UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	**PUBLIC VERSION**
MSC.SOFTWARE CORPORATION, a corporation.	)	**Docket No. 9299**

To: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S MOTION FOR SANCTIONS FOR RESPONDENT'S WILLFUL NON-COMPLIANCE WITH ORDERS THAT IT COMPLETE ITS RESPONSE TO COMPLAINT COUNSEL'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

Pursuant to Rule 3.38(b) of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.38(b), Complaint Counsel respectfully move for an order imposing sanctions against Respondent for Respondent's willful non-compliance with the Scheduling Order, (Exhibit 1), Your Honor's Order of January 18, 2002, (Exhibit 2), and Your Honor's Order of May 22, 2002, (Exhibit 3). Since the close of discovery on May 28, 2002, and in spite of your Honor's order that Respondent complete its document production by that date, Respondent produced more documents than it produced throughout the entire discovery period up to that date. Most of the materials Respondent produced were in an electronic form still not usable to Complaint Counsel.

The Federal Trade Commission Rules of Practice 3.38 provides that, "[i]t shall be the duty of parties to seek and Administrative Law Judges to grant" sanctions or other appropriate relief as may be sufficient to compensate for failure to produce documents as ordered." This case requires severe sanctions and substantial additional relief, because Respondent's violation of discovery Orders has been so severe and prejudicial. Respondent did not complete its response

to Complaint Counsel's November 21, 2002, First Request for Production of Documents and Things ("the Document Request", Exhibit 4), by May 28, 2002, as Your Honor ordered, and in fact is not expected to complete its production before the trial of this matter begins. Two alternative draft Orders are attached as Exhibits 5 and 6.

I. The Federal Trade Commission Rules of Practice Authorize Use of Sanctions

The Federal Trade Commission Rules of Practice and the Federal Rules of Civil Procedure both authorize sanctions where, as here, a party has violated an Order to comply with discovery. Rule 3.38(b) provides:

> If a party or an officer or agent of a party fails to comply with an order, including an order . . . for the production of documents, . . . the Administrative Law Judge or the Commission, or both, for the purpose of permitting resolution of relevant issues and disposition of the proceeding without unnecessary delay despite such failure, make take such action in regard thereto as is just, included but not limited to the following:
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> (1) Infer that the . . . documents or other evidence would have been adverse to the party;
> (2) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;
> (3) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent or the documents or other evidence;
> (4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony or other evidence would have shown; or
> (5) Rule that a pleading, part of a pleading, a motion or other submission by a party concerning which the order was issued be stricken, or that a decision of the proceeding be rendered against the party, or both.

16 C.F.R. 3.38(b). In addition, Rule 3.38(c) provides:

> It shall be the duty of parties to seek, and Administrative Law Judges to grant, such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the withheld testimony, documents, or other evidence.

16 C.F.R. 3.38(c).

II. Respondent's Order Violations Merit Sanctions

Respondent violated three Orders when it failed to complete production of responsive documents by May 28, 2002, as Ordered. The Scheduling Order provided that May 28, 2002, was the cut off date for discovery. On January 18, 2002, Your Honor Ordered Respondent to fulfill its own representations about what documents it would produce and what steps it would take to comply with the Document Request.[1] Four months later, when Respondent still had neither complied with the representations it had made about its production nor completed that production, Your Honor issued the May 22, 2002, Order and set a clear deadline for completion of Respondent's production. Your Honor ordered Respondent to complete its production "in no case later than May 28, 2002."[2] (Exhibit 3).

Although Respondent sought no relief from the Orders Your Honor issued, it did not comply. Instead, Respondent made a staggeringly incomplete response by May 28, 2002,

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[1] Respondent had represented at the time that, "[i]n 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." (Exhibit 7, Respondent's Memorandum in Opposition to Complaint Counsel's Motion to Compel, January 7, 2002, at p. 12). Respondent also had represented that, "MSC remains committed to working with Complaint Counsel . . . producing the large volume of documents responsive to Complaint Counsel's requests in a time period that is not unduly burdensome." (Exhibit 7 at p. 6) Respondent had stated that it was "working diligently with Complaint Counsel to provide responses to Complaint Counsel's document requests," (Exhibit 7, at p. 1),

[2] Your Honor issued the May 22, 2002, after considering Respondent's pleas for relief from discovery obligations due to Respondent's efforts to date, the claimed costs of compliance with discovery, and Respondent's financial condition, (see Respondent's May 20, 2002, Opposition to Complaint Counsel's Motion to Compel, Exhibit 8), and Respondent should not be permitted to re-litigate this issue.

delivering the hundreds of boxes, or well over half of all responsive documents, after May 28, 2002. Respondent delivered 57 boxes of hard copy responsive documents, the latest on July 1, 2002, just one week before the start of trial, and 127 CDs containing the equivalent of 460 boxes of electronic documents in unusable form, for a total of 516 boxes, after May 28, 2002.[3]

Respondent's willful non-compliance with Your Honor's Orders justifies the imposition of both Rule 3.38(b) sanctions and additional Rule 3.38(c) relief. The relief should be strong, to tailor it to the seriousness and scope of Respondent's non-compliance with Your Honor's Orders.

Under similar circumstances, in an antitrust case, the Supreme Court found the ultimate sanction under the Federal Rules of Evidence justified. In that case, the non-complying party was the plaintiff, and the Supreme Court upheld the sanction of dismissal of plaintiff's case for failure to timely comply with a discovery order. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976). The Supreme Court quoted the lower court decision:

> 'After seventeen months where crucial interrogatories remained substantially unanswered despite numerous extensions granted at the eleventh hour and, in many instances, beyond the eleventh hour, and notwithstanding several admonitions by the Court and promises and commitments by the plaintiffs, the Court must and does conclude that the conduct of the plaintiffs demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents. The practices of the plaintiffs exemplify flagrant bad faith when after being expressly directed to perform an act by a date certain, viz., June 14, 1974, they failed to perform and compounded that noncompliance by waiting until five

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[3] Respondent submitted 34 boxes of physical documents on May 30, 2002, 10 boxes on May 31, 2002, 9 boxes on June 11, 2002, 3 boxes on June 13, 2002, and one box on July 1, 2002, with no explanation as to why they were submitted after the May 28, 2002, date when their production was required by Your Honor's Order. In addition, Respondent submitted 49 CDs in unusable form on May 28, 2002, 15 CDs on May 29, 2002, 34 CDs on May 30, 2002, and 29 CDs on June 12, 2002, together containing the equivalent of approximately 460 boxes of documents. As explained in Complaint Counsel's June 7, 2002, Motion to Compel, these CDs contained no bibliographic information or load files that would be necessary to make use of them. As of this writing, Complaint Counsel still is waiting for a usable submission from Respondent.

days afterwards before they filed any motions.'

