigation.
13. If it is claimed that any document, or portion thereof, is responsive to any request is privileged, work product, or otherwise protected from disclosure, identify such information by its subject matter and state the nature and basis for any such claim of privilege, work product, or other ground for nondisclosure. As to any such document, state or describe:
 - a. the reason for withholding it or other information relating to it;
 - b. the author and date of the document;
 - c. each individual to whom the original or a copy of the document was sent;
 - d. each individual who received the original or a copy of the document;
 - e. the date of the document or oral communication;
 - f. the general subject matter of the document;
 - g. the relevant document request the document is responsive to;
 - h. whether the document was prepared in anticipation of litigation, and if the document was prepared in anticipation of litigation, in addition provide the names

of parties, case number, and the date of the complaint filing; and

- i. any additional information on which you base your claims of privilege.

For each author, addressee, and recipient, state the person's full name, title, and employer of firm, and denote all attorneys with an asterisk. The description of the subject matter shall include the number of the pages of each document and shall describe the nature of each document in a manner that, without revealing information itself privileged or protected, will enable Complaint Counsel to assess the applicability of the privileged or protection claimed. Any part of a document to which you do not claim privilege or work product should be produced in full.

14. If there are no documents responsive to any particular request, the company shall state so in its answer to the document request.
15. If documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business, but the company has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify persons having knowledge of the content of such documents.
16. In lieu of original documents, the company may submit legible copies of documents so long as the company verifies with the attached form that they fully and accurately represent the originals.
17. To furnish a complete response, the person supervising compliance with this request must submit a signed and notarized copy of the attached verification form along with the responsive materials.

SPECIFICATIONS

1. One copy of each organization chart and personnel directory in effect since January 1, 1995, for the company as a whole, and for each of the company's facilities or divisions involved in any activity relating to any relevant product or service.
2. Documents sufficient to show all document retention and destruction systems, policies, procedures, capabilities, and personnel of the company:
 - a. the persons responsible for managing such systems, policies, procedures, or capabilities;
 - b. any special policies or procedures put into place by MSC as a result of the Federal

Trade Commission's investigation of the company's acquisitions of UAI and CSAR;

- c. all electronic data and document management information systems of the company;
 - d. all network-accessible documents, information and financial data systems;
 - e. all backup procedures; and
 - f. the process and cost of recovery of backup files including documents sufficient to show:
 - (i) the cost of recovery of backup files generally,
 - (ii) the cost of recovery of backup files containing documents responsive to the Federal Trade Commission's June 28, 2000, Subpoena Duces Tecum to MSC.Software, and
 - (iii) the cost of recovery of backup files containing documents responsive to this document request.
3. All budget and financial statements, including financial projections, income statements, balance sheets, general ledgers, capital investment plans, operating reports, budget and operating results for individual business groups and product lines, and board or management financial performance summaries, presentations or other management reporting packages, together with all documents relied upon to compile such documents, including documents sufficient to show and all computerized data containing detailed income statement and balance sheet line items; and all documents analyzing, interpreting, or otherwise discussing the information, figures, or trends found or identified in such budget or financial statements.
4. All stock analysts' or other investment community analyses, recommendations, or research reports relating to the company, to any relevant product or service, or to computer aided engineering products and services in general, including all Daratech tables, analyses, and research reports.
5. All documents recording or relating to any communications between or among the company and any individual stock analyst or other person engaged associated with the investment community, including correspondence, press releases, notes, agendas, scripts, transcripts and recordings.

6. All documents relating to any meeting of or decision making by the board of directors or of any board, executive, or management committee, including:
 - a. all announcements of, agendas for, and minutes of any meeting;
 - b. all memoranda, reports, presentations, or other documents distributed to or presented to such board or committees, including all documents relied upon to prepare the memorandum, report, or presentation; and
 - c. all documents relating to the deliberations and decision making of the board or committee, including notes taken by any persons participating in any such meeting or decision making.

7. All documents relating to MSC's acquisitions of UAI or CSAR and the post-acquisition integration of UAI or CSAR into MSC, including:
 - a. all pre-acquisition communications between the parties relating to the transaction or its effects, including any plans, proposals, agreements, contracts, executive and employee agreements, distribution agreements, covenants not to compete, licenses, patents, copyrights, trade secrets, and trademarks;
 - b. all documents relating to changes and plans for changes in MSC's, UAI's, or CSAR's operations, structure, policies, pricing, strategies, corporate goals, financing, business, officers, employees, product lines, product features, development, or enhancements, any other area of corporate activity as a result of either acquisition, including whether to honor existing UAI or CSAR contracts;
 - c. all documents relating to former UAI and CSAR customers' continued use of UAI Nastran, CSAR Nastran, Astros, Gensa and to switching to or substitution of other products after the discontinuation of such UAI and CSAR products, including all contracts and pricing documents for such products;
 - d. all documents relating to changes or threatened changes in usage of Nastran for any customer or potential customer or changes in the company's revenue attributable to Nastran following the acquisitions;
 - e. all documents relating to the reasons for each acquisition;
 - f. all board and management committee documents relating to UAI and CSAR or to the proposed acquisitions or their effects, including memoranda, reports, correspondence, minutes, notes, presentations and agendas, as well as all documents used to prepare such memoranda, correspondence, minutes, notes,

presentations, and agendas, Excel worksheets, and communications from regional executives or other sales representatives;

- g. all documents relating to any person's valuation of UAI and of CSAR;
 - h. all documents relating to all statements or actions by any person in support of, in opposition to, or otherwise expressing opinions about either acquisition or its effects;
 - i. all documents relating to MSC's accounting or tax treatment of each acquisition, including any writcoff of goodwill from each acquisition;
 - j. all documents relating to any efficiencies, cost savings, economies, synergies, or consumer or other benefits from each acquisition and whether such efficiencies, cost savings, economies, synergies, or other benefits could be achieved without acquiring UAI or CSAR;
 - k. documents sufficient to show the name, address, and job responsibilities of all persons employed by or acting as a consultant or agent to either UAI or CSAR at any time since January 1, 1998, and whether MSC hired or retained the person as an employee, consultant, or agent for any period since making each acquisition; all employment or consulting contracts with each such person; and all documents relating to salaries, compensation, bonuses, stock options, or other financial incentives paid or provided to the person by any person; and
 - l. all documents relating to each job, program, or project assigned or given by MSC to each former UAI or CSAR employee, consultant, or agent employed or retained by MSC, including documents sufficient to show (i) the contribution and performance of each such person to the job, program, or project, (ii) the goal or objective of the job, program, or project, (iii) the dates the job, program, or project began and concluded, (iv) the personnel requirements for the job, program, or project, (v) the name, address, and job responsibilities of other persons working on job, program, or project, (vi) the job's, program's, or project's budget, including personnel costs, and (vii) the recruiting efforts undertaken to staff the program or project.
8. All documents relating to the competitive significance, actual or projected financial status or condition, and long term viability of UAI or CSAR prior to their acquisitions by MSC, including UAI's or CSAR's intentions or attempts to sell UAI or CSAR, UAI's or CSAR's plans to exit the market or to cease supplying any relevant product or service, and ability to engage in the continuing sales, licensing, marketing, development, programming, and customer support of any relevant product or service.

9. All documents relating to any person's plans relating to any relevant product or service or to any product or service compatible with any relevant 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 relevant product toward greater revenue realization from any relevant 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.
10. All documents relating in any person's prices, pricing decisions, pricing proposals, licensing fees, or cost of services relating to any relevant product or service generally or with respect to any particular customer or groups of customers, including standard and non-standard price lists, discount schedules and practices, pricing formulae for CMV, GLV, and BLV factors, campus and token pricing systems, pricing commitments, pricing for features, modules, and enhancements, pricing plans, pricing policies, pricing forecasts, pricing strategies, pricing analyses, cost analyses, supply and demand analyses, analyses regarding shifting from product pricing that includes service to pricing products and services separately or shifting from commodity pricing of any relevant product toward greater revenue realization from any relevant service whereby customers pay directly for such services, pricing negotiations, pricing for unlimited usage contracts, paid-up licence pricing, guidance to marketing or sales personnel regarding prices, presentations to customers relating to prices, pricing for development contracts, on-site and off-site service contracts, price for web sales and licensing, and all documents considered by or emanating from person, committee, or group making a pricing decision, recommendation, or proposal, including pricing packaging group and global pricing package committee.
11. All documents relating to competition in the design, development, enhancement, research, manufacturing, distribution, licensing, marketing, sale, support or service of any relevant product or service, including all documents relating to:
 - a. the market share or competitive position of the company or any of its competitors;
 - b. the relative strengths or weaknesses of any person producing or selling any product or service competing with any relevant product or service;

- c. the relative strengths and weaknesses and differences in capabilities, features, enhancements, and modules between or among any relevant products or services;
 - d. any actual or potential conditions affecting the supply, demand, entry, cost, price, quality, features, enhancements, modules, or applications relating to any relevant product or service;
 - e. efforts to win customers or sales from other companies, or the loss of customers or revenues due to competition or sales by other companies;
 - f. the effects of competition from any supplier of any relevant products or services, including MSC, UAI and CSAR, on sales, pricing, revenues, customers, development, features, enhancements, modules, or applications;
 - g. customers' use of in-house codes, traditional methods of product testing, or prototyping; and
 - h. lock-in effects or switching costs, including the use of unlimited usage agreements and paid-up licenses.
12. All documents relating to switching, including shifts in utilization, between or among any relevant 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 product or service or from use of a less than optimum 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 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 product or service; the use, availability, and 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.
13. All documents relating to actual, attempted, or potential entry into the market for any relevant product or service, including all documents relating to:
- a. the timeliness, conditions, costs, attractiveness, likelihood, or competitive significance of any such entry,

- b. the effects of unlimited usage contracts, paid up licenses, or any existing contracts by existing firms upon such entry;
 - c. 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;
 - d. 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;
 - e. the total costs required for such entry, including:
 - (i) 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
 - (ii) 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
 - f. 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.
14. All documents relating to the development or acquisition, including licensing, of any features, enhancements, modules, or applications for any Nastran product since January 1, 1995, including any such development or acquisition considered but not undertaken during that period, including:
- a. documents sufficient to show the feature, enhancement, module, or application, the price or charge to the customer for each such feature, enhancement, module, or application, the date each such feature, enhancement, module, or application was added, and the function and benefits of such feature, enhancement, module, or application;
 - b. for all features, enhancements, modules, and applications developed in-house or considered for in-house development, all documents relating to the in-house

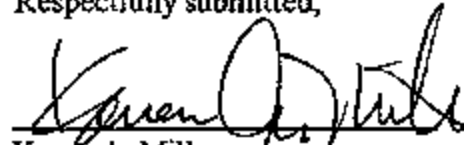
- development, development plans and strategies, time lines for development, budget and projected revenue for the development, personnel requirements, and the identity of customers likely to license the developed product; and any analyses whether to develop in-house or to acquire or license such feature, enhancement, module, or application;
- c. for all features, enhancements, modules, and applications co-developed with a customer or considered for such co-development, all documents relating to the development, development plans and strategies, the co-developer customer's identity, time lines for development, budget and projected revenue for the development, personnel requirements, and the identify of other customers likely to license the developed product;
 - d. for all features, enhancements, modules, and applications co-developed with another supplier of FEA software or considered for such co-development, all documents relating to the development, development plans and strategies, the co-developer supplier's identity, time lines for development, budget and projected revenue for the development, personnel requirements, and the identify of customers likely to license the developed product; and
 - e. for all features, enhancements, modules, and applications acquired, including licensing, by the company or considered for acquisition, all documents relating to the acquisition or licensing of such feature, enhancement, module, or application, the projected revenue for the feature, enhancement, module, and application, the identity of customers likely to license the developed product, and any analyses whether to develop in-house or to acquire or license such feature, enhancement, module, or application.
15. All documents relating to any change and modification to any MSC software product, proposed, implemented, or considered by MSC, that affected or could affect the compatibility of any MSC product to work or interface with any other software products, including any customer's pre- and post-processors or input or output file formats or models, the customer's ability to switch among Nastran products, or the cost, time required, ease, or difficulty of switching from any Nastran product supplied by MSC to any other product.
16. All documents relating to the licensing or sale of any relevant product or service to all customers, including customer-funded development, including
- a. all contracts, license agreements, offers, bids, bid solicitations, or proposals for contracts and licensing agreements and all documents interpreting, modifying, or amending such contracts, license agreements, offers, bids, or proposals;

