

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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In the Matter of
MSC SOFTWARE CORPORATION,
a corporation.

Docket No. 9299

PUBLIC

DASSAULT SYSTÈMES' MOTION FOR *IN CAMERA* ORDER

Third-party Dassault Systèmes ("DS"), a French corporation, hereby moves, on behalf of itself and its wholly-owned United States subsidiary, Dassault Systèmes of America ("DSA"), for an *in camera* order pursuant to 16 C.F.R. § 3.45, with respect to the documents listed in Exhibits A, B, and C (the "Documents" or the "Exhibit A, B, and C Documents"). Some of the Documents were produced voluntarily, while others were produced pursuant to an FTC subpoena. All were produced subject to the terms of the Court's Protective Order in this matter dated December 6, 2001 ("Protective Order"). Because public disclosure of the Documents at this time would likely result in serious competitive harm to DS and DSA, *in camera* treatment is appropriate. Moreover, with regard to five of the Documents that are highly sensitive (the "Exhibit C Documents"), as well as four Documents that DS has promised its customers it will not disclose (the "Exhibit B Documents"), DS moves not only for *in camera* treatment, but for terms in an *in camera* order that will prevent their disclosure to the Respondent, including Respondent's in-house counsel.

FACTUAL BACKGROUND

In February 2002, DSA provided a number of documents to the Commission pursuant to a subpoena *duces tecum* issued to DSA by the FTC. Affidavit of Thibault de Tersant (attached as Exhibit D) (“Affidavit”) ¶ 2. DS, the parent of DSA, was not covered by the subpoena served on DSA; DS is located in Suresnes, France and is incorporated under French law. However, in the interest of cooperation with the Commission’s investigation, DS provided a significant number of documents to the FTC on a voluntary basis. *Id.* ¶ 3.

DS and DSA provided the documents, stamped to indicate their confidential nature, with the understanding that the Protective Order would prevent the disclosure of any of the documents to third parties, and would keep those documents stamped “Restricted Confidential” pursuant to the Protective Order from being disclosed to MSC except for outside counsel and specially-designated in-house counsel. *Id.* ¶ 4. Had DS and DSA believed that there was a significant risk that any such documents might be disclosed to the public or to MSC (for those documents shielded from MSC by virtue of the Protective Order), they would not have provided the Documents to the FTC except to the extent DSA was required to do so by legal process.¹

On May 28, 2002, Complaint Counsel notified DS’s counsel of the FTC’s intention to use some of the documents provided by DSA and by DS as evidence at trial in the FTC’s case against Respondent. DS now seeks an *in camera* order with respect to certain of these documents, so as to preserve the treatment they have received to date under the Protective Order.

LEGAL STANDARDS

Under Rule 3.45, material should be granted *in camera* treatment when “its public disclosure will likely result in a clearly defined, serious injury to the [movant].” *Id.* Because DS

¹ DS recognizes that paragraph 13 of the Protective Order provides that the Order “does not constitute an *in camera* order.”

is a third party, its request for *in camera* treatment “deserve[s] special solicitude.” *In re Coca-Cola Co.*, No. 9207, 1990 FTC LEXIS 364, at * 3 (Oct. 17, 1990) (quoting *Kaiser Alum. & Chem. Corp.* 103 F.T.C. 500 (1984)). Furthermore, although DS has attempted to be as specific as possible in detailing the grounds for its motion, “the movants cannot be expected to reveal so much detail that they will defeat the purpose of their application.” *In re Coca-Cola*, 1990 FTC LEXIS 364 at *3.

ARGUMENT

I. The Exhibit A Documents Contain Confidential Sales Data, Business Plans, Marketing Strategies, Product Roll-Out Schedules, and Profit Information, the Disclosure of Which Would Cause Serious, Irreparable Harm to DS’s Competitive Interests

The Documents listed in the attached Exhibit A reflect confidential discussions and contain highly confidential information about the strategic plans of DS and an “Alliance” between DS and MSC for the development and marketing of new products. *See* Affidavit ¶ 8. The Commission has consistently protected sensitive business information of this nature through appropriately tailored *in camera* treatment, and, as discussed below, such treatment is especially proper here.

On April 20, 2001, DS and MSC formed an Alliance whereby MSC will develop new software products on DS’s CAA V5 software architecture. *Id.* In the process of developing the strategy for their Alliance, DS and MSC have exchanged confidential business information, which the two companies have shared and developed pursuant to a confidentiality agreement between them. *Id.* This information includes projections regarding each company’s product pipelines and data about their respective research and development efforts. *Id.* DS and MSC have also discussed potential marketing and sales strategies for the products developed through their Alliance, and have had strategic discussions regarding the Alliance’s financial prospects.