427 U.S. at 640, *citing National Hockey League v. Metropolitan Hockey Club*, 63 F.R.D. 641, 656 (1974). The Supreme Court then concluded that the ". . . record shows that the District Court was extremely patient in its efforts to allow the respondents ample time to comply with its discovery orders. Not only did the respondents fail to file their responses on time, but the responses which they ultimately did file were found by the District Court to be grossly inadequate." *Id.* at 642. The Supreme Court acknowledged that dismissal was a severe sanction, but concluded in this antitrust case that, ". . . here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Id.* at 643.

Respondent's conduct here was similarly egregious – and even more egregious -- than the non-responding party's in *National Hockey League*, and warrants a similarly severe sanction. Respondent did not object to or seek relief from this May 22, 2002 Order, or inform either this court or Complaint Counsel that it would have difficulty or be unable to comply with it. The non-complying party in the Supreme Court case mentioned above at least filed motions five days after its failure to comply with an order to complete discovery. *Compare, National Hockey League, supra*, at 640.

III. Complaint Counsel Offers Two Alternative Sanctions Orders

Federal Trade Commission Rule 3.38(b)(2) provides that an Administrative Law Judge or the Commission may rule that for the purposes of the proceeding, the matters concerning which

an order was issued shall be taken as established adversely to the party who violated the order. Complaint Counsel respectfully moves the issuance of the proposed Order attached hereto as Exhibit 4, containing a ruling that the elements of Complaint Counsel's Complaint are taken as established adversely to Respondent, and entering a judgment for Complaint Counsel. A proposed draft order doing so is attached hereto as Exhibit 5.

In the alternative, Complaint Counsel proposes that Your Honor issue the proposed Order attached hereto as Exhibit 6. This proposed order would impose three sanctions against respondent under Rule 3.38(b):

(1) adopt an inference under Rule 3.38(b)(1) that the documents not produced by May 28, 2002, would have been adverse to Respondent on any or all allegations of the Complaint (adoption of which inference still would allow Respondent to put on a defense);

(2) prohibit Respondent from introducing into evidence or otherwise relying upon, such documents, pursuant to Rule 3.38(b)(3); and

(3) prohibit Respondent from objecting to introduction and use by Complaint Counsel of any secondary evidence to show what the documents produced by Respondent after May 28, 2002 would have shown, pursuant to Rule 3.38(b)(4).

In addition, the alternative proposed Order also would permit Complaint Counsel to:

(1) amend its Exhibit List;

(2) introduce into evidence any of the documents produced by Respondent to Complaint Counsel after May 28, 2002, or any other documents or events reasonably related thereto, and Respondent shall have no right to object to their introduction;

(3) present testimony, including expert testimony, regarding any of the documents produced by Respondent to Complaint Counsel after May 28, 2002, or any documents or events reasonably related thereto, without objection by Respondent; and

(4) introduce such documents into evidence or present testimony about them in its rebuttal case which otherwise rightly should have been part of Complaint Counsel's case in chief.

Finally, the alternative proposed Order makes clear that Complaint Counsel's experts may

testify about and rely upon any of the documents produced by Respondent to Complaint Counsel after May 28, 2002, or any documents or events reasonably related thereto, without objection by Respondent. In order to permit Complaint Counsel to complete its discovery, the proposed Order requires Respondent to produce its employees for deposition promptly at Complaint Counsel's request, and to give Complaint Counsel 5 business days' notice before the testimony of each of Respondent's witnesses.

Respondent should not be granted additional time to complete its document response, in lieu of sanctions.[4] Your Honor already has accommodated Respondent up to close of discovery set in the Scheduling Order. Any further delay would not be in the public interest. It is well recognized that when the disobedient party is the defendant, a stay of the proceedings is unlikely to be an effective remedy, and could operate to defendant's advantage, particularly when (as here) the defendant has an interest in delaying the plaintiff's case. *See,* e.g., *Bell v. United States,* 31 F.R.D. 32, 36 (D.Kan. 1962). See also *Moore's Federal Practice 3d,* 37-98, and *Verrazzano Trading Corporation,* 91 F.T.C. 888 (1976) (no tempus penitentiae should be allowed before sanctions are granted where the responding party's failed production was deliberate and willful).

Given the enormous volume of documents that Respondent produced after the close of discovery, and so close to the hearing date, there is no time to give Respondent another chance to comply without delaying the hearing and resolution of this matter,[5] and such cannot be granted

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[4] Complaint Counsel filed a Motion to Compel Respondent to Complete its Response on June 7, 2002. Respondent answered the motion, it still is pending. Complaint Counsel considers this motion not moot until Complaint Counsel receives a complete and usable response.

[5] *Compare, Beatrice Foods,* 180 FTC Lexis 204 (to avoid prejudice to complaint counsel after Respondent produced 8 cartons of documents late, substantial continuance of

under the Rules absent good cause,[6] and would not be in the public interest. As Complaint Counsel has steadfastly maintained throughout this proceeding, however, delay in the trial and ultimate resolution of this matter is against the public interest because Respondent's own documents suggest that it has profited from its anticompetitive acquisitions of UAI and CSAR, to the detriment of consumers. Respondent has sought throughout this proceeding, most recently in its July 3, 2002, motion, to have Your Honor delay the hearing and resolution of this matter, and Complaint Counsel has opposed all delays. Respondent should not be rewarded with the delay it has sought, for its non-compliance with Your Honor's Orders, and for taking matters into its own hands to impede Complaint Counsel's preparation and presentation of its case.

The Supreme Court found in *National Hockey League* that even the severest of sanctions are justified where, as here, a responding party complied partly with discovery as ordered, but the response remained substantially incomplete by the deadline contained in an order. In this case, Respondent's production by the May 28, 2002, deadline set by Your Honor's May 22, 2002, Order was dwarfed by Respondent's production after May 28, 2002, and Respondent's production still is not complete one month after that date, and on the eve of trial

Respondent's conduct subsequent to the May 28, 2002, deadline confirms that its non-compliance with Your Honor's Orders exemplifies bad faith. Respondent has offered no explanation to Complaint Counsel or Your Honor for its late production of physical documents, and although Complaint Counsel notified Respondent immediately of the deficiency in the May

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proceedings granted for Complaint Counsel to peruse them, and Respondents ordered to make their officials available for depositions in Washington).

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28, 2002, electronic production, and even after Complaint Counsel filed a Motion to Compel production in usable form on June 7, 2002, Respondent refused and failed to supply the electronic documents in usable form. As of the date of this filing, one month after the date Respondent was required to have completed its production, and just days before trial is to begin, Complaint Counsel still do not have beneficial use of the electronic document production.