- b. strategic, sales, and marketing plans for licensing and serving the customer, including sales call reports and sales presentations and pitches;
 - c. price lists, negotiation correspondence, price escalation calculations, documents relied upon to formulate or calculate prices, projections of prices offered by other suppliers of relevant products or services;
 - d. field and headquarters sales and contract files;
 - e. reports of prior or existing usage; and
 - f. invoices for products and services; and record of payment for products or services.
17. All documents relating to personnel and staffing for the development and technical support of any relevant product and service, including:
- a. all practices, policies, plans, agreements, and proposals relating to hiring and retention of employees, including recruiting efforts, employment incentives and bonuses, wage, salary, bonus, and stock option offers and agreements, incentives and restrictions on employee mobility, covenants not to compete, job advertisements, and the use of recruiting firms;
 - b. all documents relating to the use of off-shore developers and the use of contractors and consultants; and
 - c. all documents relating to the personnel and staffing needs for any general or specific job, program, or project, including customer-funded development projects.
18. All documents relating to any plans of, interest in, or efforts undertaken by the company or any other person for any acquisition, divestiture, joint venture, alliance, or merger of any kind involving the licensing or sale of any relevant product or service, including:
- a. any acquisition, joint venture, alliance, or merger of any kind with UAI or CSAR by any person;
 - b. the divestiture or sale by MSC of any former UAI or CSAR assets, intellectual property, employees, contracts, customer relations, or UAI's or CSAR's former businesses as going concerns;
 - c. any strategic business relationship between MSC and Dassault Systemes or any Dassault affiliated person or between MSC and IBM or any IBM affiliated person; and

- d. any acquisition of an interest in MSC by Dassault Systemes or any Dassault affiliated person.
19. All documents relating to financial or economic methodologies, formulae, or performance models or criteria used by the company or any person for valuing or determining the purchase prices for any actual, attempted, or potential acquisitions, divestitures, joint ventures, alliances, or mergers of any kind involving the licensing or sale of any relevant product or service.
 20. All license agreements for any intellectual property, including patents, copyrights, trademarks, or trade secrets, owned by any person other than the company and included in or furnished with any Nastran product or service, including all documents modifying, amending, or interpreting such agreements, all documents relating to payment of any licensing fees, and all documents relating to the company's plans, actions, or efforts to enforce such agreements against any person.
 21. All documents relating to any governmental, customer, contractual, industry, network, or collaborator requirements, preferences, custom, or practices requiring, recommending, suggesting, dictating, or promoting the use of any particular relevant product, including Nastran.
 22. Documents sufficient to show and all computerized data containing each transaction for the licensing or sale of any Nastran product or service for the period January 1, 1995, to the present, including:
 - a. the date of transaction,
 - b. the amount of the transaction,
 - c. the quantity,
 - d. the type and duration of the contract or license,
 - e. a description of each product or service licensed or sold (including product number or code),
 - f. the contract number,
 - g. the location, including physical address and serial number, of the computer where the software is located or service rendered,
 - h. the SIC code, trade or industry category, and business group of the customer, and

- i. the price paid for each item, including the beginning price, discount, net price, quantity, and units of usage, and as may be applicable.
23. For each relevant product or service offered for sale or licensing, all selling aids and promotional materials and all manuals, including instructional and installation manuals.

Respectfully submitted,



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

Dated: November 21, 2001

VERIFICATION

I personally supervised the preparation and assembly of this response in accordance with the Definitions and Instructions set forth in Complaint Counsel's First Request for Production of Documents and Things Issued to Respondent MSC Software Corporation in Docket No. 9299. All copies submitted in lieu of originals are true, correct and complete copies of the original documents. This response is complete and correct to the best of my knowledge and belief.

Signed: _____

Name: _____

Title: _____

Date: _____

Subscribed and sworn to before me this ____ day of

Notary Public

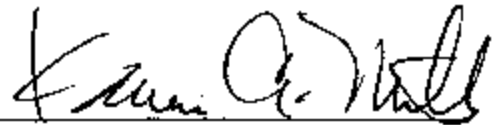
My Commission expires

CERTIFICATE OF SERVICE

This is to certify that on November 21, 2001, I caused a copy of the attached Complaint Counsel's First Request for Production of Documents and Things Issued to MSC Software Corporation to be served upon the following person by facsimile transmission and by hand-delivery:

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

Counsel for MSC Software Corporation



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

Exhibit B



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

December 26, 2001

Via Facsimile Transmission
(202) 879-5200

Marimichael O. Skubel, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, DC 20005

Re: MSC Software Corporation
FTC Docket No. 9299

Dear Ms. Skubel:

We received your December 21, 2001, letter proposing modification of Complaint Counsel's First Request for Production of Documents and Things, and the supporting information you sent. Based upon this information, and our previous meeting and telephone conferences, Complaint Counsel agree to modify Complaint Counsel's First Request for Production of Documents and Things as follows:

1. Specification 9 is modified at the beginning to read:

All documents relating to any person's plans relating (a) to any relevant product or service, and (b) to any product or service compatible with any relevant product or service (where those plans affected or may affect compatibility with any relevant product, ability to interface with any relevant product, cost or difficulty of switching among products, ease of entry into the market for any relevant product or service, customer utilization of any relevant product, or the demand for any relevant product), including business plans . . .

2. Specification 15 is modified to read:

All documents relating to any change and modification to any MSC software product, proposed, implemented, or considered by MSC, that affected or could affect the compatibility of any MSC product to work or interface with any relevant product, or with any customer's pre- or post-processor, input or output file formats, customers' ability to switch among Nastran products, or the cost, time required, ease, or difficulty of switching from any Nastran Product supplied by MSC to any other product.

Marimichael O. Skubel, Esq.
December 26, 2001

Page 2 of 2

3. Responsive documents will be produced from MSC customer contract files for all years since January 1, 1995, for those Nastran customers who spent more than \$25,000 in the aggregate on MSC products in any given year since January 1, 1995, provided, however, that responsive documents must be produced from customer contract files for all customers identified on Complaint Counsel's December 17, 2001, preliminary witness list, and for OAO Corporation and Hughes Space and Communications Company. This modification applies only to MSC customer contract files, and does not apply to UAI and CSAR customer contract files.

Complaint Counsel see no basis in the information you have provided for further modification of the Complaint Counsel's First Request for Production of Documents and Things.

Very truly yours,


Karen A. Mills
Complaint Counsel

Exhibit C

January 1, 1995 as to anything, let alone the blunderbuss demands for the production of documents Complaint Counsel has made. *See, e.g.*, Specification No. 16 (relating to all contracts, sales call reports, correspondence, and invoices, etc. for all sales by MSC for any products). This is particularly true since MSC operates in a *dynamic, high-tech industry* subject to sudden and significant Schumpeterian competition. Given that the FTC Commissioners found sufficient "reason to believe" on October 9, 2001, that MSC's acquisition of UAI in June, 1999, and CSAR in November, 1999, to merit this administrative proceeding, MSC's production obligations should be limited to searching for responsive documents since November 17, 2000 (the date MSC certified its compliance with the FTC's subpoena and CID), absent specific good cause shown for other discovery.

B. Objection to Applying the Geographic Scope of the Search to the World.

MSC objects to Complaint Counsel's instruction extending the geographic scope of the search for responsive documents and things to the world. MSC has admitted that the relevant geographic market is the world. However, to the extent that MSC intends to offer documents from foreign offices, MSC will search those offices. There is and there can be no showing of need for discovery from all of MSC's forty-five offices around the world.

C. Objection to Requests for Protected Information. MSC objects to Complaint Counsel's specifications to the extent that they call for the production of documents which are subject to the attorney-client privilege, are protected by attorney work product immunity, or any other evidentiary privilege or immunity.

D. Objection to Burdensomeness. MSC objects to Complaint Counsel's specifications to the extent that they are overly broad; unduly burdensome; unreasonably cumulative

or duplicative; seek information obtainable from some other source that is more convenient, less burdensome, or less expensive; seek information for which the burden and expense of production outweigh the benefit of having the information; and call for the production of documents and things not reasonably calculated to lead to the discovery of admissible evidence. MSC has already produced twenty-two boxes of documents during the course of the FTC's non-public investigation of MSC's 1999 acquisitions of CSAR and UAI. MSC objects to producing further documents in this case before the FTC has complied with its obligation to provide documents as part of its mandatory Initial Disclosures under Commission Rule of Practice 3.31, 16 C.F.R. § 3.31.

E. Objection to Definition of "The Company" and "MSC." MSC objects to Complaint Counsel's definition of "the company" and "MSC" to the extent it attempts to impose upon MSC an obligation to respond to these specifications on behalf of affiliates, joint ventures, directors, officers, employees, consultants, agents and representatives of the foregoing to the extent that MSC does not exercise control over such persons.

F. Objection to Definition of "Nastran." MSC objects to these specifications to the extent that Complaint Counsel's definition of "Nastran" calls upon MSC to produce documents and things unrelated to FEA solvers.

G. Objection to Produce Documents and Things Unrelated to the Aerospace and Automotive Industries and the Service Industries which Support Them. MSC objects to these specifications to the extent that they call upon MSC to produce documents and things unrelated to customers in the aerospace and automotive industries and the service industries which support them.

H. Objection to Imposition of Requirements Beyond Those Contained in the Commission's Rules. MSC objects to these specifications to the extent that they impose obligations

greater than those imposed by the Commission's Rules of Practice.

I. Objection to Complaint Counsel's Instruction No. 5 Regarding Format of Magnetic Media. MSC objects to Complaint Counsel's Instruction No. 5 regarding the formatting of magnetic media to the extent that it imposes obligations upon MSC beyond those required by Commission Rule of Practice 3.37, 16 C.F.R. § 3.37.

J. Objection to Complaint Counsel's Instruction No. 6 Regarding Format of Data Responsive to Specification No. 22. MSC objects to Complaint Counsel's Instruction No. 6 regarding the formatting of data responsive to Specification No. 22 to the extent that it imposes obligations upon MSC beyond those required by Commission Rule of Practice 3.37, 16 C.F.R. § 3.37.

K. Objection to Instructions Nos. 7 -10. MSC objects to Complaint Counsel's Instructions Nos. 7 - 10 to the extent that they call upon MSC to produce documents in a manner other than the way in which they were kept in the normal course of business and, therefore, seek to impose obligations upon MSC greater than those imposed by Commission Rule of Practice 3. 37, 16 C.F.R. § 3. 37.

L. Objection to Instruction No. 12. MSC objects to Complaint Counsel's Instruction No. 12 to the extent that it calls for MSC to produce copies of documents that are identical to those previously produced except for the fact that they are located in different files than those from which they were originally produced. Producing identical copies of previously-produced documents is unreasonably duplicative, cumulative, and burdensome.

M. Objection to Instruction No. 13. MSC objects to Complaint Counsel's Instruction No. 13 to the extent that it requires information to be contained within a privilege log

beyond that which is necessary to establish the grounds for an assertion of privilege or immunity with respect to that document. Specifically, MSC objects to Instruction Nos. 13g, 13h, and to the instruction that MSC identify the employer, firm, and title of each recipient, author, or addressee. MSC further objects to searching the files or logging any privileged documents from the files of outside counsel in this matter. MSC also further objects to logging any documents created after the date on which the FTC issued its Complaint in this matter.

N. MSC Responses Not an Admission of Complaint Counsel's Accuracy. MSC's production of any document or thing in response to these specifications is not an admission of the accuracy or completeness of any of Complaint Counsel's definitions. In addition, MSC's production of any document or thing in response to these specifications is not an admission regarding the admissibility, relevancy, responsiveness, or discoverability of such documents or things.

O. MSC's Agreement to Produce "Non-Privileged" Responsive Documents is an Agreement to Conduct a Reasonable Search. MSC's response to any specification that it intends to produce non-privileged responsive documents means that MSC agrees to conduct a reasonable search of its files for such documents and to produce such documents without waiving any of its general or specific objections or applicable privileges and immunities.