This information is reflected in the Exhibit A Documents. *Id.* DS would likely suffer substantial competitive injury if the Exhibit A Documents were to become public, because competitors would have access to DS's business models, product development and marketing plans, and profit margins, as well as business plans for the Alliance.

More specifically, Documents A1-A10 qualify for *in camera* treatment because they contain a variety of competitively sensitive information: DS and Alliance strategic plans, DS pricing and distribution information, detailed descriptions of DS and MSC product pipelines through roughly 2003-2004, Alliance marketing strategies, and strategic comparisons of DS and MSC products, as well as analyses of the Alliance's strengths and weaknesses. Such sensitive business planning, product development, and sales strategy information requires *in camera* treatment or it could be exploited by DS's competitors. *See, e.g., In re Schering Corp.*, No. 9232, 1990 FTC LEXIS 362, at *2 (Oct. 16, 1990) (granting *in camera* treatment to "sensitive and confidential proprietary information about ongoing product research and development"); *In re Gen'l Motors Corp.*, No. 9114, 1982 FTC LEXIS 89, at *3-7 (Dec. 22, 1982) (same, protecting for ten years documents reflecting business and marketing strategies); *In re Champion Spark Plug Co.*, No. 9141, 1982 FTC LEXIS 92, at * 4-6 (Mar. 4, 1982) (same, "sales information," documents showing "business strategies," "profits margins," and "strategic planning information" regarding applicant's "strengths and weaknesses"); *In re Brunswick Corp.*, No. 9028, 1977 FTC LEXIS 312, at * 3 (Jan. 12, 1977) (same, "forecasts, business plans and marketing strategy"); *In re Kaiser Aluminum & Chem. Corp.*, No. 9080 C, 1977 FTC LEXIS 1, at *5-6 (Dec. 30, 1977) (same, "future business plans"); *see also In re E.I. DuPont de Nemours & Co.*, 97 F.T.C. 116, 1981 FTC LEXIS 91, at *3 (Jan. 21, 1981) ("[I]t is proper to

infer, without a specific showing of how a competitor would use it, that disclosure of allegedly sensitive information would seriously affect the firm's commercial position.'").

In camera treatment should initially extend for a period of at least seven years for these Documents, so as to ensure that the information is not publicly disclosed prior to realization of the plans (which are in incipient stages and may or may not proceed on the precise timeline projected).

Documents A11-A12 contain information regarding profit margins, market analyses, and revenue projections for DS, MSC, and the Alliance. Based on the precedents cited above, DS is clearly entitled to *in camera* treatment of this information. Because profit margins for sales to specific customers are included, this information should be granted *in camera* treatment for ten years. Otherwise, if this information were disclosed in fewer than ten years, customers and competitors might be still be able to use these figures to project estimates of current profit margins and production costs, a serious blow to DS's ability to compete.

Documents A13-A14 are two different versions of confidential guidelines for answering customer inquiries. They provide insight into DS's strategies for customer relations and the development of customer confidence, and as such consist of valuable and secret information. If this background information were viewed by customers, it would cause serious injury to DS's customer relations, both generally and as regards specific customers. *In camera* treatment for such documents is appropriate for three years.

None of the information in the Exhibit A Documents is known outside the Alliance, and a relatively small number of employees at MSC and DS have been sharing the information only pursuant to a confidentiality agreements. Affidavit ¶ 8. This information is one of the central assets of the Alliance and cannot be properly acquired by competitors. These considerations all

weigh in favor of *in camera* treatment. See *Bristol-Myers Co.*, 90 F.T.C. 455, 456-57 (1977) (listing six factors relevant to grant of *in camera* treatment). DS respectfully asks that the Court grant *in camera* treatment for the Exhibit A documents.

II. The Exhibit B Documents Require *In Camera* Treatment, Including Terms that Prevent Their Being Disclosed to any MSC Employee, As They Contain Customer Information Which DS Has Promised Not to Disclose

The Exhibit B Documents contain or reflect the confidential business information of two of DS's significant customers, Lockheed-Martin and Embraer. The Exhibit B Documents describe the methodology by which these two companies select software partners, as well as business information that was provided to DS pursuant to confidentiality agreements with these companies. Because Lockheed-Martin and Embraer would likely suffer substantial competitive injury if their confidential business information became public and available to their competitors, DS would also likely suffer substantial competitive injury, as such disclosure would place it in the awkward position of being the conduit for the release of its customers' confidential internal business information. In such circumstances, *in camera* treatment for an indefinite period is appropriate so as to avoid "undermin[ing] the confidence of past and future clients." *In re R.R. Donnelly & Sons Co.*, No. 9243, 1993 FTC LEXIS 32, at *3-4 (Feb. 18, 1993).