IV. There is Ample Precedent for ALJ Use of Sanctions

Administrative Law Judges have imposed sanctions under the Federal Trade Commission Rules of Practice, and the Commission has strongly reaffirmed the power of Administrative Law Judges to impose sanctions, as appropriate, in adjudicative proceedings. The Federal Trade Commission Rules of Practice authorizing Administrative Law Judges and the Commission to impose sanctions and such other relief as may be necessary to compensate for non-compliance with Orders compelling compliance with discovery are essential to maintaining the integrity of the administrative process, particularly given the deadlines for adjudication imposed by the 1996 Rules changes.[7] Rule 3.1 provides that, "[i]t is the policy of the Commission that, to the extent

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[7] In 1996, when the Commission amended the Rules of Practice, it stated that: "unnecessary delay in adjudications can have a negative impact on the Commission's adjudicatory program and law enforcement mission. The agency's longstanding policy has been that, to the extent practicable and consistent with requirements of law, adjudicative proceedings shall be conducted expeditiously and that both the Administrative Law Judge and litigants shall make every effort to avoid delay at each stage of the proceeding. 16 CFR 3.1. Unnecessary long proceedings waste Commission and private resources. Delay can extend legal uncertainty for respondents and third parties, and may reduce the efficacy of any remedies resulting from such proceedings." 61 FR 50640 (1996). The statement of basis and purpose for the Rules changes provides further guidance: "The Commission also encourages the ALJs to consider implementing other techniques, besides the rule amendments announced in this notice, to expedite action in each adjudicatory proceeding. Efficient adjudication required affirmative case management, and ALJ's have broad powers under Rule 3.42(c) that should be used fully to balance the interests of expedition and fairness. . . . The Commission also invites the ALJs to exercise their discretion in regulating the course of adjudicative proceedings in a manner that expedites proceedings,

practicable and consistent with requirements of law, such proceedings shall be conducted expeditiously. In the conduct of such proceedings the Administrative Law Judge and counsel for all parties shall make every effort at each state of a proceeding to avoid delay." 16 C.F.R. 3.1. The Commission's 1996 Rules changes sought to promote expeditious resolution of Part III cases by requiring that an Administrative Law Judge file an initial decision within one year of service of the administrative complaint, except in extraordinary circumstances, strengthening the tools available to an ALJ to manage administrative proceedings, and encouraging the Administrative Law Judges to actively manage administrative proceedings.

To minimize discovery delays in administrative proceedings, the Commission in 1996 amended Rule 3.21 to promote greater use of pre-hearing and status conferences to narrow evidentiary issues and help the Administrative Law Judge plan an efficient evidentiary hearing. The Commission announced that it expected that at this conference, counsel would be required to submit any proposed stipulations of law, fact, or admissibility of evidence, exchange exhibit and witness lists, and designate testimony to be presented by deposition. *Id.* at 50644. Respondent's late production and production in unusable form of responsive documents made it impossible for Complaint Counsel to prepare properly its exhibit list, proposed stipulations, and evidentiary objections as required by the Scheduling Order or anticipated by this Rule change. The consequence, as the Commission well anticipated, is likely to be delay at trial, as Complaint Counsel will be forced to deal with evidentiary issues during the course of trial, rather than in advance, particularly if sanctions and other relief are not granted.

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consistent with due process considerations." *Id.* at 50640-50641.

The Commission has upheld use of Rule 3.38 sanctions in circumstances similar to those presented by this case. See, e.g., *Olin Corporation*, 113 F.T.C. 400 (1990) (Commission upheld sanctions for violation of prehearing scheduling order); *International Telephone and Telegraph Corp.*, 104 F.T.C. 280 (1984) (Commission upheld use of sanctions where respondent willfully withheld some of the documents required to be produced by an order, even after complaint counsel had reduced the scope of subpoena specifications on which compliance had been delayed–sanctions merely held the respondent to their own choice of how to proceed). The Commission upheld the *ITT* Administrative Law Judge's use of sanctions like those Complaint Counsel seeks here.[8]

The Commission recognizes that the adverse inferences available under Rule 3.38 and Federal Rule of Civil Procedure are both based on the same premise: if a party has relevant evidence within its control but fails to produce it, that failure gives rise to an inference that the evidence is unfavorable to him. *ITT, supra,* at 380, *citing International Union (UAW) v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972). In *American Medical Association*, 94 F.T.C. 701 (1979), the Commission stated that application of the adverse inference rule may be made only when the

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[8] (1) An adverse inference under 3.38(b)(1) such that Complaint Counsel was deemed to have established one of the elements of liability for which Respondent had produced documents after the deadline set by an Order; (2) a ruling under Rule 3.38(b)(3) that Respondent was barred from entering into evidence or otherwise relying upon any of the documents not supplied by the date required by the Order; and (3) a ruling under Rule 3.38(b)(4) that Respondent would not be permitted to object to Complaint Counsel's introduction and use of other relevant and reliable evidence, on the grounds that the withheld documents were better evidence. *ITT, Id.* The Commission affirmed Administrative Law Judge's denial of respondent's motion for dismissal of the sanctions, even though respondent offered to agree to allow complaint counsel to present the late-produced evidence during their rebuttal case, and respondent offered to forego the right to use such late-produced evidence in rebuttal. Such offers did not negate the prejudice, or obviate the need for sanctions, and would not here if they were made.

party's failure to produce documents is not adequately explained. The resulting inference may be strong or weak, depending on the person's conduct and the surrounding circumstances. In the absence of "a strong explanation for non-compliance," adverse inferences are properly drawn. *ITT, Id.* at 410-411, *citing American Medical Association, supra,* at 195-196. Respondent has offered no explanation for its non-compliance.

Precedent under the Federal Rules supports sanctions for tardy production of electronic documents without the source code necessary to read such records. *See Fautek v. Montgomery Ward & Co.*, 96 F.R.D. 141, 145-146 (N.D. Ill. 1982) (party sanctioned for tardy production of computer records and source code to read records, and liable for costs incurred by requesting party in developing software program to retrieve electronic data because responding party initially denied existence of software it later produced). *See also, Second Chance Body Armor, Inc., v. American Body Armor, Inc.,* 177 F.R.D. 633, 636-637 (N.D. Ill. 1998) (untimely production of computer tapes and back-up tapes sanctioned). Where a party fails to provide ***with*** the electronic production of responsive documents the codes and other information necessary to decipher an electronic production of responsive documents, the response violates the responder's obligation to respond completely, accurately, and in timely fashion. "[D]ilatory and partial compliance with a document request does not remove a case from the ambit of sanctions." *Fautek, supra,* at 145. Informal cooperation later, after a defective production electronic documents, does not cure the earlier non-compliance, or render the responding party immune from sanctions. *Fautek, supra.* at 144-145. Ultimate production of required responsive material does not absolve a party from liability for sanctions where production was not timely made in compliance with a court order. *Ohio v. Arthur Andersen & Co.*, 570 F.2d 12370, 1374 (10th Cir.), *cert. denied,* 439 U.S. 833

(1978).

Respondents' legal obligations to respond to discovery in timely and complete fashion in turn requires parties and their attorneys to take reasonable steps to ensure that their responses to discovery are complete and accurate. *Fautek, supra,* at 145, *citing, inter alia, Haney v. Woodward & Lothrop, Inc.*, 330 F.2d 940 (4th Cir. 1964); *Allen Penn Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 23 (1st Cir. 1981). Failure to make timely production of responsive information may justify the imposition of sanctions, even where the failure to make timely production is the result of simple negligence. *Compagnie de Bauxites de Guinea v. Insurance Co. of North America,* 651 F.2d 877, 885 (3d Cir. 1981), *aff'd sub nom. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 102 S. Ct. 2099 (1982). Where it is apparent that it should have been easy for counsel to determine with the help of their clients and computer experts what auxiliary information would be necessary to understand the electronic production of documents, courts have concluded that non-production of the auxiliary information is reckless, negligent, and misleading not only to the party requesting documents, but to the court. Sanctions have been found to be appropriate in such cases "'not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.'" *Fautek, supra,* at 146-147, *citing National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (*per curiam*).