P. Reservation of Right to Further Object. MSC's enumeration of particular objections in response to Complaint Counsel's specifications is not, and should not be construed to be, a waiver of objections not so specified.

Q. Reservation of Right to Supplement. MSC reserves the right to supplement its responses to the specifications pursuant to Commission Rule of Practice 3.31, 16 C.F.R. § 3.31.

**MSC'S RESPONSES AND OBJECTIONS TO
COMPLAINT COUNSEL'S SPECIFICATIONS**

- I. One copy of each organization chart and personnel directory in effect since January 1, 1995, for the company as a whole, and for each of the company's facilities or divisions involved in any activity relating to any relevant product or service.

RESPONSE: Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that such documents and things have not already been produced.

2. Documents sufficient to show all document retention and destruction systems, policies, procedures, capabilities, and personnel of the company:
 - a. the persons responsible for managing such systems, policies, procedures, or capabilities;
 - b. any special policies or procedures put into place by MSC as a result of the Federal Trade Commission's investigation of the company's acquisitions of UAI and CSAR;
 - c. all electronic data and document management information systems of the company;
 - d. all network-accessible documents, information and financial data systems;
 - e. all backup procedures; and
 - f. the process and cost of recovery of backup files including documents sufficient to show:
 - (i) the cost of recovery of backup files generally,
 - (ii) the cost of recovery of backup files containing documents responsive to the Federal Trade Commission's June 28, 2000, Subpoena Duces Tecum to MSC Software, and
 - (iii) the cost of recovery of backup files containing documents responsive to this document request.

RESPONSE: MSC objects to subpart “f.(iii)” as unduly burdensome because it imposes obligations upon MSC greater than those imposed by the Commission’s Rules of Practice to the extent that the specification calls upon MSC to create information regarding “the cost of recovery of backup files containing documents responsive to this document request” which does not exist. Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents responsive to this Specification to the extent they have not already been produced.

3. All budget and financial statements, including financial projections, income statements, balance sheets, general ledgers, capital investment plans, operating reports, budget and operating results for individual business groups and product lines, and board or management financial performance summaries, presentations or other management reporting packages, together with all documents relied upon to compile such documents, including documents sufficient to show and all computerized data containing detailed income statement and balance sheet line items; and all documents analyzing, interpreting, or otherwise discussing the information, figures, or trends found or identified in such budget or financial statements.

RESPONSE: MSC objects that the specification is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it calls for the production of documents and things unrelated to FEA solvers. Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that the specified documents and things pertain to FEA solvers and have not already been produced.

4. All stock analysts’ or other investment community analyses, recommendations, or research reports relating to the company, to any relevant product or service, or to computer aided engineering products and services in general, including all Daratech tables, analyses, and research reports.

RESPONSE: Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that have not already been produced.

5. All documents recording or relating to any communications between or among the company and any individual stock analyst or other person engaged [*sic*] associated with the investment community, including correspondence, press releases, notes, agendas, scripts, transcripts and recordings.

RESPONSE: MSC objects that the specification is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it seeks documents and things unrelated to any issue in this case. Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that they pertain to FEA solvers and the specified documents and things relate to other specifications of this document request and to the extent that they have not already been produced.

6. All documents relating to any meeting of or decision making by the board of directors or of any board, executive, or management committee, including:
 - a. all announcements of, agendas for, and minutes of any meeting;
 - b. all memoranda, reports, presentations, or other documents distributed to or presented to such board or committees, including all documents relied upon to prepare the memorandum, report, or presentation; and
 - c. all documents relating to the deliberations and decision making of the board or committee, including notes taken by any persons participating in any such meeting or decision making.

RESPONSE: MSC objects that the specification is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it seeks documents and things unrelated to any issue in this case. Subject to and without waiving its General

and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that they pertain to FEA solvers and are responsive to other specifications of this document request and have not already been produced.

7. All documents relating to MSC's acquisitions of UAI or CSAR and the post-acquisition integration of UAI or CSAR into MSC, including:
 - a. all pre-acquisition communications between the parties relating to the transaction or its effects, including any plans, proposals, agreements, contracts, executive and employee agreements, distribution agreements, covenants not to compete, licenses, patents, copyrights, trade secrets, and trademarks;
 - b. all documents relating to changes and plans for changes in MSC's, UAI's, or CSAR's operations, structure, policies, pricing, strategies, corporate goals, financing, business, officers, employees, product lines, product features, development, or enhancements, any other area of corporate activity as a result of either acquisition, including whether to honor existing UAI or CSAR contracts;
 - c. all documents relating to former UAI and CSAR customers' continued use of UAI Nastran, CSAR Nastran, Astros, Gensa and to switching to or substitution of other products after the discontinuation of such UAI and CSAR products, including all contracts and pricing documents for such products;
 - d. all documents relating to changes or threatened changes in usage of Nastran for any customer or potential customer or changes in the company's revenue attributable to Nastran following the acquisitions;
 - e. all documents relating to the reasons for each acquisition;
 - f. all board and management committee documents relating to UAI and CSAR or to the proposed acquisitions or their effects, including memoranda, reports, correspondence, minutes, notes, presentations and agendas, as well as all documents used to prepare such memoranda, correspondence, minutes, notes, presentations, and agendas, Excel worksheets, and communications from regional executives or other sales representatives;

- g. all documents relating to any person's valuation of UAI and of CSAR;
- h. all documents relating to all statements or actions by any person in support of, in opposition to, or otherwise expressing opinions about either acquisition or its effects;
- i. all documents relating to MSC's accounting or tax treatment of each acquisition, including any writeoff of goodwill from each acquisition;
- j. all documents relating to any efficiencies, cost savings, economies, synergies, or consumer or other benefits from each acquisition and whether such efficiencies, cost savings, economies, synergies, or other benefits could be achieved without acquiring UAI or CSAR;
- k. documents sufficient to show the name, address, and job responsibilities of all persons employed by or acting as a consultant or agent to either UAI or CSAR at any time since January 1, 1998, and whether MSC hired or retained the person as an employee, consultant, or agent for any period since making each acquisition; all employment or consulting contracts with each such person; and all documents relating to salaries, compensation, bonuses, stock options, or other financial incentives paid or provided to the person by any person; and
- l. all documents relating to each job, program, or project assigned or given by MSC to each former UAI or CSAR employee, consultant, or agent employed or retained by MSC, including documents sufficient to show (i) the contribution and performance of each such person to the job, program, or project, (ii) the goal or objective of the job, program, or project, (iii) the dates the job, program, or project began and concluded, (iv) the personnel requirements for the job, program, or project, (v) the name, address, and job responsibilities of other persons working on job, program, or project, (vi) the job's, program's, or project's budget, including personnel costs, and (vii) the recruiting efforts undertaken to staff the program or project.

RESPONSE: Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that the specified documents and things have not already been produced.

8. All documents relating to the competitive significance, actual or projected financial status or condition, and long term viability of UAI or CSAR prior to their acquisitions by MSC, including UAI's or CSAR's intentions or attempts to sell UAI or CSAR, UAI's or CSAR's plans to exit the market or to cease supplying any relevant product or service, and ability to engage in the continuing sales, licensing, marketing, development, programming, and customer support of any relevant product or service.

RESPONSE: Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that the specified documents and things have not already been produced.

9. All documents relating to any person's plans relating to any relevant product or service or to any product or service compatible with any relevant 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 relevant product toward greater revenue realization from any relevant 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.

RESPONSE: MSC objects to this specification as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it calls for documents "relating to any person's plans relating to any relevant product or service or to any product or service compatible with any relevant product or service." The use of the term "compatible" extends the specification to include documents regarding competition in areas not relevant to any issue in this case. Subject to and without waiving its General and Specific Objections,

MSC will produce non-privileged documents and things responsive to this Specification to the extent that they pertain to FEA solvers and the specified documents and things have not already been produced.

10. All documents relating in *[sic]* any person's prices, pricing decisions, pricing proposals, licensing fees, or cost of services relating to any relevant product or service generally or with respect to any particular customer or groups of customers, including standard and non-standard price lists, discount schedules and practices, pricing formulae for CMV, GLV, and BLV factors, campus and token pricing systems, pricing commitments, pricing for features, modules, and enhancements, pricing plans, pricing policies, pricing forecasts, pricing strategies, pricing analyses, cost analyses, supply and demand analyses, analyses regarding shifting from product pricing that includes service to pricing products and services separately or shifting from commodity pricing of any relevant product toward greater revenue realization from any relevant service whereby customers pay directly for such services, pricing negotiations, pricing for unlimited usage contracts, paid-up licence pricing, guidance to marketing or sales personnel regarding prices, presentations to customers relating to prices, pricing for development contracts, on-site and off-site service contracts, price for web sales and licensing, and all documents considered by or emanating from person, committee, or group making a pricing decision, recommendation, or proposal, including pricing packaging group and global pricing package committee.

RESPONSE: MSC objects to this specification as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it calls for documents "relating in *[sic]* any person's prices, pricing decisions, pricing proposals, licensing fees, or cost of services relating to any relevant product or service generally or with respect to any particular customer or groups of customers," to the extent that the request calls for documents unrelated to FEA solvers. Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that the specified documents and things pertain to FEA solvers and have not already been produced.

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

RESPONSE: Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that they have not already been produced.

12. All documents relating to switching, including shifts in utilization, between or among any relevant 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 product or service or from use of a less than optimum 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 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 product or service; the use, availability, and 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.

RESPONSE: Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that the specified documents and things have not already been produced.

13. All documents relating to actual, attempted, or potential entry into the market for any relevant product or service, including all documents relating to:
 - a. the timeliness, conditions, costs, attractiveness, likelihood, or competitive significance of any such entry;
 - b. the effects of unlimited usage contracts, paid up licenses, or any existing contracts by existing firms upon such entry;
 - c. 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;

- d. 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;
- e. the total costs required for such entry, including:
 - (i) 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
 - (ii) 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
- f. 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.

RESPONSE: Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that the specified documents and things have not already been produced.

14. All documents relating to the development or acquisition, including licensing, of any features, enhancements, modules, or applications for any Nastran product since January 1, 1995, including any such development or acquisition considered but not undertaken during that period, including:
 - a. documents sufficient to show the feature, enhancement, module, or application, the price or charge to the customer for each such feature, enhancement, module, or application, the date each such feature, enhancement, module, or application was added, and the function and benefits of such feature, enhancement, module, or application;
 - b. for all features, enhancements, modules, and applications developed in-house or considered for in-house development, all documents relating to the in-house development, development plans and strategies, time lines for development, budget and projected revenue for the development, personnel requirements, and the identity of customers likely to license the developed product; and any analyses whether to develop in-house or to acquire or license such feature, enhancement, module, or application;
 - c. for all features, enhancements, modules, and applications co-developed with a customer or considered for such co-development, all documents relating to the development, development plans and strategies, the co-developer customer's identity, time lines for development, budget and projected revenue for the development, personnel requirements, and the identify of other customers likely to license the developed product;
 - d. for all features, enhancements, modules, and applications co-developed with another supplier of FEA software or considered for such co-development, all documents relating to the development, development plans and strategies, the co-developer supplier's identity, time lines for development, budget and projected revenue for the development, personnel requirements, and the identify of customers likely to license the developed product; and
 - e. for all features, enhancements, modules, and applications acquired, including licensing, by the company or considered for acquisition, all documents relating to the acquisition or licensing of such feature, enhancement, module, or application, the projected revenue for the feature, enhancement, module, and application, the identity of customers likely to license the developed product, and any analyses whether to develop in-house or to acquire or license such feature,

enhancement, module, or application.

RESPONSE: MSC objects that the specification is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it calls for the production of documents and things unrelated to FEA solvers. Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that the specified documents and things pertain to FEA solvers and have not already been produced.

15. All documents relating to any change and modification to any MSC software product, proposed, implemented, or considered by MSC, that affected or could affect the compatibility of any MSC product to work or interface with any other software products, including any customer's pre- and post-processors or input or output file formats or models, the customer's ability to switch among Nastran products, or the cost, time required, ease, or difficulty of switching from any Nastran product supplied by MSC to any other product.