Because disclosure to any employee of MSC would be inconsistent with DS's confidentiality obligations and would provide less protection than the terms of the protective order, DS asks that *in camera* treatment for the Exhibit B Documents be crafted so as to prevent their disclosure to in-house counsel for MSC. "Although [Respondent] has a strong interest in having its employees present during the trial, that interest may be outweighed by the submitter's need to protect the confidentiality of the information, and by the Commission's interest in assuring that, in the future, parties will be willing to disclose confidential information." *In re Toys 'R' Us, Inc.*, No. 9278, 1998 FTC LEXIS 119, at *165 (Oct. 13, 1998) (providing that

respondent's in-house counsel not have access to certain *in camera* documents). Such is the case here. Access to these Documents by outside counsel is sufficient to protect MSC's interests here.

With regard to specific Documents, Documents B1 and B2 reflect confidential information from Lockheed Martin. Although this information is several years old, it is nevertheless customer information which DS is obligated not to disclose. Similarly, Documents B3 and B4 were prepared by DS but include confidential information obtained from Embraer which DS is obligated not to disclose.

DS therefore asks that the Exhibit B Documents be granted *in camera* treatment and not be disclosed to any employee of MSC.

III. The Exhibit C Documents Should Be Granted *In Camera* Treatment, Including Terms that Prevent Their Being Disclosed to any MSC Employee, Because They Contain Highly Sensitive DS Internal Business Plans and Strategies

Like the Exhibit B Documents, the Exhibit C Documents should not be disclosed to MSC except for its outside counsel. Of all the Documents, the Exhibit C Documents are by far the most sensitive and secret. Although DS and MSC jointly participate in the Alliance, they are entirely separate companies with different strategies, objectives, interests, and perspectives, and they maintain their own separate confidences except as regards matters directly related to the Alliance. Moreover, MSC is a relatively small company whose in-house counsel can be expected to perform day-to-day business functions; disclosure to such counsel would pose a grave risk of inadvertent disclosure to other MSC employees. Thus, disclosure of the Exhibit C Documents to any employee of Respondent would cause clearly defined, devastating harm to DS's commercial interests.

The Exhibit C Documents are highly sensitive internal DS business planning documents. Affidavit ¶ 10. The Exhibit C Documents discuss DS's current and future strategic plans for new

product development and for the marketing and sale of existing and future products. Documents C2-C3 and C5 contain internal business plans, market data and DS strategies. Document C4 discusses how DS plans to improve a business relationship with a particular strategic partner. Document C1 includes sensitive and confidential information about DS's revenues, allocation of revenues per customer, geography, etc. and thus must not be disclosed to MSC or any third parties.

The Commission "ha[s] never interpreted Rule 3.45 to require that respondents must have access to *in camera* material." *Toys 'R' Us*, 1998 FTC LEXIS 119 at *167. Such access is not appropriate here. Moreover, because disclosure of the Exhibit C Documents would place DS at a disadvantage in its commercial relations with its Alliance partner, MSC, such *in camera* treatment should be for an indefinite period.

Finally, it should be noted that the Exhibit C Documents were located outside the reach of the subpoena the Commission issued to DSA in this matter, but were nonetheless provided by DS to the FTC on a voluntary basis, with the understanding that by marking them "Restricted Confidential Attorneys Eyes Only" under the Protective Order issued by the Court, their disclosure to all but the FTC and MSC's outside counsel would be prevented. Because access to the Exhibit C Documents would give MSC or any other party an unfair competitive advantage over DS, such disclosure would render impossible the kind of voluntary cooperation upon which the Commission depends, and would make it highly unlikely that DS would cooperate voluntarily with future investigations and proceedings before the Commission.

CONCLUSION

DS respectfully requests that the Court order *in camera* treatment for all the Documents and that it order that the Exhibit B and Exhibit C Documents not be disclosed to MSC (except for outside counsel).