Where a responding party has agreed to produce documents responsive to a requesting party's requests, but then does not do so in a complete, accurate, and timely way, sanctions are appropriate. *Tec-Air, Inc. v. Nippondenso Manufacturing USA, Inc.,* 1994 U.S. Dist. Lexis 2026 (N.D. Ill. 1994). Where the requesting party has relied upon representations of the responding

party that it would respond completely, and has constructed and implemented its discovery, trial strategy, and trial preparation around the responding party's representations and certifications that relevant documents will be and have been produced, as Complaint Counsel has, the prejudice to the requesting party is acute. *Id.* Sanctions are appropriate where a responding party produces responsive documents after discovery has closed, and close to the eve of trial. *Id.* When it is apparent that a responding party easily located the remaining and late-produced documents in the offices of its own counsel, courts have found that this indicates that reasonable steps were not taken by the responding party during discovery to ensure that its responses were complete and accurate, and sanctions have been imposed. *Id.*

V. Respondent's Violation of Your Honor's Orders Was Willful

Respondent chose to reduce its efforts to comply with Your Honor's Orders, due to its financial condition. See, Respondent's May 20, 2002, Opposition to Complaint Counsel's May 10, 2002, Motion to Compel. (Exhibit 8). Respondent admitted that its production of responsive documents had been slowed due to Respondent's decision, "due to its current financial condition, to limit the number of people reviewing documents to six, down from thirty." Your Honor rejected Respondent's arguments that it could not comply by May 28, 2002, and Ordered Respondent to comply by that date.

Respondent's decision to produce electronic documents in an unusable form was intentional and willful, as well. Respondent neither objected to nor complied with the Document Request instruction that Respondent confer in advance to obtain Complaint Counsel's agreement

that a proposed electronic document production would be in a usable form.[9] Respondent consistently maintained that it was under no obligation to supply Complaint Counsel with the documentation necessary to make the electronic document production usable to Complaint Counsel. See, Respondent's Supplement to Its Emergency Motion to Remedy Jim Cashman's Refusal to Appear, at fn.13. (Exhibit 9). As explained in the attached sworn statement of Complaint Counsel Karen A. Mills, even after Complaint Counsel advised Respondent what it would need to make the electronic production usable, Respondent refused to provide the information,[10] and refused to commission its electronic document production company to make the electronic document production usable to Complaint Counsel, as well as Respondent.

Respondent's subsequent conduct further confirms that it willfully withheld responsive electronic documents from Complaint Counsel until the eleventh hour. Respondent compounded the prejudice due to its non-compliance with the May 22, 2002, Order by failing to include copies of most of the electronic documents on the Exhibit List it submitted pursuant to its Scheduling Order obligations. Respondent did not submit copies of all exhibits, including the electronic documents it planned to use, until 6:20 p.m. on June 28, 2002. Evidence that a party deliberately withheld relevant responsive documents also justifies a sanction prohibiting the party from relying upon those documents in its own presentation. *ITT, Id.* at 381, *citing NLRB v. C. H. Sprague &*

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[9] Complaint Counsel's conduct in this matter follows, and Respondent's violates, well-accepted legal practice. In this day and age of electronic documents, when electronic production is sought or made, it is well accepted good legal practice for parties to discuss in advance of production which supplementary materials will be needed to use them effectively. *Moore's Federal Practice 3d,* § 37A-46 and 47.

[10] Complaint Counsel's efforts to obtain the electronic documents in usable form via negotiation with Respondents is no bar to sanctions. *Fautek, supra,* at 147.

Son Co., 428 F.2d 938, 942 (1st Cir. 1970).

Respondent's subsequent conduct does not cure the Order violation, diminish the prejudice to Complaint Counsel, or obviate the need for sanctions. It was not until fourteen days after Respondent's production was due that it even offered to permit its electronic document production company to produce the electronic documents to Complaint Counsel in usable form. In order for a complete response to the Document Request to include an electronic submission, Respondent was obliged to confer in advance, obtain Complaint Counsel's determination that the production planned would be usable, and provide the usable production by May 28, 2002. Because the electronic production was not designed to be usable for Complaint Counsel, Respondent's electronic document production company must retrofit the production it prepared for Respondent. This retrofit has taken substantial time, and Complaint Counsel still does not have beneficial use of these documents.[11] Usability disputes aside, Respondent indisputably

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[11] From May 28 to the present, Respondent consistently maintained that it was under no obligation to supply Complaint Counsel with the documentation necessary to make the electronic document production usable to Complaint Counsel. See, Respondent's Supplement to Its Emergency Motion to Remedy Jim Cashman's Refusal to Appear, at fn.13. (Exhibit 9) Complaint Counsel disputes Respondent's characterization of the facts in footnote 13, and notes that Respondent's motion was not supported by any sworn statement by counsel to the factual predicates on which Respondent relies. Complaint Counsel disputes Respondent's representation that the failure to produce the 29 CDs delivered on July 12, 2002, was beyond MSC's control. As Commission precedent and case law summarized below demonstrates, Respondent was legally obliged to supervise its agents to insure a complete, accurate, and timely production of responsive documents. Furthermore, while it is true that Respondent orally offered for the first time on June 12, 2002, to authorize its document production company to provide Complaint Counsel with additional documentation to make the electronic production usable, it was a late and hollow offer, and has not yet been accomplished. Complaint Counsel disputes Respondent's misleading representation that Respondent volunteered to give Complaint Counsel a searchable database for the entire 127 CD production. Respondent neglected to mention that no such searchable database accessible to Complaint Counsel existed or even now exists. It did not exist on June 12, 2002, when the proffer was made, nor on June 17, 2002, when Respondent's Supplemental filing was made, and it still does not exist, but must be created. Complaint

produced 78 CDs after the deadline of May 28, 2002, set by Your Honor's May 22, 2002 Order, and for 49 of those tardily produced CDs, Respondent does not even claim the weak excuse for non-production of inadvertence.

VI. Complaint Counsel Is Prejudiced by Respondent's Incomplete and Tardy Production

Respondent's tardy and incomplete production of responsive documents significantly prejudices Complaint Counsel's preparation of its case by denying the timely and complete discovery Your Honor ordered – prejudice that, if not at least partially remedied by sanctions and additional relief, will deny the public the benefit of a full and fair trial on the merits, and will complicate and lengthen the trial of this matter. The nature and extent of the prejudice is obvious. Complaint Counsel was unable to use documents produced late, or in usuable form, to depose witnesses about these documents, share the documents with experts, follow where the documents might lead with additional discovery, use the documents in its pre-trial brief or findings of fact, include the documents on its exhibit list, use the documents to inform the preparation and presentation of Complaint Counsel's presentation of its case in chief, prepare documents for use in courtroom presentations, anticipate and test Respondent's defenses, or consider whether such documents might usefully serve as rebuttal evidence.