RESPONSE: MSC objects to this specification because it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it seeks "[a]ll documents relating to any change and modification to any MSC software product, proposed, implemented, or considered by MSC, that affected or could affect the compatibility of any MSC product to work or interface with any other software products." The use of the terms "compatibility" and "interface" extend this specification to cover products other than FEA solvers. Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that they pertain to FEA solvers and the specified documents and things have not already been produced.

16. All documents relating to the licensing or sale of any relevant product or service to all customers, including customer-funded development, including
 - a. all contracts, license agreements, offers, bids, bid solicitations, or proposals for contracts and licensing agreements and all documents interpreting, modifying, or amending such contracts, license agreements, offers, bids, or proposals;
 - b. strategic, sales, and marketing plans for licensing and serving the customer, including sales call reports and sales presentations and pitches;
 - c. price lists, negotiation correspondence, price escalation calculations, documents relied upon to formulate or calculate prices, projections of prices offered by other suppliers of relevant products or services;
 - d. field and headquarters sales and contract files;
 - e. reports of prior or existing usage; and
 - f. invoices for products and services; and record of payment for products or services.

RESPONSE: Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that the specified documents and things have not already been produced.

17. All documents relating to personnel and staffing for the development and technical support of any relevant product and service, including:
 - a. all practices, policies, plans, agreements, and proposals relating to hiring and retention of employees, including recruiting efforts, employment incentives and bonuses, wage, salary, bonus, and stock option offers and agreements, incentives and restrictions on employee mobility, covenants not to compete, job advertisements, and the use of recruiting firms;
 - b. all documents relating to the use of off-shore developers and the use of contractors and consultants; and

- c. all documents relating to the personnel and staffing needs for any general or specific job, program, or project, including customer-funded development projects.

RESPONSE: Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that the specified documents and things have not already been produced.

- 18. All documents relating to any plans of, interest in, or efforts undertaken by the company or any other person for any acquisition, divestiture, joint venture, alliance, or merger of any kind involving the licensing or sale of any relevant product or service, including:
 - a. any acquisition, joint venture, alliance, or merger of any kind with UAI or CSAR by any person;
 - b. the divestiture or sale by MSC of any former UAI or CSAR assets, intellectual property, employees, contracts, customer relations, or UAI's or CSAR's former businesses as going concerns;
 - c. any strategic business relationship between MSC and Dassault Systemes or any Dassault affiliated person or between MSC and IBM or any IBM affiliated person; and
 - d. any acquisition of an interest in MSC by Dassault Systemes or any Dassault affiliated person.

RESPONSE: Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that the specified documents and things have not already been produced.

19. All documents relating to financial or economic methodologies, formulae, or performance models or criteria used by the company or any person for valuing or determining the purchase prices for any actual, attempted, or potential acquisitions, divestitures, joint ventures, alliances, or mergers of any kind involving the licensing or sale of any relevant product or service.

RESPONSE: Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that the specified documents and things have not already been produced.

20. All license agreements for any intellectual property, including patents, copyrights, trademarks, or trade secrets, owned by any person other than the company and included in or furnished with any Nastran product or service, including all documents modifying, amending, or interpreting such agreements, all documents relating to payment of any licensing fees, and all documents relating to the company's plans, actions, or efforts to enforce such agreements against any person.

RESPONSE: Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that they have not been previously produced.

21. All documents relating to any governmental, customer, contractual, industry, network, or collaborator requirements, preferences, custom, or practices requiring, recommending, suggesting, dictating, or promoting the use of any particular relevant product, including Nastran.

RESPONSE: Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that the specified documents and things and have not already been produced.

22. Documents sufficient to show and all computerized data containing each transaction for the licensing or sale of any Nastran product or service for the period January 1, 1995, to the present, including:
- a. the date of transaction,
 - b. the amount of the transaction.
 - c. the quantity,
 - d. the type and duration of the contract or license,
 - e. a description of each product or service licensed or sold (including product number or code),
 - f. the contract number,
 - g. the location, including physical address and serial number, of the computer where the software is located or service rendered,
 - h. the SIC code, trade or industry category, and business group of the customer, and
 - i. the price paid for each item, including the beginning price, discount, net price, quantity, and units of usage, and as may be applicable.

RESPONSE: Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that have not already been produced.

23. For each relevant product or service offered for sale or licensing, all selling aids and promotional materials and all manuals, including instructional and installation manuals.

RESPONSE: Subject to and without waiving its General and Specific Objections, MSC will produce non-privileged documents and things responsive to this Specification to the extent that they have not already been produced.

Dated: December 3, 2001



Jeffrey W. Smith (Bar No. 458441)

Marie Michael 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 December 3, 2001, I caused a copy of the attached Respondent MSC Software Corporation's Responses and Objections to Complaint Counsel's First Request for Production of Documents and Things 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


David Shotlander

Exhibit D

this Tribunal with a dispute that MSC has been attempting diligently to resolve. Therefore, for the reasons set forth below, Complaint Counsel's motion should be denied.

STATEMENT OF FACTS

Despite Complaint Counsel's eighteen-month investigation of MSC's 1999 acquisitions of two small, flailing firms, Universal Analytics, Inc, ("UAI") and Computerized Structural and Analysis Research Corporation ("CSAR"), Complaint Counsel served MSC with twenty-three separate requests for the production of documents and things. Complaint Counsel served its essentially limitless requests at the close of business on November 21, 2001 – the day before the long Thanksgiving holiday. Complaint Counsel makes much of the fact that it offered to "meet and confer" regarding these requests via telephone over the Thanksgiving holiday.¹ See Mills Declaration at ¶ 2. It is unclear what purpose such a meet and confer would have served since neither MSC nor its counsel would have had adequate time to understand the scope of the documents requested until such time as they had an opportunity to assess the scope of what was being demanded and the number of files and locations that would have to be searched. In light of the inability of MSC's counsel to consult with its client over the holiday so as to represent sufficiently MSC's interests in a meet and confer, MSC timely served its objections and responses on December 3, 2001.

Three days later, counsel for MSC and Complaint Counsel met. Complaint Counsel initially demanded that the meet and confer cover *only* Complaint Counsel's Document Requests, but

¹ Although it takes issue with the fact that MSC did not offer to meet and confer with Complaint Counsel regarding its document requests over the Thanksgiving holiday without having first obtained input from its client, Complaint Counsel never offered to meet and confer with MSC regarding its objections to MSC's contention interrogatories. In fact, Complaint Counsel was reluctant to discuss its objections during the combined meet and confer held on December 6, 2001. Nor did Complaint Counsel offer to meet and confer regarding its objections to MSC's document requests.

Complaint Counsel reluctantly agreed to address Complaint Counsel's specious objections to MSC's interrogatories as well. During the course of the meeting, Complaint Counsel seemed indiscriminately anxious to have every MSC document and had trouble demonstrating the need for the documents it asked for, the desired scope of the requests (*i.e.*, what Complaint Counsel *actually wanted*), and urged MSC to use its "judgment" in determining which documents to produce in response to Complaint Counsel's broad, burdensome requests (Complaint Counsel's urgency is strange in light of its eighteen month pre-Complaint investigation and the fact that it supposedly possessed sufficient information to prepare and file its Complaint).

Counsel for MSC attempted to explain the breadth of the material sought (and the burden imposed upon MSC) and endeavored to get Complaint Counsel to limit its requests in some intelligible and fair way. Counsel for MSC also agreed to confer with MSC to assess further the impact of Complaint Counsel's requests and identify areas where the requests might be narrowed. Since then, MSC has attempted to meet Complaint Counsel's demands and is continuously endeavoring to produce documents responsive to Complaint Counsel's slightly narrowed requests.

The central fact – ignored by Complaint Counsel – is that MSC is working with Complaint Counsel to produce responsive documents and remains committed to doing so. In fact, MSC, in the interest of expeditiously advancing discovery without waiving its objection as to burden, has begun its search of offices throughout the world for responsive documents going back to 1995.

MSC's efforts to resolve these issues stands in sharp contrast to Complaint Counsel's conduct in meeting its discovery obligations. For example, Complaint Counsel listed nearly forty individuals on its Preliminary Witness List who were *not* listed on its Initial Disclosures, even though the Rules *mandate* that Complaint Counsel disclose such individuals. Moreover, Complaint

Counsel delayed in providing these witnesses with copies of the Tribunal's Protective Order until December 17, 2001, thus delaying the provision to MSC of verbatim witness statements until **January 2, 2002.**²

Complaint Counsel has also refused to answer MSC's contention interrogatories – served the same day as Complaint Counsel's Document Requests – in any detail, objecting, *inter alia*, that “it is not Complaint Counsel's job to act as attorneys or paralegals for Respondent.” Complaint Counsel's Objections and Responses to Respondent MSC Software Corporation's First Set of Interrogatories at 3 (“Complaint Counsel's Objections To Interrogatories”) (attached as Exhibit A). Thus, even as it seeks aggressive, burdensome discovery, Complaint Counsel refuses to produce information in its possession since before the Complaint was filed and refuses to explain the bases for the allegations contained in that Complaint.

ARGUMENT

MSC's objections to Complaint Counsel's broad, duplicative, cumulative, and burdensome discovery requests are proper. MSC properly relied upon Commission Rule of Practice 3.31, 16 C.F.R. § 3.31, in objecting to the burdensomeness and duplicativeness of Complaint Counsel's request. MSC's objections were made in response to the requests-as-served and were properly made.

A. MSC's Objection to Producing Documents Before Complaint Counsel Had Even Met its Initial Disclosure Obligations was Appropriate.

² Complaint Counsel's refusal to identify witnesses is nothing new. In conversations on the day of the Tribunal's scheduling conference, Complaint Counsel refused to state whether it would be producing affidavits. Complaint Counsel demurred, asserting privilege issues. Complaint Counsel waited until January 2, 2002, to produce a single declaration and one draft declaration.

Complaint Counsel takes issue in its motion with MSC's objection to producing documents before Complaint Counsel had even made its Initial Disclosures. This objection is appropriate, especially since MSC does not intend to withhold any documents based on this objection. The objection makes a critical point about the fairness with which Complaint Counsel has approached these proceedings. Even as Complaint Counsel was demanding untold tens of thousands of pages of documents from MSC, it was delaying producing a *single document* that it gathered during the course of its entire eighteen month investigation. Not only did Complaint Counsel drag its feet in getting out its Initial Disclosures, it waited until it served its Preliminary Witness list on December 17, 2001, to identify nearly forty people with knowledge relevant to the case.

Complaint Counsel then waited until it served its Preliminary Witness List to provide those persons identified with a copy of the Protective Order, entered on November 27, 2001, and amended on December 6, 2001, so that those individuals might object to producing their third party documents held by Complaint Counsel to MSC. Complaint Counsel controlled the timing of its discovery production to deny MSC access to critical information, even as it served discovery requests largely duplicative of what it obtained during the Part 2 investigation. Thus, MSC's objection is well founded and this Tribunal should take note of the way that Complaint Counsel has evaded meeting even the most fundamental discovery requirements, even as it brings a time-consuming and baseless motion such as this one.

B. MSC's Objections to the Burdensomeness of Complaint Counsel's Document Requests Are Proper.

MSC objected appropriately to the burdensomeness of Complaint Counsel's requests. Complaint Counsel contends in its motion that "Respondent did not object to the return date

specified in the Document Request.” Complaint Counsel’s Motion to Compel Compliance With Complaint Counsel’s First Request for Production of Documents and Things at 4 (“Complaint Counsel’s Motion”) (attached as Exhibit B). Yet, one of the factors which makes Complaint Counsel’s requests so burdensome is the short amount of time under the Tribunal’s Scheduling Order that MSC had to collect, review, copy and produce the untold tens of thousands of pages of documents from more than forty offices throughout the world that might be responsive to Complaint Counsel’s sweeping requests.

The magnitude of the burden lies with Complaint Counsel’s inability to articulate a specification which seeks information that is tailored to obtain information that is likely to lead to admissible evidence. Furthermore, the time period specified by Complaint Counsel to govern these requests is the last seven years. Thus, Complaint Counsel seeks virtually every document at MSC produced over the last seven years anywhere in the world. This is not mere hyperbole. This problem is compounded by Complaint Counsel’s refusal to engage in good negotiations to narrow the scope of their discovery requests. MSC remains committed to working with Complaint Counsel to resolve these differences in a fair, intelligible, and equitable way (and remained so, even as Complaint Counsel was filing this motion), including producing the large volume of documents responsive to Complaint Counsel’s requests in a time period that is not unduly burdensome.