Dated: June 11, 2002

SHEARMAN & STERLING

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Attorneys for Dassault Systèmes

EXHIBIT A

| <u>Reference Number</u> | <u>Bates Range</u> |
|-------------------------|-----------------------------------|
| A1 | pp. 2-7 of DSA Narrative Response |
| A2 | DSA 00009-00038 |
| A3 | DSA 00067-00100 |
| A4 | DSA 00101-00105 |
| A5 | DSA 00106-00132 |
| A6 | DSA 00322-00351 |
| A7 | DSA 00480-00483 |
| A8 | DSA 00484-00521 |
| A9 | DSA 01045-01075 |
| A10 | DSA 00470-00479 |
| A11 | DSA 00039-00054 |
| A12 | DSA 00133-00195 |
| A13 | DSA 00055-00066 |
| A14 | DSA 00307-00321 |

EXHIBIT B

| <u>Reference Number</u> | <u>Rates Range</u> |
|-------------------------|--------------------|
| B1 | DSA 00616-00618 |
| B2 | DSA 00619-00620 |
| B3 | DSA 01089-01094 |
| B4 | DSA 01095-01112 |
| B5 | DSA 01113-01152 |

EXHIBIT C

| <u>Reference Number</u> | <u>Bates Range</u> |
|-------------------------|------------------------------------|
| C1 | pp. 8-11 of DSA Narrative Response |
| C2 | DS 00296-00308 |
| C3 | DS 00309-00341 |
| C4 | DS 00342-00346 |
| C5 | DS 00347-00352 |

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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In the Matter of : Docket No. 9299
MSC SOFTWARE CORPORATION,
a corporation. :
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ORDER FOR *IN CAMERA* TREATMENT

Dassault Systèmes (“DS”) having moved the Court for an *in camera* order with respect to the documents attached to its Motion, and the Court having examined the documents and having found good cause for such an order, it is hereby ORDERED pursuant to 16 C.F.R. § 3.45 that from the date of this order

the documents designated in DS’s Motion as A1-A10 shall remain *in camera* for a period of seven years;

the documents designated in DS’s Motion as A11-A12 shall remain *in camera* for a period of ten years;

the documents designated in DS’s Motion as A13-A14 shall remain *in camera* for a period of three years;

the documents designated in DS’s Motion as B1-B5 shall remain *in camera* for an indefinite period and shall not be disclosed to Respondent except for its outside counsel;

the documents designated in DS’s Motion as C1 C5 shall remain *in camera* for an indefinite period and shall not be disclosed to Respondent except for its outside counsel.

Date: _____

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 2002, I caused an original, one paper copy and one electronic copy of the foregoing motion for *in camera* treatment and supporting papers to be filed with the Secretary of the Commission, and that two paper copies were served by hand upon:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

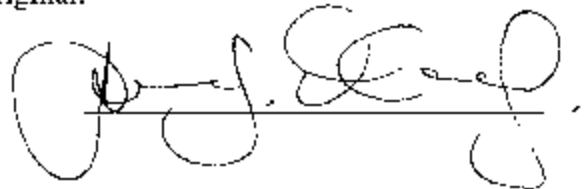
and one paper copy was hand-delivered upon:

Karen A. Mills, Esq.
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Gregg Locascio, Esq.
Kirkland & Ellis
655 15th Street, N.W.
Washington, DC 20005

I further certify as required by section 4.2(c)(3) of the Commission's Rules of Practice that the electronic copy of the foregoing motion for *in camera* treatment filed with the Secretary of the Commission is a true and correct copy of the paper original.

A handwritten signature in black ink, appearing to read "D. Michael Chappell", is written over a horizontal line. The signature is cursive and includes a large loop at the end.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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In the matter of

MSC.SOFTWARE CORPORATION,
a corporation.

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: Docket No.: 9299
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**AFFIDAVIT IN SUPPORT OF MOTION OF DASSAULT SYSTEMES
FOR *IN CAMERA* ORDER**

Thibault de Tersant hereby states as follows:

1. I am the Executive Vice President Finance & Administration at Dassault Systèmes ("DS"). My job responsibilities at DS include all responsibilities for finance, legal and corporate matters. I am familiar with all aspects of DS' business strategy, including the DS alliance with MSC.Software ("MSC"), the Respondent in this matter.
2. In February 2002 Dassault Systèmes of America ("DSA"), DS' U.S. subsidiary, provided a number of documents to the U.S. Federal Trade Commission ("FTC") pursuant to a subpoena *duces tecum* issued to DSA by the FTC.
3. DS, the parent of DSA, is located in Suresnes, France and is incorporated under French law. It was therefore not covered by the subpoena served on DSA. However, in the interest of cooperation DS provided a significant number of documents to the FTC on a voluntary basis.
4. DS understood that the documents that it and DSA provided, both those provided voluntarily and those provided pursuant to the FTC subpoena, were covered by a Protective Order that would prevent the disclosure of said documents to third parties, and in some cases to all at MSC except for specially-designated in-house and outside counsel.
5. I have read the letter Karen Mills of the FTC sent to DS' counsel (the "FTC Letter") informing them of the FTC's intention to use some of the documents provided by DSA and by DS as evidence at trial in the FTC's case against Respondent (the "DSA/DS

Documents"). I understand from the FTC Letter and from discussions with counsel that any DSA/DS documents that are used as evidence will become part of the public record unless they are protected pursuant to an *in camera* order.