The tardy and unusable electronic documents, are on CDs labeled including responsive documents from top executives at MSC, including Messers. Perna (CEO), Murphy (Senior Vice

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Counsel further dispute Respondent's June 17, 2002, representation in footnote 13 of Respondent's Supplement to its Emergency Motion that Respondent had been working with the vendor to obtain the files in the format best suited to Complaint Counsel's needs – Respondent has done nothing of the kind, but put the burden on Complaint Counsel to work with Respondent's electronic production company to design a retrofit of Respondent's unusable production. This delay could have been avoided if Respondent had conferred in advance as required by the Document Request.

President of Global Sales), Morgan (Vice President of Software Development for MSC and former President of UAI), Dyer (Senior Director Global Aerospace Accounts), and Mehta (Director of Marketing and Business Development). Also, it should be noted that Respondent represented to Complaint Counsel that Mr. Morgan had no non-electronic responsive documents, and that all of his responsive documents would be electronic. Therefore, the tardy and unusable production of Mr. Morgan's responsive documents is particularly egregious, as Complaint Counsel have had access to none of Mr. Morgan's responsive documents.

In addition, Complaint Counsel was prejudiced by the delivery, after the May 28, 2002, return date set by Your Honor's May 22, 2002, Order, of 57 boxes of hard copy documents, representing responsive documents from the files of the following MSC employees: Baldwin, Barthenheier, Barclay, Beer, Blakely, Brown, Cully, Dimas, Dyer, Gastl, Gwillim, Hart, Ibrahim, Johnson, Kenyon, John Long, Lou Long, Louwers, Mattice, Mattson, Mowrey, Murphy, Roach, Rose, Sacro, Smith (secretary to the CEO, Mr. Perna), Smithson, Spangler, Thornton, Torres, Torvund, Reymond, Sheridan, Waas, Cully, Louwers, Murphy, and Rose, as well as some contract, central files, and other files unidentified as to source. Respondent's tardy production denied the same beneficial uses of these documents listed above. It also should be noted that Respondent did not volunteer to make any of the witnesses previously deposed, for whom documents were produced after Respondent was ordered to produce them, available for additional deposition, in any effort to partially cure the defective production.

VII. <u>The Request for Sanctions is Timely and There is No Just Alternative</u>

No doubt Respondent will oppose this motion for sanctions, and we can anticipate and urge Your Honor to dismiss Respondents' objections as untimely presented and already decided.

Your Honor already considered and rejected Respondent's argument that its financial condition prevented it from responding by May 28, 2002. Respondent argued that its financial condition was "an encumbrance to the completion of the production" in its May 20, 2002, Opposition to Complaint Counsel's May 10, 2002, Motion to Compel (Exhibit 8). Respondent at the time admitted that that its production of responsive documents had been slowed due to its decision, "due to its current financial condition, to limit the number of people reviewing documents to six, down from thirty." Your Honor rejected Respondent's financial condition as an excuse for non-production or delay, and issued the May 22, 2002, order that Respondent complete its response by May 28, 2002. Respondent should not be permitted to re-litigate this issue, or demand that Your Honor to re-decide it.

It is no excuse for non-production of documents and no defense to a request for sanctions that a responding party claims the material sought would not have been helpful to the requesting party, or was not discoverable. Responding parties are obliged to raise such concerns in motions for protective orders, and unless granted relief, are obliged to reply to discovery. *Fautek, supra,* at 147, citing *United States v. Reserve Mining Co.,* 412 F. Supp. 705, 710-11 (D. Minn.) *aff'd,* 543 F.2d 210 (8th Cir. 1976). Respondent argued in its May 20, 2002, Opposition to Complaint Counsel's Motion to Compel that Respondent already had provided Complaint Counsel with 322 boxes of documents. Your Honor considered and rejected that argument, issuing the May 22, 2002, Order requiring Respondent to complete its response by May 28, 2002. Respondent should not be permitted to re-litigate this issue..

Similarly, technical difficulties producing responsive documents electronically does not excuse untimely production. Counsel for a responding party has legal obligations to investigate

what will be required to comply with discovery, including electronic discovery, and to seek relief in timely fashion under the Rules and the Scheduling Order of the case. Throughout this proceeding, and as late as May 20, 2002, Respondent's Counsel reported new discoveries about the extent of Respondent's volume of responsive and potentially responsive documents.. Whatever difficulties Respondent may have had because of its belated decision to make an electronic production of electronic documents, these could have been avoided if Respondent had accepted Complaint Counsel's earlier invitation to consider electronic production.

It is irrelevant when considering whether sanctions are appropriate, whether Respondent's Counsel's surprise about the volume of responsive documents or the complications of producing them electronically was the result of lack of diligence by counsel or client. Counsel has obligations to take measures to insure that its client's production is complete, and sanctions are appropriate if they do not. *Fautek, supra,* at 145. Similarly, sanctions are appropriate where counsel has been diligent, but the client has not. *Verrazzano Trading Corporation,* 1976 FTC Lexis 390 (1976) (sanctions granted where client failed to comply with discovery that its attorney was seeking to complete). A responding party has a legal obligation to identify a need for relief from discovery obligations in timely fashion according to the Rules and scheduling order of the case, and legal obligation to advise the court immediately if it needs additional time to do any programming necessary to produce responsive electronic documents in compliance with a court order. *Bonilla v. Trebol Motors Corp.*, (D.C. Puerto Rico 1997), 1997 U.S. Dist. Lexis 4370, at 94.

VIII. The Sanctions and Other Relief Requested by Complaint Counsel are Appropriate

The sanctions and other relief proposed by Complaint Counsel are "reasonable in light of

the material withheld and the purposes of Rule 3.38(b)," and for further guidance, an ALJ may look to precedent under the Federal Rules of Civil Procedure. *Grand Union Co.*, 102 F.T.C. 812, 1589 (1983). The sanctions are "reasonably tailored to fit the conduct," which was egregious and have however serious the sanctions may be, they have not been designed "arbitrarily or solely to punish the recalcitrant party." *Beatrice Foods, supra.* There is "an explicit, logical connection between the failure to produce evidence and the inferences drawn." *Id.*

Complaint Counsel's request for 3.38(b)(2), (3) and (4) sanctions clearly are justified in this case. Adverse inferences are preferable to further enforcement efforts against an intransigent party, particularly in administrative proceedings where the enforcement process is of necessity collateral to the main case. *International Union (UAW) v. N.L.R.B.*, 459 F.2d 1352, 1338 (D.C. Cir. 1972) (finding that Administrative Law Judge's failure to draw adverse inferences from the party's refusal to produce documents was reversible error), *cited with favor in American Medical Association, supra.* Sanctions precluding a late-responding party from opposing or introducing any evidence opposing any claim for which responsive information was not produced pursuant to a discovery order. are just even where late production has been made. *Ohio v. Arthur Andersen*, 570 F.2d 1370, 1375 (10th Cir. 1978).