Complaint Counsel suggests that MSC’s “delay of discovery may compromise Complaint Counsel’s [ability to comply with future Scheduling Order deadlines].” Complaint Counsel’s Motion at 3 (attached as Exhibit B). Complaint Counsel has only itself to blame. Its refusal to negotiate the document requests has hampered MSC’s ability to conduct its searches, which has lead to any such

delay, and it has forced an enormous yet unnecessary document review, which will necessarily take time to complete.

C. MSC Properly Objected to Searching its Worldwide Offices

During the meet and confer, counsel for MSC explained to Complaint Counsel that documents responsive to Complaint Counsel's requests which were located in foreign offices were also maintained in MSC's United States offices. Therefore, there was no need to separately search foreign offices for copies of documents already produced from U.S. offices. Moreover, insofar as many of these documents are in foreign languages – and MSC has no duty to translate them – it is very doubtful that these documents would be of sufficient value to justify the burden and cost of producing them.

MSC has more than forty offices in Europe, Asia, and South America. Searching these offices would be unduly burdensome, particularly since Complaint Counsel has not articulated any need for the documents. MSC has most recently offered, however, to search all world offices,³ and as such, has mooted the necessity for this Court's intervention.⁴

D. MSC Properly Objected to Producing Identical Copies of Documents.

³ Complaint Counsel complains that MSC's offer would allow MSC to selectively search offices and provide only what is favorable to MSC. See Complaint Counsel's Motion at 8 (attached as Exhibit B). While this is *not* the case, and was never MSC's intent, the charge comes with particular ill grace from Complaint Counsel which has selectively identified people on its Preliminary Witness List in a way to hide those who may have exculpatory evidence, asserting the informant's privilege, even as it refuses to produce a privilege log.

⁴ MSC initially attempted to negotiate in good faith to search all world offices for documents relating to competitors and competition and for contracts in excess of \$25,000, as all other documents would have been maintained in MSC's United States headquarters. Complaint Counsel flatly rejected this proposal. Recognizing Complaint Counsel's unwillingness to negotiate this issue, MSC has agreed to search all world offices for all requested documents, in an effort to avoid any further delay and to allow for preparation for a fast approaching trial date.

Complaint Counsel's Instruction No. 12 requires MSC to produce identical copies of documents already produced during the Part 2 investigation, if such documents are found in some other person's files or to identify each individual in whom such files are found.⁵ Contrary to Complaint Counsel's claim in its motion, allowing MSC to identify each individual in whose files such duplicates can be found is no relief. The instruction essentially requires MSC to reconstruct its previous production and determine where duplicate files exist. MSC properly objected to producing such cumulative materials, absent some showing of need. Complaint Counsel did not demonstrate that need to MSC and such demonstration can be found *nowhere* in Complaint Counsel's motion.

During the investigatory phase, MSC produced more than thirty-five boxes of materials to Complaint Counsel. Many of these documents may exist in duplicate form throughout the company. In particular, since foreign offices were not searched during the investigatory phase (Complaint Counsel limited their inquiry to the United States), it is possible that MSC would find such duplicates throughout the world (as well as in its United States offices). Some of these documents could be quite sizeable. Complaint Counsel has not demonstrated any need to have such additional copies or to know the identity of each individual who has such a copy. Moreover, *MSC has agreed*

⁵ Instruction No. 12 requires:

If the company has produced documents responsive to this request in the course of the pre-complaint investigation of this matter, FTC File No. 001-0077, those documents need not be produced again, *unless identical copies are found in more than one person's files*. In such a case, the company must produce or identify from each person's files all identical copies of documents previously produced in the pre-complaint investigation.

Complaint Counsel's First Request For Production at 7(attached as Exhibit C) (*emphasis added*).

– as Complaint Counsel notes in its motion -- to copy or identify duplicative source materials as appropriate. It is unclear what Complaint Counsel wants this Tribunal to do about this issue now.⁶

E. MSC Properly Objected to Producing Privileged Materials

It is difficult to imagine that Complaint Counsel seriously contests MSC's right to object to producing privileged documents. Although Complaint Counsel contends "Respondent's objection to producing privileged documents is groundless, as Instruction 13 recognizes Respondent's right to make privilege claims," Complaint Counsel's Motion at 5 (attached as Exhibit B), Complaint Counsel's instruction can not alter MSC's right to assert appropriate privileges. Moreover, had MSC not raised an objection to producing privileged materials, Complaint Counsel would argue that MSC waived its privilege. See Complaint Counsel's Motion at 9-10 (attached as Exhibit B) (arguing that those objections not made by MSC in its responses are waived).⁷

Complaint Counsel's argument about privilege comes with particularly disingenuous because Complaint Counsel has objected that it is *not* required to produce a privilege log, despite its widespread assertion of various broad and unsupported privileges in its responses to MSC's discovery requests. MSC remains prepared to exchange privilege logs with Complaint Counsel at an appropriate time.

F. MSC Properly Objected to Producing Documents Related to Industries Other than Aeronautics and Automotive

⁶ It is worth noting that these objections were made by MSC before the meet and confer.

⁷ Complaint Counsel's contention that objections not made in response to its document requests is inconsistent with its contention in its own responses to MSC's document requests that Complaint Counsel retains the right to raise new objections to MSC's document requests. See Complaint Counsel's Objection And Responses To Respondent MSC Software Corporation's First Set Of Requests For The Production Of Documents And Things (attached as Exhibit D).

In light of Complaint Counsel's sweeping requests which seek, *inter alia*, all contract information on all of MSC's products, MSC properly objected to producing documents for industry segments other than those identified in the Complaint and in response to MSC's interrogatories. Clearly, the focus of Complaint Counsel's activities has been on the aeronautics and automotive industries and it has demonstrated no need to go beyond that, nor has it done so in the present motion. Again, after having conferred with Complaint Counsel and meeting with absolute recalcitrance, MSC has agreed to search all industries in an effort to move this production forward, once again obviating this Court's involvement.

G. MSC Properly Objected to Creating New Data to Meet Complaint Counsel's Demands

MSC properly objected to creating new documents or data collections that do not already exist to comply with Complaint Counsel's requests. Rule 3.37 is quite clear that MSC is obligated only to "make documents available as they are kept in the usual course of business *or* shall organize and label them to correspond with the categories in the request." 16 C.F.R. § 3.37(a). MSC is not required to create new data compilations or to translate existing data into new data formats as demanded by Complaint Counsel's instructions and requests.

Complaint Counsel's contention that it specified particular data formats for *MSC's* convenience is disingenuous. See Complaint Counsel's Motion at 7 (attached as Exhibit B). As Complaint Counsel acknowledges, MSC did collect and tabulate data that MSC had in a format Complaint Counsel desired during the Part 2 investigation. But MSC's willingness to do so was tempered by the fact that it was in a Part 2 *investigation* and hoping to avoid this Part 3 *litigation*.

As Complaint Counsel readily acknowledges, what went on in Part 2 does not establish obligations for future litigation. Thus, MSC is under no obligation to produce documents in any order other than those specified by the Commission's own rules.

As to Complaint Counsel's contention that MSC has not objected to producing documents from back-up tapes, that dispute is not ripe. MSC notes, however, that the Specification to which Complaint Counsel refers (Specification No. 2) is directed to document retention policies and has nothing to do with whether there is an obligation to search back-up tapes.

H. MSC Properly Objected to Producing Documents Prior to January 1, 1997

Complaint Counsel misstates the gravamen of MSC's objection to producing documents prior to November 17, 2000. *See*, Respondent MSC Software Corporation's Responses And Objections To Complaint Counsel's First Request For Production Of Documents And Things at 1 (attached as Exhibit E). The thrust of MSC's objections is not what Complaint Counsel and MSC agreed to or did not agree to during the Part 2 investigation, but, rather, that searching an additional four years of files is unduly burdensome and the benefit of doing so does not outweigh the cost. Complaint Counsel has failed to demonstrate why it needs to go back to 1995 to assess the competitive effects of acquisitions completed in 1999. There has been more than two-years worth of post-merger evidence (nearly three-years worth by the time of trial) to assess the impact of the acquisitions on the competitive state of the relevant product market(s). What happened four years *before* the merger can hardly shed any light on the effects of the acquisitions, particularly since the market is so dynamic.

Complaint Counsel has made no showing to either this tribunal or MSC as to the relevancy of this additional data. Therefore, it has failed to overcome MSC's objection. Even more strange,

is the fact that MSC has been working with Complaint Counsel to resolve this issue and substantial progress has been made. In fact, MSC has agreed to, and has begun searching for documents responsive to Complaint Counsel's request dating back to 1995. Thus, as with Complaint Counsel's other issues raised by its motion, there was no need to involve the Tribunal at this time.

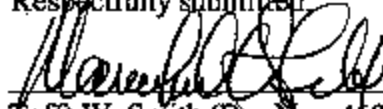
CONCLUSION

MSC is somewhat bemused by this Motion to Compel filed by Complaint Counsel. Over the past month or so, MSC has continuously and in good faith attempted to negotiate and narrow the breadth of these otherwise overreaching document requests in an attempt to arrive at a subset of documents which are actually necessary and likely to lead to the discovery of relevant information. Furthermore, MSC has done this in the midst of the busiest time of its sales year, and in the midst of the holiday season. However, such efforts have been met with strong resistance from Complaint Counsel, who want essentially every MSC document in an extraordinarily short time frame. In an effort to promote the flow of discovery, MSC has agreed to and begun searching all of its world offices for all responsive documents for all times requested by Complaint Counsel, despite the enormity of the burden of such searches. It is unreasonable to expect that such a search could be completed in a mere twenty days— or even in sixty-five days, as Complaint Counsel “generously” allots.

Complaint Counsel's motion is baseless and should be denied. The parties have been working steadily toward resolving these disputes and dealing with the enormous burden imposed by these requests. Complaint Counsel's motion fails to show that MSC's objections were inappropriate. Accordingly, Complaint Counsel's motion should be denied.

Dated: January 7, 2002

Respectfully submitted



Tefft W. Smith (Bar No. 458441)

Marimichael O. Skubel (Bar No. 294934)

Michael S. Becker (Bar No. 447432)

Bradford E. Biegon (Bar No. 453766)

Larissa Paule-Carres (Bar No. 467907)

KIRKLAND & ELLIS

655 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 January 7, 2002, I caused a copy of the attached RESPONDENT MSC.SOFTWARE CORPORATION'S MEMORANDUM IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO COMPEL COMPLIANCE WITH COMPLAINT COUNSEL'S FIRST REQUEST FOR THE PRODUCTION OF DOCUMENTS AND THINGS 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
Karen Mills, Esquire
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, DC 20580



David S. Shotlander

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

Counsel for Respondents,
MSC.Software Corporation

Exhibit E

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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

ORDER ON COMPLAINT COUNSEL'S MOTION TO COMPEL
COMPLIANCE WITH FIRST DOCUMENT REQUEST

I.

On December 27, 2001, Complaint Counsel filed a motion to compel compliance with Complaint Counsel's First Request for Production of Documents and Things. Respondent MSC Software Corporation ("MSC") filed an opposition on January 7, 2002. Complaint Counsel filed a response on January 11, 2002.

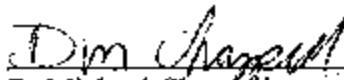
For the reasons set forth below, Complaint Counsel's motion is DENIED WITHOUT PREJUDICE.

II.

Complaint Counsel served its First Request for Production of Documents and Things (Hereinafter "Document Request") on November 21, 2001. Complaint Counsel's motion asserts that MSC's response to its document request is deficient in several aspects. MSC asserts that it has been working to resolve the disputes. Complaint Counsel's response acknowledges that MSC has dropped many of its earlier objections and has agreed to search for and produce responsive documents. However, Complaint Counsel asserts that MSC continues to refuse to comply in certain aspects.