6. I have reviewed the DSA/DS Documents. This affidavit describes the nature of the DSA/DS Documents for which DS is seeking *in camera* status, and explains the likely risk of substantial competitive injury to DS if certain of the DSA/DS Documents are not protected from disclosure.

7. I affirm that to the best of my knowledge and belief all of the facts and statements contained in DS' Memorandum of Law that pertain to the DSA/DS Documents are true.

8. On April 20, 2001, DS and MSC signed a Memorandum of Understanding establishing an Alliance between the two companies whereby MSC will develop new software products on DS's CAA V5 architecture. The companies believe that the Alliance will benefit both DS and MSC customers. In the course of developing the strategy for their Alliance, DS and MSC have exchanged confidential business information regarding their product pipelines and their respective research and development efforts. DS and MSC have also discussed potential marketing and sales strategies for the products developed through their Alliance, and have had strategic discussions regarding the financial prospects for the Alliance. The DSA/DS Documents listed in the attached Exhibit A ("Exhibit A Documents") reflect these discussions and contain highly confidential information about the strategic plans of MSC, DS, and the Alliance for the development and marketing of new products. This information was shared and developed pursuant to a confidentiality agreement between MSC and DS, and DS would likely suffer substantial competitive injury if the Exhibit A Documents were to become public, as our competitors would gain valuable insight into the future plans for the Alliance.

9. The documents listed in the attached Exhibit B ("Exhibit B Documents") contain or reflect the confidential business information of two of DS' significant customers, Lockheed-Martin and Embraer. The Exhibit B Documents describe the methodology by which these two companies select software partners, as well as business information that was provided to DS pursuant to confidentiality agreements with the company. Lockheed-Martin and Embraer


would likely suffer substantial competitive injury if their confidential business information became public and available to their competitors. DS would also likely suffer substantial competitive injury, as such disclosure would place it in the awkward position of being the conduit for the release of its customers' confidential internal business information.

10. The documents listed in the attached Exhibit C ("Exhibit C Documents") are highly sensitive internal DS business planning documents. These documents contain confidential DS business information, the release of which to the public or to MSC would likely cause substantial competitive injury to DS. The Exhibit C Documents discuss DS' current and future strategic plans for new product development and for the marketing and sale of existing and future products. For example, one of the Exhibit C Documents discusses DS' plans for improving its current business relationship with IBM. Furthermore, the Exhibit C Documents that bear the legend "DS" are documents that were provided to the FTC on a voluntary basis with the understanding that the Protective Order issued by the Court would protect their disclosure to all but the FTC and MSC's outside counsel. Because access to the documents listed on Exhibit C would give MSC or any other party an unfair competitive advantage over DS, such disclosure would make it highly unlikely that DS would cooperate voluntarily with future investigations or proceedings before the FTC.

* * * * *

Pursuant to 28U.S.C. §1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 5, 2002

A handwritten signature in black ink, appearing to read "Tibault de Tersant", written above a horizontal line.

Tibault de Tersant

EXHIBIT A

| <u>Reference Number</u> | <u>Bates Range</u> |
|-------------------------|-----------------------------------|
| A1 | pp. 2-7 of DSA Narrative Response |
| A2 | DSA 00009-00038 |
| A3 | DSA 00067-00100 |
| A4 | DSA 00101-00105 |
| A5 | DSA 00106-00132 |
| A6 | DSA 00322-00351 |
| A7 | DSA 00480-00483 |
| A8 | DSA 00484-00521 |
| A9 | DSA 01045 01075 |
| A10 | DSA 00470-00479 |
| A11 | DSA 00039-00054 |
| A12 | DSA 00133-00195 |
| A13 | DSA 00055-00066 |
| A14 | DSA 00307-00321 |

EXHIBIT B

| <u>Reference Number</u> | <u>Bates Range</u> |
|-------------------------|--------------------|
| B1 | DSA 00616-00618 |
| B2 | DSA 00619-00620 |
| B3 | DSA 01089-01094 |
| B4 | DSA 01095-01112 |
| B5 | DSA 01113-01152 |

EXHIBIT C

| <u>Reference Number</u> | <u>Bates Range</u> |
|-------------------------|------------------------------------|
| C1 | pp. 8-11 of DSA Narrative Response |
| C2 | DS 00296 00308 |
| C3 | DS 00309-00341 |
| C4 | DS 00342-00346 |
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