Complaint Counsel further proposes that additional relief is necessary under Section 3.38(c) to compensate Complaint Counsel for the extreme prejudice caused by the tender of such an enormous volume of responsive documents after the date Respondent was ordered to produce them, and so close to trial. Because Respondent's production occurred too late for Complaint Counsel to review the documents and consider including them on its Exhibit list, and review of this huge production could be accomplished, if at all, only during Complaint Counsel's final trial

preparation and during the hearing, the proposed Order would permit Complaint Counsel to amend its Exhibit List up to the date of the beginning of Complaint Counsel's rebuttal case, to include any of the documents produced by Respondent to Complaint Counsel after May 28, 2002, or any other documents reasonably related thereto.[12] Furthermore, the proposed Order would permit Complaint Counsel to introduce into evidence any of the documents produced by Respondent to Complaint Counsel after May 28, 2002, or any other documents or events reasonably related thereto, and Respondent shall have no right to object to their introduction.

Complaint Counsel would be irreparably prejudiced were its witnesses, including experts, denied the opportunity to rely upon and testify about the late produced documents. Therefore, the proposed Order would permit Complaint Counsel to present testimony regarding any of the documents produced by Respondent to Complaint Counsel after May 28, 2002, or any documents or events reasonably related thereto, without objection by Respondent, and to introduce into evidence or present testimony about any such or testimony in its rebuttal case which otherwise rightly should have been part of Complaint Counsel's case in chief. This proposed relief is necessary to permit Complaint Counsel beneficial use of the late produced documents, and is not an attempt to evade any obligations to present its case in chief. The Commission has approved of an ALJ permitting complaint counsel to put on case-in-chief evidence during rebuttal hearings where responsive material was not produced in timely fashion. *American Medical Association*, 94 F.T.C. 701 (1979).

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[12] Complaint Counsel needs to add to its exhibit list not only the documents produced late, but also earlier documents reasonably related thereto, because Respondent's late production denied Complaint Counsel the benefit of review of those documents for inclusion on its Exhibit list in light of the documents Respondent would later produce.

Complaint Counsel has been severely prejudiced by its inability to depose Respondent's witnesses and other of Respondent's employees about the late produced documents during the discovery period set forth in the Scheduling Order. Because Complaint Counsel had no opportunity to conduct discovery to determine what Respondents' employees have to say about such documents, Complaint Counsel will not be able to conduct a proper cross-examination of Respondents' witnesses, or anticipate and refute Respondents' defenses. Respondent should not be permitted to present documents or testimony that has not been tested in the adversarial discovery process, lest this hearing leave Your Honor without the ability to evaluate the credibility of witnesses and the reliability of documents. In order to seek to partially cure the prejudice to Complaint Counsel and to give Complaint Counsel an opportunity to present Your Honor a more complete and reliable record, the proposed Order requires Respondent to make available any of its employees for deposition in Washington, DC, at a location specified by Complaint Counsel, at Complaint Counsel's request, and upon three calendar days' notice, notwithstanding any other commitments of Respondents' employees. To prevent delay in scheduling such depositions, the proposed Order provides that witnesses failing to appear for such depositions shall be barred from testifying for Respondent.

In order cure that prejudice to Complaint Counsel's preparation to cross-examine Respondents' witnesses, the proposed order requires Respondent to give Complaint Counsel 5 business days' notice before the testimony of each of Respondent's witnesses. This relief will give Complaint Counsel some opportunity to target and plan its review of the huge volume of documents submitted by Respondent after May 28, 2002, and make some beneficial use of them in preparing for cross-examination of Respondents' witnesses, despite the exigencies of time and

trial of this matter. There is precedent for such advance notice. *See Verrazzano Trading Corporation*, 91 F.T.C. 888 (1976). In the absence of such notice, Respondent's witnesses should not be permitted to testify.

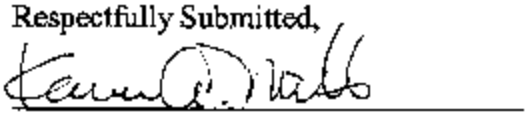
IV. Conclusion

Respondent's failure to comply with Your Honor's Orders and the Scheduling Order prejudiced Complaint Counsel's preparation of its case, and its ability to respond to what Respondent proposes to be its defense, threatens to cause disruption and delay in the hearing, and jeopardizes the integrity of the adjudicative process itself. The Rules and justice require either summary decision in favor of Complaint Counsel, or the issuance of both sanctions for Respondent's non-compliance with the outstanding Orders, and additional relief to compensate for the withheld documents.

Complaint Counsel therefore respectfully move the issuance to of either the attached Exhibit 4 Order ruling that all elements of the Complaint be taken as established adversely to Respondent, and that judgment is entered for Complaint Counsel. Alternatively, Complaint Counsel respectfully move the issuance of the attached Exhibit 5 Order imposing the enumerated sanctions and other relief necessary for a timely, fair, and efficient trial of this matter.

Dated: July 5, 2002

Respectfully Submitted,



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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

DECLARATION OF KAREN A. MILLS

I, Karen A. Mills, make the following statement:

1. I am an attorney for the Federal Trade Commission. I serve as Complaint Counsel in *MSC.Software Corporation*, Docket No. 9299.

2. On May 28, 2002, at 6:40 p.m., Marimichael Skubel of Kirkland and Ellis, representing Respondent, told me by telephone that Respondent would be delivering printed copies of some of the documents responsive to Complaint Counsel's First Request for Production of Documents and Things, as modified by Complaint Counsel's letter of December 26, 2002, ("the Document Request), after the May 28, 2002, date that Respondent had been ordered to comply with the Document Request, and that Respondent would be submitting the remainder of Respondent's production of documents responsive to the Document Request in electronic form on CDs. Ms. Skubel admitted that Respondent had made the decision to submit an electronic production only after Your Honor's May 22, 2002, Order.

3. At no time did Respondent make inquiries of Complaint Counsel, as required by Instruction 4 of the Document Request, in what form electronic delivery of documents would be considered "usable" by Complaint Counsel.

4. Respondent delivered 15 boxes of printed documents and 49 CDs containing imaged documents in "tif" files without bibliographic information or load files to Complaint Counsel on May 28, 2002.

5. Respondent delivered 15 CDs containing imaged documents in "tif" files, without bibliographic information or load files, to Complaint Counsel on May 29, 2002.

6. Respondent delivered 34 boxes of printed documents and 34 CDs containing imaged documents in "tif" files without bibliographic information or load files, to Complaint Counsel on May 30, 2002.

7. Respondent delivered 10 boxes of printed documents to Complaint Counsel on May 31, 2002.

8. Respondent delivered 9 boxes of printed documents to Complaint Counsel on Jun 11, 2002.

9. Respondent delivered 29 CDS containing imaged documents in "tif" files without bibliographic information or load files, to Complaint Counsel on June 12, 2002.