To the extent that MSC has made representations about documents it will produce or steps it will take to comply with Complaint Counsel's discovery request and has not yet fulfilled those representations, MSC is hereby ORDERED to do so. Complaint Counsel's motion is DENIED WITHOUT PREJUDICE. If the parties are unable to resolve this dispute by January 25, 2002, Complaint Counsel may file a renewed motion to compel.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: January 18, 2002

Exhibit F

From: <tefft_smith@dc.kirkland.com>
To: FTC.SERIOUS("kmills@ftc.gov"; "Pmccartney@ftc.gov")
Date: Jan 18, 2002 4:05PM
Subject: Communications

Abbott/Karen

On Monday, I offered to meet with Complaint Counsel face-to-face to talk about overall discovery issues in the interests of advancing the ball and trying to find a way to restore civility to the relationship given the necessarily intense demands of any trial preparation schedule. While I was met with smiles and "thanks for the offer," I have heard nothing since.

Suddenly, there have been a flurry of calls from Karen to Marimichael and me, relating to the ALJ's Order this afternoon. We intend to await Complaint Counsel's promised reconsideration of the positions taken in response to MSC's Interrogatories and Document Requests and possible supplementation, due today, before deciding what we will do in response to the ALJ's Order. As you know, we held off filing our motions to compel in the hope that Complaint Counsel would decide to provide meaningful discovery responses.

We await your promised materials and the opportunity to review them. In the interim, if you have something else you want to say, please put it in writing.

Respectfully,

Tefft

.....
The information contained in this communication is confidential, may be attorney-client privileged, may constitute inside information, and is intended only for the use of the addressee. It is the property of Kirkland & Ellis. Unauthorized use, disclosure or copying of this communication or any part thereof is strictly prohibited and may be unlawful. If you have received this communication in error, please notify us immediately by return e-mail or by e-mail to postmaster@kirkland.com, and destroy this communication and all copies thereof, including all attachments.
.....

From: <tefft_smith@dc.kirkland.com>
To: FTC.SERIOUS("kmills@ftc.gov"; "pmccartney@ftc.gov")
Date: Jan 19, 2002 2:14PM
Subject: Dkt. 9299

Karen/Abbott

Your letter late Friday underscores the issues between us. While you continue to demand and insist that we do things and talk to you about what we are going to do, you refuse to do anything in response or to be willing to talk about your discovery obligations. And, you knowingly misrepresent what we do say and do.

First, we/ I did respond to your phone calls by my email Friday asking that you advise us of where you stood on your prior promises -- orally to me -- of a "reconsideration" of your position on MSC Interrogatories and Document requests by "January 18th" (you did equivocate in writing that it would be "on or around"). You have obviously decided -- in your own words -- to "renege" on that promise which, as we advised you by our letter of January 14th, was the basis for our decision not to file motions to compel. We will accordingly immediately proceed to file same.

Second, my email asked you to advise me -- In writing -- specifically how you wanted to proceed. It is Complaint Counsel, not MSC -- as evidenced by your lack of any response to my offer last Monday for a face-to-face meeting -- that refuses to have a verbal exchange on discovery issues.

Third, we said we had not decided what we would do in light of the ALJ's Order until we saw whether you were going to provide meaningful answers to MSC's basic contention Interrogatories and supplement your document production with the materials that you are admittedly withholding, notably without providing any privilege log. Please specify when "early next week" we will receive anything and specifically what we will receive.

Lastly, before we decide what to do, we need to know -- in writing -- whether you agree that if these witnesses are produced now, that Complaint Counsel will not seek to redepose them after MSC's production of additional documents which production you knew, at the time you noticed these depositions, would not occur until after the depositions were

completed. Notably, at George Riordan's deposition, Abbott purported to reserve the right to recall Mr. Riordan based on "the additional documents we're waiting for" from MSC (1/14/02 Dep. Tr. 215, 217). Indeed, Abbott objected "to the deposition proceeding without having received responses to our [document] subpoenas[.]" (Tr. 7).

Complaint counsel cannot have it both ways. We await your written response.

Respectfully,

Tefft Smith

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Exhibit G

discovery Orders, and which stated that Respondent would await Complaint Counsel's response to Respondent's discovery demands "before deciding what we will do in response to the ALJ's Order." (Ex. A, Letter of Karen A. Mills, Jan. 18, 2002). Complaint Counsel responded with a fax letter indicating that respondent's position of refusing to discuss scheduling of the depositions appeared to be in defiance of the Judge's Order. The letter asked Respondent to clarify if this was not its position.

On Saturday afternoon January 19, Respondent's counsel replied with a further email. (Ex. B, Email of Tefft W. Smith, Jan. 19, 2002). That email again reiterated Respondent's dissatisfaction with the discovery provided by Complaint Counsel and repeated that "we had not decided what to do in light of the ALJ's Order until we saw whether [Complaint Counsel] were going to provide meaningful answers" to Respondent's discovery demands. It also added, for the first time, a further condition – that "before we [Respondent] decide[s] what to do" in response to the ALJ's Order, Complaint Counsel must agree that the deponents would not be deposed again, even to address documents produced at some future date by Respondent in its much-delayed production pursuant to Complaint Counsel's Document Request. Respondent sought no such condition in its motion to quash the depositions, and there is no such condition in the Order.

Complaint Counsel by this emergency motion seek your Honor's intervention in order to clarify that Respondent is in violation of the recent discovery Orders by refusing to discuss scheduling of the depositions or the remaining outstanding disputes pertaining to Complaint Counsel's Discovery Request. While we are conscious of the burdens on this forum and are loathe to address your Honor unnecessarily on such discovery disputes, we are also aware that unless action is taken promptly the deadlines set in the Orders could be rendered a nullity. After today, there are only eight business days

within which to schedule and take the six remaining depositions by February 1. There are only three business days until January 25, the contemplated date for resolving the disputes concerning the Document Request.

Complaint Counsel therefore file this emergency motion seeking that your Honor clarify that Respondent, by refusing to discuss scheduling the depositions or the remaining outstanding disputes pertaining to Complaint Counsel's Discovery Request, is in violation of the discovery Orders dated January 17 and 18, 2002. Complaint Counsel request that Respondent be required to respond to this motion, orally or in writing, no later than the close of business today, January 22, 2002. Complaint Counsel make this motion without prejudice to our right to seek future sanctions as may be appropriate for Respondent's non-compliance with your Honor's orders.

Dated: January 22, 2002

Respectfully Submitted,

KAREN A. MILLS A.M.C.

P. Abbott McCartney
Peggy D. Bayer
Kent E. Cox
Karen A. Mills
Patrick J. Roach
Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580
(202) 326-2695
Facsimile (202) 326-3496

Exhibit H

KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

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

202 879-5000

Facsimile:
202 879-5200

Marimichael O Skubel
To Call Writer Directly:
(202) 879-5034
Marimichael_skubel@dc.kirkland.com

January 24, 2002

Via Facsimile

Karen A. Mills, Esq.
Federal Trade Commission
Bureau of Competition
601 Pennsylvania Avenue, N.W.
Washington, DC 20580

Subject: MSC Software Inc.

Dear Ms. Mills:

In response to your letter dated January 22, 2002, and in continuing efforts to resolve our remaining discovery disputed in accordance with the Court's order entered on January 18, 2002, please note the following:

Production Date

MSC has on multiple occasions attempted to narrow and focus the scope of the document production so as to limit the burden of producing all documents contemplated by Complaint Counsel's First Request for the Production of documents dated November 21, 2001. In conjunction with these negotiations, MSC estimated that a modified document production could be completed by February 8, 2002 (see December 18, 2001 letter from M. Skubel to K. Mills). *This date was offered under the premise that the document requests would in fact be negotiated to a more narrow and manageable universe of documents.* Specifically, MSC requested that documents from all of its foreign offices be omitted from the production, that documents pre-1998 be precluded, and that industries not targeted by the Complaint be omitted from the search and production. During the course of negotiations, Complaint Counsel either refused to narrow the scope of its requests, demanded extensive information before it would consider such requests, thereby negating the incentive to negotiate, or failed to respond to MSC's requests. Realizing that this search and production would be quite onerous, and not receiving sufficient feedback from Complaint Counsel in the negotiations, MSC decided to initiate its production effort in order to comply with the production requests. MSC did not "back[] down considerably," as Complaint Counsel suggests, but rather began the lengthy production process.

KIRKLAND & ELLIS

Miss Mills
January 24, 2002
Page 7

Currently, MSC has collected over 200 boxes, almost 225 diskettes and five CDs from multiple MSC locations. Counsel for MSC is still receiving documents from MSC sales personnel and offices worldwide, and is still in the process of gathering electronic documents. Given Complaint Counsel's refusal to limit the requests in any truly substantive way, this document collection, review and production process has necessarily been protracted such that the February 8, 2002, date is not a realistic deadline for the completion of the production. Furthermore, the exercise of reviewing all of the collected documents for responsiveness, privilege and confidentiality designations simply takes time. That being said, *MSC will produce documents to Complaint Counsel on a rolling basis*, but cannot commit to a two week completion date for the production of all responsive hard and electronic documents relating to all MSC industries, for all years requested, from all MSC locations.

Privilege Log

MSC intends to comply with the Federal Trade Commission's Rules of Practice and submit a privilege log at the completion of its production. MSC expects that Complaint Counsel will do the same.

Data

During the Part 2 investigation, Complaint Counsel requested that certain sales data be provided from MSC's Oracle database in a report format so that sales trends could be analyzed by Complaint Counsel. After much discussion, MSC complied with this request in an effort to cooperate with Complaint Counsel to avoid litigation. Complaint Counsel has been alerted to the fact that the report was specially designed, and not a standard report maintained or produced by MSC. To this date, *such a report is non-standard and not produced in the regular course of business, thus MSC is not obligated to construct it.*

In addition, there are extreme burdens and costs affiliated with the creation of such a report. Essentially, when creating such a report, an enormous amount of system memory is required. Such memory requirements are so significant that no other system functions are possible when creating such a report. In fact, when the prior report was run for Complaint Counsel during the investigation, the report was run over a holiday when systems could be shut down to funnel all available system memory and functions to this project. Currently there are even more strains on the MSC computer system that prohibit it: MSC is making corporate-wide changes in computer programs that require an abundance of the already limited system memory and IT resources, making it virtually impossible to run such a request.

KIRKLAND & ELLIS

Miss Mills
January 24, 2002
Page 3

Backup Tapes

Complaint Counsel's request that MSC search all backup tapes for documents responsive to the Document Requests is simply too costly and burdensome for MSC to undertake. Since spring of 2000, backup tapes are no longer overwritten. This has led to extensive number of tapes in storage. Furthermore, MSC does not require regular purging of electronic documents. MSC conservatively estimates that it will take approximately eleven hours to review and to restore a backup tape, which, when billing MSC employees' time at \$100 per hour, results in \$1100 per tape. This cost would be doubled if an outside vendor were to perform the review and restoration, for vendors typically charge \$200-\$225 per hour for such work. The effort and expense required to review and to restore these tapes, which number in the thousands, is prohibitive, especially given that much of the material will already have been collected through other means.

As always, we are willing to discuss these issues in order to reach resolution, as we would like to complete this document production as soon as possible. I look forward to discussing these issues at your earliest opportunity.

Sincerely,



Marimichael O Skubel

Exhibit I



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

Marimichael O. Skubel, Esq.
Kirkland & Ellis
655 15th Street, N.W.
Washington, DC 20005

January 30, 2002

Re: FTC Docket No. 9299

VIA FAX

Dear Ms. Skubel,

We received your letter faxed to us at 10:12 p.m. last evening regarding document discovery issues. We contacted you today in an effort to move forward on outstanding document discovery issues. It appears that we have made progress on some, and we hope to continue the conversation with you tomorrow in the hope of making additional progress on others.

Today by telephone you confirmed that Respondent has changed its position since the letter you sent last night, now has agreed to produce the data required by the document request in the form requested by Complaint Counsel, and is preparing the data response. Please notify us as soon as possible when we will receive that data.

Regarding backup tapes, we posed a number of questions to you today, and await your answers to them. They include: (1) when do backups occur; (2) what is backed up from the server; (3) what is backed up from hard drives; (4) what is contained on each backup tape; (5) are backup tapes labeled according to the time period they cover; (6) are different offices of the company backed up on different tapes, and can the location of the backup be identified from the tape (i.e., is headquarters backed up on tapes separately from other locations; are offices within a location backed up separately from each other); (7) does the backup function back up all documents at the time of the backup, or only updates to documents and new documents since the last backup. When we receive more information about the backups, we will be in a position to discuss further with you.