10. Respondent delivered 3 boxes of printed documents to Complaint Counsel on June 13, 2002.

11. On behalf of Complaint Counsel, I notified Respondent of the non-compliance of its electronic production with Instructions 4 and 5 of the Document Request and the unusability of the electronic production by letter to Marimichael Skubel of May 29, 2002, and sought to confer with Respondent about how it could cure the non-compliance at Respondent's earliest opportunity.

12. On behalf of Complaint Counsel, and accompanied by Gregory Brown of the FTC, I conferred with Larissa Paule-Carres and Lisa Horton of Kirkland and Ellis, about Instructions 4 and 5 of the Document Request, and the unusability of the electronic production on Friday, May 31, 2002. Greg Brown and I outlined what information would be needed to make an electronic production usable, including OCR, bibliographic information, and load files, and in what form that production should be submitted to make it usable. Complaint Counsel offered to supply Respondent with a SNAP server to facilitate and expedite electronic document transfer. Respondent represented that it had a conference call scheduled with the electronic document production company it was using that afternoon, to explore what additional information and in what form Respondent could obtain to make the electronic production usable. Larissa Paule-Carres promised to call Complaint Counsel to report back after that meeting.

13. On Monday morning, June 3, 2002, since Complaint Counsel had heard nothing from Respondent, I called Larissa Paule-Carres. Ms. Paule-Carres said that she had not had a chance to talk to Lisa Horton yet about what Ms. Horton had learned from the conference call with the electronic document production company, but Respondent had decided that it would not be supplying Complaint Counsel with any additional information because Respondent considered the CDs to be "usable" to Complaint Counsel. I confirmed to Respondent that Complaint Counsel still consider the electronic production "usable," and Ms. Paule-Carres and I confirmed that we had reached an impasse.

14. On Wednesday, June 5, 2002, I telephoned Ms. Paule-Carres to confirm whether we were indeed, still at an impasse on the electronic production issue. She confirmed that we were. I told Ms. Paule-Carres that Complaint Counsel intended to move to compel a useful electronic production, and that we would like Respondent to agree to reply to that motion on an expedited basis. She refused to commit Respondent to replying on an expedited basis without

seeing the motion, and we therefore reached an impasse on that issue as well.

15. At 4:35 p.m. on June 12, 2002, Marimichael Skubel called to say that Respondent had discovered an additional 27 CDs containing responsive imaged documents in the custody of Respondent's electronic document production company, and would be producing them later that day. Respondent later submitted 29 CDs. Ms. Skubel continued to take the position that Respondent was not required to produce an additional documentation to make the CDs usable to Complaint Counsel, but offered to allow its electronic document production company to either produce the documents in the Corcordance format that Respondent had had produced to make the documents on CDs usable for Respondent, or allow its electronic document production company to produce the documents in another form usable to the Commission, since Respondent had produced these 29 CDs, containing the equivalent of approximately 100 boxes of documents 15 days after it had been ordered to complete its discovery. I reminded Ms. Skubel that Complaint Counsel had told Respondent's Counsel on May 31, 2002, before Respondent was to meet with its contractor to determine how the responsive electronic documents would be made usable for Respondent that Complaint Counsel did not have Concordance software, but Summation software, and the production would not be usable to Complaint Counsel unless it were produced for Summation. Ms. Skubel in that telephone conversation inquired whether Complaint Counsel would withdraw its motion to compel a usable production, given this offer. I told her that Complaint Counsel would not view its motion to compel as moot and withdraw it until it had beneficial use of the electronic documents. I asked Respondent whether Complaint Counsel would be permitted to interact directly with Respondent's document production company, and for contact information.

16. Marimichael Skubel supplied contact information for Respondent's electronic document production contractor, and Complaint Counsel left a telephone message for the contractor on Thursday, June 13, 2002.

17. Respondent's contractor returned Complaint Counsel's call on Friday June 14, 2002. After discussing some background issues, an appointment was scheduled for a Monday June 17, 2002, when both the contractor and Complaint Counsel's information technology litigation support staff would be available.

18. Greg Brown and I had a June 17, 2002, telephone conference call with Joe Turner and his colleagues at Merrill Corporation, Respondent's electronic document production contractor. We reviewed together a sample of the information available about the electronic documents, and Merrill agreed to send a sample for Greg Brown to review over the weekend. Merrill agreed that it could have and would produce the information Complaint Counsel requested, but noted that it would have been easier and less time consuming to do had the project been designed with the two outputs, Concordance and Summation, in mind.

19. Merrill Corporation has supplied Complaint Counsel with some documentation. Complaint Counsel's information technology litigation support personnel are working with the documentation to try to make Respondent's submission usable, but it is not yet, as of this writing.

July 5, 2002

Karen A. Mills

CERTIFICATE OF SERVICE

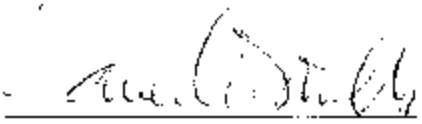
This is to certify that on July 5, 2002, I caused a copy of Complaint Counsel's Motion for Sanctions to be served via facsimile upon the following person:

Marimichael O. Skubel, Esquire
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
Counsel for MSC.Software Corporation

On July 8, 2002, I caused a copy of Complaint Counsel's Motion for Sanctions 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
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
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580
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EXHIBIT 1

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

SECOND REVISED SCHEDULING ORDER

At the status conference on April 25, 2002, the parties raised requests for revisions to the current scheduling order. The parties were urged to file a joint motion by April 26, 2002, and required, to the extent that they could not agree to the revisions each side sought, to file separate motions to revise the scheduling order by April 26, 2002, and any oppositions thereto by April 30, 2002. On April 26, 2002, Respondent MSC.Software ("MSC") filed a motion seeking modifications to the current scheduling order. Also on April 26, 2002, Complaint Counsel filed an opposition to Respondent's motion. On April 30, 2002, MSC filed a reply in support of its motion.

On May 1, 2002, Complaint Counsel filed a response to MSC's motion for a second amended scheduling order. Complaint Counsel was required to file any response to MSC's motion by April 30, 2002. This opposition, which was filed on May 1, 2002, is untimely and will not be considered. Also on May 1, 2002, MSC filed a request for leave to file a supplemental memorandum in support of its motion to amend the scheduling order. This request is denied and the supplement will not be considered.

In consideration of the April 26, 2002 pleadings of Complaint Counsel and of MSC and the April 30, 2002 reply of MSC, the Revised Scheduling Order, previously entered on March 5, 2002, is hereby revised to establish the following deadlines.

The "Additional Provisions" from the November 13, 2001 Scheduling Order remain in place. The parties may take the depositions of third parties listed on the opposing parties' final witness list beyond the close of discovery deadline only upon a showing of good cause.

April 30, 2002	-	Respondent's Counsel provides supplemental revised witness list, if necessary, including preliminary sur-rebuttal witnesses, with description of proposed testimony.