Regarding production of responsive documents and the timing thereof, we hope to continue this discussion with you tomorrow. We also will need to discuss whether your search has been adequately comprehensive in at least three respects: it is not clear from the lists of persons searched that you sent us that there has been a search for documents of former employees, of archived documents, or of documents of certain key personnel who we would have expected to have been included in the search group.

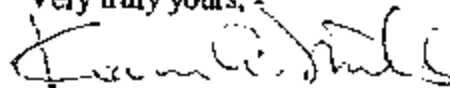
Your January 29 letter contains an inaccurate recitation of our discussion about possible inadvertent production of privileged documents. We did discuss the fact that the Protective Order contains a process for your requesting retrieval of privileged documents that you believe may have been produced inadvertently. We did not agree to any amendment of the procedure

Marimichael O. Skubel
January 30, 2002

Page 2 of 2

recited in the Protective Order for your request of return of documents, and did not agree to handle your requests or the documents in any way other than that prescribed in the Protective Order.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Karen A. Mills".

Karen A. Mills

Exhibit J



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

Marimichael O. Skubel, Esq.
Kirkland & Ellis
655 15th Street, N.W.
Washington, DC 20005

February 1, 2002

Re: FTC Docket No. 9299

VIA FAX

Dear Ms. Skubel,

Since Judge Chappell's January 18, 2002, order encouraging us to resolve four outstanding disputes about Respondent's compliance with Complaint Counsel's Document Request, and more specifically, since the filing of our emergency motion on January 22, 2002, two of the four outstanding disputes have been resolved by your withdrawal of your previously asserted objections. However, two issues remain unresolved. Although Judge Chappell's Order of January 25, 2002, authorized Complaint Counsel to re-file a motion to compel if the outstanding discovery disputes were not resolved by January 25, 2002, and only one of the four disputes was resolved by that date, Complaint Counsel has spent an additional week prodding you for more information and diligently attempting to resolve the remaining disputes.

Two issues have been resolved as follows:

- By letter of January 24, 2002, you withdrew your objection to producing a privilege log, and promised to provide the privilege log required by the Document Request.
- On January 30, 2002, you told me by telephone that you were withdrawing your objection to producing data responsive to specification 22 of the Document Request in the form that MSC produced the data in the Part 2 investigation, bringing up to date the two data sets generated using the "Data Mart" query and the "All" query. While Respondent now has agreed to provide data in this form, you have not committed to a production date.

Two issues remain unresolved, however, and it therefore appears that Complaint Counsel may have to seek the court's intervention:

- You offer no final production date, and the tardy and slow pace of production is unacceptable.
- You object to producing from backup tapes, and while Complaint Counsel has attempted to narrow the scope of search required, no resolution has been reached.

In addition, in the course of your production, a new production compliance issue has arisen:

- Respondent has indiscriminately marked documents CONFIDENTIAL and RESTRICTED CONFIDENTIAL.

We outline below a plan for production that we would find acceptable, if production were completed by February 22, 2002. Without written confirmation from you that you will produce as described by that date, we are likely to have to move to compel and put this matter again before Judge Chappell for resolution.

- Production must be completed by February 22, 2002.
- Production will be prioritized for the persons, files and offices listed on Attachment A.
- Prioritized production will include hard copy, electronic documents, and e-mails, but not backups, except as provided below.
- If any of the persons identified on Attachment A are no longer with the company, the production still will include documents resulting from a search for their documents, whether in storage, archived, passed on to other individuals, or electronically stored.
- Among the contract files, priority within the priority production will be made of the files relating to those customers we identified to you in our letter of December 14, 2001, and in Complaint Counsel's Preliminary Witness List of December 18, 2001
- Responsive documents of persons not identified in Attachment A but on the search lists you produced to Complaint Counsel on January 25, 2002, and January 28, 2002, will be produced after the priority production.
- Respondent will search backup tapes for responsive documents of the 15 individuals listed on Attachment A next to whose names we have placed a "(B)".
- Respondent will properly designate all documents entitled to be marked CONFIDENTIAL or RESTRICTED CONFIDENTIAL, and correct erroneous designations by submitting properly marked documents, by March 1, 2002.

Please advise promptly whether you agree to this resolution of the remaining outstanding issues. If not, we will be required to place the unresolved issues before Judge Chappell.

Very truly yours,



Karen A. Mills

ATTACHMENT A

Allahabadi, Rakesh (B)	MacNeal, B.*
Bakhtary, N.*	Maher, William
Baldwin, Joe	Mattson, Harold (B)
Barclay, Richard	Mehta, Anil* (B)
Barthenheier, Keane	Morgan, Jeff* (B)
Beer, Dave	Mowrey, John
Benson, Doug*	Murphy, Rick (B)
Bentley, Steve*	Nagy, D.*
Blakely, Ken (B)	Neill, Douglas
Brar, Deepak	Parady, John*
Brown, Todd	Perna, Frank (B)
Bryce, Dan*	Platnick, Joe*
Bush, Richard	Privett, Cory
Caserio, Alan	Ramirez, R.*
Castro, Jack*	Reymond, Antoine
Central Files	Reymond, Mike
Clark, Jay*	Riordan, George*
Contrady, Jackie	Roach, Doug
Crooks, Matthew	Robertson, Alastair
Crum, Lois*	Rose, Ted
CSA	Roundy, Lance*
Cully, Tom	Sacro, Steve*
Curry, Tom*	Sauer, Paulo
Davis, Chuck	Schultz, Jeff
DiLullo, John	Schwartz, Peter
Doyle, Dan*	Sheridan, Lynn
Dyer, Ron (B)	Sikes, Greg*
Glickman, Donald*	Smith, Jane (B)
Goekel, Mike	Smith, L.*
Grassinger, Thomas*	Smithson, Tyler
Greco, Louis (B)	Spangler, Paul
Greg, Bryan*	Staunton, Ed
Grun, William*	Stass, Bob
Harder, Robert	Swan, James*
Hatt, Fritz*	Swedburg, Debbie*
Hart, Bruce (B)	Sweite, Robert
Heil, Joan*	St. Johns, Christopher* (B)
Hoff, Claus	Tateishi, Mars* (B)
Hubert, Lum*	Tecco, Thomas*
Hunt, H. Harris*	Thornton, Brian
Ibrahim, Omar	Torres, Bill
Johnson, Dan*	Towles, Linda
Jones, Edward* (B)	UAI*
Kenyon, Mark	Wallerstein, Dave
Krauski, Mike* (B)	White, James*
Kurlfink, Robert	Williams, Charles
Layfield, Dale	Wilson, Charles
Long, Lou*	Wright, Paul*
Long, Jon*	Asia-Pacific offices
Louwers, Robert	European offices
MacKay, John*	South American offices
	Contract Files

Exhibit K

KIRKLAND & ELLIS

Fax Transmittal

655 Fifteenth Street, N.W.
Washington, D.C. 20005-5793
Phone: (202) 879-5000
Fax: (202) 879-5200

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(202) 879-5000.**

To:	Karen A. Mills	From:	Marimichael O. Skubel
Company:	Federal Trade Commission	Fax #:	(202) 879-5200
Fax #:	(202) 326-3496	Direct #:	(202) 879-5034
Direct #:	(202) 326-2052	Date:	January 25, 2002
Pages:	8 (including this cover sheet)		

Message:

KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

555 Fifteenth Street, N.W.
Washington, D.C. 20006

202 879-5000

Facsimile:
202 879-5200

Marlmichael O. Skubel
To Call Writer Directly:
(202) 879-5034
Marlmichael_Skubel@dc.kirkland.com

January 25, 2002

Via Facsimile

Karen A. Mills, Esq.
Federal Trade Commission
Bureau of Competition
601 Pennsylvania Avenue, N.W.
Washington, DC 20580

Subject: MSC Software Inc.

Dear Ms. Mills:

As we discussed yesterday afternoon, I am writing to memorialize our discussion regarding the status of and issues pertaining to MSC's document production in response to Complaint Counsel's First Request for the Production of Documents.

Data

At this time, counsel for MSC is in the process of exploring all possible avenues for the production of data responsive to Specification 22, such that the logistical dilemmas that the response to the last subpoena presented can be avoided. (see 1/24/02 letter from M. Skubel to K. Mills). MSC does plan to respond to this request, and will inform Complaint Counsel as soon as new information is learned.

Backup Tapes

To reiterate our discussion, the costs and labor necessary to review MSC's backup tapes are prohibitively burdensome. As counsel for MSC has informed Complaint Counsel, because of policies implemented since spring of 2000, MSC is currently in possession of thousands of backup tapes both on site and in storage, delivery of which could take up to one week. Each tape would need to be restored and indexed in order to ascertain the contents of the tape. Then, if a tape contains backed-up documents of a person who could have material responsive to the requests, such documents would need to be reviewed. Because of MSC's use of a "jukebox" system to loop the backup tapes, there is no organized approach to locating MSC personnel's documents on a tape. Thus, although only a certain number of persons backup files would need

KIRKLAND & ELLIS

Ms. Mills
January 25, 2002
Page 2

to be reviewed, all tapes would require restoration and indexing¹ in order to find those persons' files. Additionally, the tape drives are used heavily during the afternoon and evening hours to create back-up data sets. During these hours it is possible that it would take several hours for a tape drive to become available for a requested restoration.

It is MSC's belief that the value gleaned from this financially draining and labor intensive exercise of searching the backup tapes is minimal. Given that MSC does not enforce any document purge policy, the majority of the documents that were backed up will also be gathered as a part of the electronic and hard document production. Furthermore, because of the Send Mail system that MSC uses, in which electronic messages are only on the server for the amount of time that it takes to either send or receive mail, there are essentially no electronic messages captured in the backup tapes (other than those messages in the process of being sent or received at the time of the backup). For such reasons, we believe there is no need to review the backup tapes.

E-Mail

E-mail cannot be gathered from a central site or server. As mentioned above, the application currently used by MSC does not maintain e-mail messages on a server, rather they are maintained on the local drive of the file's owner. To collect e-mail from MSC employees will require that each individual's computer be accessed and files copied locally. Depending on the size of the files, an individual's e-mail is expected to take approximately one hour to copy. The difficulty in completing this task is compounded by the frequency with which individuals travel with their computers.

Production Date

Complaint Counsel expressed some concern at the fact that the above issues and delays are just now being realized and/or expressed to Complaint Counsel. Counsel for MSC is somewhat surprised at this statement, because throughout its discussions with Complaint Counsel MSC has been forthright as to the status of its document production. Throughout the month of December, Complaint Counsel and MSC were engaged in negotiations designed to narrow and focus the breadth of the document request. Given the potential for these discussions to limit significantly the scope of the production, MSC did not begin to search its files until after the apparent stalemate in negotiations.

¹ Recall that the conservative estimate for such a task is approximately eleven hours, which, when billing MSC employees' time at \$100 per hour, results in \$1100 per tape. This cost would be doubled if an outside vendor were to perform the review and restoration, for vendors typically charge \$200-\$225 per hour for such work.

KIRKLAND & ELLIS

Ms. Mills
January 25, 2002
Page 3

Moreover, on December 19, 2001, in a letter from MSC to Complaint Counsel addressing negotiations designed to limit the volume of contracts produced by a) the value of the contract and b) the year of the contract, MSC expressed that "[w]e would like to begin the contract/customer search as soon as possible." Such language clearly alerted Complaint Counsel to the fact that particular portion of the document request had not been initiated. Undeniably, a portion of such search would have been avoided in the event that the parties arrived at an agreement. In fact, this ultimately happened. It was not necessary for MSC to undertake the costly and time consuming task of collecting, reviewing, and producing documents that could have ultimately been eliminated from the document request.

Similarly, in a letter dated December 18, 2001, Complaint Counsel attempted to negotiate the language of the document requests with respect to contracts, foreign offices, financial documents, and limitations to specifications 9 and 15. MSC could not know the ultimate universe of requested documents until the close of negotiations or know the volume of the documents that were going to be gathered until the search was underway. Accordingly, in the December 18th letter, MSC said "[a]ssuming these modifications are accepted, *MSC would begin production the week of January 3, 2002, and estimates that it could complete its production by February 8, 2002.*" At all times, Complaint Counsel was on notice that MSC would not begin its document production effort until after the first of the year and that its production schedule, based on incomplete information, was an estimate.

Proposed Production

After our conversation yesterday afternoon, counsel for MSC brainstormed on potential solutions aimed at hastening the completion of MSC's document production. As explained in our January 24, 2002, letter to Complaint Counsel, a significant amount of time and manpower is expended in the mastery of this complicated subject matter, and in the review of the collected documents to determine responsiveness, privilege, and the level of confidentiality. We propose to continue to review the documents for responsiveness and privilege, but to make a universal "Restricted Confidential" designation for the remainder of the production. This would eliminate an entire portion of the review, thereby facilitating a quicker review and production of documents to Complaint Counsel. As we have not yet begun to institute this new review process, we cannot certify a completion date for the production, however, we are certain that this change in review procedure will hasten the ultimate completion of the production.

Additionally, as discussed on yesterday's call, Complaint Counsel has attached a listing of a) all MSC personnel, to date, who have been searched for documents responsive to Complaint Counsel's First Request for the Production of Documents and b) all persons or offices from which MSC is expecting to receive documents. (Persons listed in Attachment B are all

KIRKLAND & ELLIS

Ms. Mills
January 25, 2002
Page 4

sales related personnel.) It would be mutually beneficial if Complaint Counsel would review the list and prioritize this listing for an order of production. MSC already notes Complaint Counsel's request to make the deponents' documents and the Board minutes first priority and to the extent that counsel for MSC has these documents, it has been done.

MSC also proposes that Complaint Counsel limit the number of persons from whom electronic documents and e-mail shall be gathered. This will expedite and make more manageable the electronic and e-mail portion of the MSC document production. As noted above, we have attached a listing of MSC personnel searched or identified as potentially having documents responsive to these document requests

We believe that these proposals will help to streamline MSC's production efforts. Please do not hesitate to contact me should you have any questions or further discussions regarding this production.

Respectfully,



Marimichael O. Skubel

Attachments

MSC Interviewee List

Last Name	First Name	Title
Alarcon	Precilia	Sales Administrator
Barday	Richard	Account Manager, Aerospace Corp. Accounts
Blakely	Kenneth	Executive Vice President
Bloomberg	John	Sales Representative
Brar	Deepak	Director of Technology
Brennan	Doug	Director, Professional Solutions
Bush	Richard	Director, Marketing Communication
Button	Ronda S.	Supervisor, Marketing Coordination
Casero	Alan K.	Product Manager
Chaiyyk	Mike	Development Engineer
Choi	Carlson	Manager, Internet Technologies - Marketing Communications
Conrardy	Jackie	North America Western Region Admin
Costa	Cindy	Sales Administrator
Cripps	Chris	Account Executive
Crooks	Matthew G.	Manager, Financial Planning & Analysis
Davis	Chuck	Corporate Controller
Di Lullo	John	Vice President, General Manager
Dimas	Davin	Director, Training and Support
Figer, Jr.	Charles	Engineering Support Manager
Fischer	Michael	Senior Manager - Technical Documentation
Fumo	John	Senior Applications Engineer - Aerospace Corporate Accounts
Garcia	Lina	Sales Associate
Ghanb	Jamshid	Development Project Manager - Automotive Acoustics
Gockel	Mike	Nastran Development
Greco	Louis	Chief Financial Officer
Grosven	Michael L.	Engineering Support Manager - Western Region Operations
Haberman	David T.	Business Development Manager, Training & Support
Hart	Bruce A.	Director, Central Region
Hikita	Hai	Business Unit Manager - Fatigue
Ho	Wal	Director, Business Processes
Hoff	Claus C.	Development Engineer - Finite Element Specialist
Malcomb	John R.	Senior Technical Consultant
Ibrahim	Omar M.	Director, Nastran Product Development
Isaak	Kenneth H.	Senior Software Engineer
Javadi	Mahmud	Quality Assurance Engineer
Johnson	Erwin H.	Project Manager
Johnson	Lary L.	Chief Architect
Kansakar	Rajendra K.	Engineering Software Specialist
Kanhasamy	Kuna	Senior Software Specialist
Karapelian	Michael S.	MSC.Patran America's Business Unit Leader
Kelly	Benjamin	Training Administrator
Kenyon	Mark	Director, Aerospace Business
Kilroy	Kevin L.	Director, Development Infrastructure
Kobayashi	Makiko	Marketing Specialist, Global Sales Operations
Koko	Boma	Senior Director, Simulation Data Management
Krishnasamy	Guna	Manager, Meshing Technology
Kurfinck	Robert	Senior Account Manager
Layfield	Dale	MSC.Nastran Toolkit Project Manager
Li	Jason	Director, Global Sales Operations
Louwers	Robert E.	Senior Account Manager - Aerospace Accounts
Lum	Hubert	Division Controller
Maher	William R.	Account Manager
Martinez	Alfonso	Manager, PMD
Mastromarco	David T.	Senior Consulting Engineer
Mattice	Karan	Training Specialist

MSC Interviewee List

Last Name	First Name	Title
Mattson	Harold E.	Senior Director, Business Management & Analysis
McLaughlin	Janet M.	Project Administrator
Mendoza	Peter J.	Manager, Business Development - Dytran Product Line
Moore	James	Software Developer
Mowray	John W.	Vice President, Professional Services and Automotive Business
Murphy	James R.	Senior Director
Murphy	Rick	Senior Vice President, Global Sales Operations
Nageswaran	Shan	Senior Director - New Technology Development
Neill	Douglas J.	Manager, Aerospace Applications Business Unit
Oien	Julia	Sales Representative
Orozco	Daniel R.	Director, Corporate Administration
Perez	Gloria	Sales Administrator - Finance
Perna	Frank	Chief Executive Officer
Peterson	Edward W.	Manager, Code Management and MSC/Nastran Operations
Privett	Cory	Porting Manager for Nastran
Pun	Adarsh	Senior Product Manager
Raymundo	Don	Administrative Supervisor
Reynold	Antoine	Senior Manager, Strategic Alliances
Reynold	Mike	Senior Software Engineer - DMAP Development
Roch	Douglas K.	Automotive Business Manager
Robertson	Alastair	Product Marketing Manager
Rosato	Carol A.	Quality Assurance Program Manager
Rose	Ted	Manager of MSC/Nastran Training and Support
Sadeghi	Reza	Senior Director - Multi-Physics and Manufacturing Technologies
Schiermeier	John E.	Senior Development Engineer
Schantz	Peter	Manager, DMP Projects
Schultz	Jeff	Marketing Communications
Sheridan	Lynn M.	Contracts Manager
Smithson	Tyler	MSC/Nastran America's Business Unit Manager
Stanton	Ed	Chief Technical Officer
Stass	Bob	Account Manager
Sun	Jian	Senior Software Developer
Stone	Tweed	Program Manager Level 2
Svette	Robert F.	Business Unit Leader for Desktop Products
Teague	Chris	Product Release Manager
Thomson	Brian E.	Senior Account Manager
Tones	Bill L.	Senior Account Manager
Towles	Linda	Manager, Marketing Programs
Truedell	George	Senior Software Engineer, Results Visualization
Wallerstein	Dave	Senior Manager, MSC/Nastran Engineering
Wass	William E.	Sales Representative
Williams	Charles	Western Region Channel Manager
Wilson	Charles T.	Director, MSC/Nastran Senior Development Staff
Woo	Brian L.	Manager, Purchasing

Attachment B

Ron Dyer
Dave Beer
Keane Barthenheler
Joe Baldwin
Bob Louwers
Tom Cully
Don Rioniek
Daryl Patrishkoff
Dale Delgado
Tom Bastanza
Paul Spangler
Paulo Sauer
Greg Floute
David Stogsdill
Mike Malmsten
Bruce Perkins
Sue Werner (inside)
Jason Simon
Salvatore Ginella
Mark Whitmore
Jim Buckley
John Steere
Jon Long
Roy Haynie
Alan Harvey
Aaron Graves
Edward Bullock
Craig Berger
Annelise Tran
Brian Davis
David Stout
Alley Catyb
Bill Kester
Philip Roberts
Marinos Stylianou
Gerry Pugliese
Vincent Bement
Will Hicklen
Mark Kerrigan
Peter Hajjar
Asia-Pacific offices
European offices
South American offices

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Pages:	7 (including this cover sheet)		

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In the Matter of MSC Software

Documents Collected From MSC¹

Custodian	Box Count
Alishetti, Bhoomaish	1
Allahabadi, Rakesh	1
Barclay, Richard	2
Bella, Dave	1
Blakely, Ken	5
Bloomberg, John	2
Brar, Deepak	1
Brauer, John	1
Brennan, Douglas	1
Brown, Todd	3
Bush, Richard	1
Button, Ronda	1
Caselio, Alan	1
Casey, Brian	1
Central Files	3
Chainyk, Mike	1
Chang, Harry	1
Chaudhari, Rajendra	1
Chou, David	1
Chen, Wei-Long	1
Cheng, Hsien C.	1
Contracts	64

¹ Does not include electronic files.

Custodian	Box Count
Cripps, Chris	1
CSA	3
Cully, Tom	3
Daniel, Al	1
Davis, Chuck	1
Dickerson, Ed	1
Dimas, David	1
Fang, Jenny	2
Figer, Charles	2
Finance	1
Furno, John	1
Gockel, Mike	1
Grossen, Mike	1
GSSL	1
Gwillim, Mark	1
Harder, Robert	1
Hart, Bruce	2
Herting, Dave	1
Hoff, Claus	1
Ho, Wai	1
Hu, Jian-Shium	1
Hu, Wai	1
Hultgren, Glen	1
Izadpanah, Arnir	1
Johnson, Erwin	2

Custodian	Box Count
Jones, Bill	2
Kanthasamy, Kunaseelan	1
Karapetian, Mike	2
Karlsten, Keith	1
Kenyon, Mark	1
Kester, Bill	1
Kiroy, Kevin	1
Kobayashi, Makiko	1
Koko, Bomo	1
Komzsik, Louis	1
Kowalski, Tom	1
Kurlink, Rob	1
Layfield, Dale	2
Lec, Jason	1
Lee, Sang	1
Librahim, Omar	1
Lombard, David	1
Long, Louis	1
MacNeal, Richard	1
Maber, Bill	2
Marb, Wolfgang	2
Martin, Ralph	1
Martinez, Al	1
Mattice, Karen	3
Mattson, Hal	2

Custodian	Box Count
Mayer, Stefan	1
McLaughlin, Janet	2
Mendoza, Peter	1
Mistra, Himanshu	1
Moore, Gregory	1
Moore, Jim	1
Mowrey, John	4
Murphy, Jim	1
Murphy, Rick	5
Nageswaran, Shan	1
Neill, Doug	3
Oien, Julia	2
Pamidi, P. R.	1
Papoulia, Katerina	1
Partner Files	7
Patel, Hemant	1
Perna, Frank	2
Poschmann, Petra	1
Reymond, Antoine	2
Reymond, Mike	2
Roach, Doug	4
Rosato, Carol	1
Rose, Ted	1
Roy, Kil	1
Sanders, John	1

Employee	Box Count
Schiermeier, John	1
Schreiber, Oliver	1
Schwartz, Peter	3
Shamsian, Shawn	1
Sheridan, Lynn	1
Sitton, Grant	1
Smith, Jane	6
Smithson, Tyler	1
Song, Dae	1
Stass, Bob	1
Stout, Danielle	2
Stowers, Frederique	1
Supplies/Central Files	2
Swette,	1
Thornton, Brian	2
Torres, Bill	2
Towles, Linda	1
Wallerstein, Dave	1
Wass, Bill	1
Wilder, Stephen	1
Wongk, Dale	1
Yau, Lawrence	1
Yu, Fisher	1

Custodian	Box Count
Yu, Xiaoming	1
Yuh-Yi, Chu	1
Zhang, Sherghua	1
Total	246

Exhibit L