EXHIBIT 2

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

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

EXHBIT 3

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

ORDER ON COMPLAINT COUNSEL'S MOTION TO COMPEL AN EXPEDITED ANSWER AND COMPLIANCE WITH COMPLAINT COUNSEL'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

On May 10, 2002, Complaint Counsel filed its Motion to Compel an Expedited Answer and Compliance with Complaint Counsel's First Request for Production of Documents and Things. The motion requested Respondent MSC.Software Corporation ("MSC") to file a reply to Complaint Counsel's motion by May 13, 2002. Complaint Counsel's motion to compel asserts that Respondent has not produced the responsive documents, including electronic documents and e-mails, that MSC had promised to produce by May 10, 2002.

On May 21, 2002, MSC filed its opposition to Complaint Counsel's motion to compel. MSC asserts that it has already produced 322 boxes of documents, has already spent over $1.5 million to comply with Complaint Counsel's document request, and is working on compliance with Complaint Counsel's remaining requests. MSC states that it has collected 300 additional boxes of electronic documents, 32 of which have been produced to Complaint Counsel. MSC asserts that it intends to continue its review of the 274 boxes; however, MSC cannot afford to hire an army of people to review them on an expedited basis. Pursuant to Rule 3.31(d)(1) which provides that the Administrative Law Judge may deny discovery or make any order which justice requires to protect a party from undue burden or expense, MSC seeks an order denying Complaint Counsel's insistence of an expedited review of the remaining documents.

In the certificate of conference attached to the motion, there is no indication that Complaint Counsel attempted to reach an agreement with MSC regarding an expedited response to the motion. Accordingly, Complaint Counsel's request for an expedited answer to its motion is DENIED.

MSC has demonstrated, with reasonable particularity, that it was unable to comply with Complaint Counsel's demands by May 16, 2002. Complaint Counsel's motion to compel is GRANTED in part and DENIED in part. MSC is hereby ordered to produce the responsive documents as soon as practicable and on a rolling basis, but no later than May 28, 2002.

ORDERED.

D. Michael Chappell
Administrative Law Judge

Date: May 22, 2002

EXHIBIT 4

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS ISSUED TO RESPONDENT MSC.SOFTWARE CORPORATION

Pursuant to the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.37, Complaint Counsel hereby request that Respondent MSC.Software Corporation (hereinafter "MSC") produce all documents and other things responsive to the following requests, within its possession, custody, or control within twenty days of service of this request, in accordance with the Definitions and instructions set forth below. Objections shall be due within ten days of service.

DEFINITIONS

A. The term "the company" or "MSC" means MSC.SOFTWARE Corporation, its domestic and foreign parents, predecessors, successors, divisions, and wholly or partially owned subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, consultants, agents and 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 the company.

B. The term "UAI" means Universal Analytics, Inc., its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents and 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 UAI. When "company" is used in any specification, it includes UAI for purposes of producing documents, information, and things separately for UAI.

C. The term "CSAR" means Computerized Structural Analysis and Research Corporation, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, and all directors, officers, employees, agents and

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, *e.g.*, MSC, CAI, 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, [illegible]:

    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 or 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 committee 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 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.

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 to 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 license 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 identity 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

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

EXHIBIT 5

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR SANCTIONS

Because Respondent violated three Orders (the Scheduling Order, the January 18, 2002, Order, and the May 22, 2202 Order) when it produced documents after May 28, 2002, and produced electronic documents on or after May 28, 2002, in a form not usable to Complaint Counsel, IT IS HEREBY ORDERED that Complaint Counsel's Motion for Sanctions and Other Relief for Respondent's failure to comply with discovery as ordered by May 28, 2002, is GRANTED.

Pursuant to Rule 3.38(b)(2) for the purposes of the proceeding the elements of Complaint Counsel's Complaint will be taken as established adversely to Respondent, and judgment entered for Complaint Counsel.

Dated: _____

_____
D. Michael Chappell
Administrative Law Judge

EXHIBIT 6

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR SANCTIONS

Because Respondent violated three Orders (the Scheduling Order, the January 18, 2002, Order, and the May 22, 2202 Order) when it produced documents after May 28, 2002, and produced electronic documents on or after May 28, 2002, in a form not usable to Complaint Counsel, IT IS HEREBY ORDERED that Complaint Counsel's Motion for Sanctions and Other Relief for Respondent's failure to comply with discovery as ordered by May 28, 2002, is GRANTED.

For purposes of this Order, all electronic documents produced by Respondent on or after May 28, 2002, are found to have been unusable by Complaint Counsel, to its prejudice. For purposes of this Order, these unusable documents are referred to along with other documents as produced after May 28, 2002.

Pursuant to Rule 3.38(b), and for the purpose of permitting resolution of relevant issues and disposition of this proceeding without unnecessary delay despite Respondent's failure to comply with Complaint Counsel's First Request for Production of Documents and Things, as Ordered, the following sanctions are imposed, as is just:

1. Pursuant to Rule 3.38(b)(1), for the purposes of this proceeding it shall be inferred that the documents responsive to Complaint Counsel's First Request for Production of Documents and Things produced by Respondent after May 28, 2002, would have been adverse to Respondent on any or all allegations of the Complaint.

2. Pursuant to Rule 3.38(b)(3), Respondent may not introduce into evidence or otherwise rely upon, in support of any claim or defense, or present testimony by any party, officer, agent, expert, or other person about any document produced by Respondent after May 28, 2002, on direct examination, cross examination, or rebuttal. All such documents listed on Respondent's Exhibit List shall be stricken from it.

3. Pursuant to Rule 3.38(b)(4), Respondent may not be heard to object to introduction and use by Complaint Counsel of any secondary evidence to show what the documents produced by Respondent after May 28, 2002 would have shown.

Furthermore, pursuant to Rule 3.38(c), the following additional relief is granted to compensate for the non-production of responsive documents by Respondent, in usable form, by May 28, 2002, as required by Order:

1. Complaint Counsel may amend its Exhibit List up to the date of the beginning of Complaint Counsel's rebuttal case, to include any of the documents produced by Respondent to Complaint Counsel after May 28, 2002, or any other documents reasonably related thereto.

2. Complaint Counsel may introduce into evidence any of the documents produced by Respondent to Complaint Counsel after May 28, 2002, or any other documents or events reasonably related thereto, and Respondent shall have no right to object to their introduction.

3. Complaint Counsel may present testimony, including expert testimony, regarding any of the documents produced by Respondent to Complaint Counsel after May 28, 2002, or any documents or events reasonably related thereto, without objection by Respondent.

4. Complaint Counsel may introduce into evidence or present testimony about any of the documents produced by Respondent to Complaint Counsel after May 28, 2002, or any documents reasonably related thereto, in its rebuttal case which otherwise rightly should have been part of Complaint Counsel's case in chief, since Complaint Counsel did not have access to these documents in sufficient time to prepare its case in chief.

5. Complaint Counsel's experts may testify about and rely upon any of the documents produced by Respondent to Complaint Counsel after May 28, 2002, or any documents or events reasonably related thereto, without objection by Respondent.

6. In order to permit Complaint Counsel to complete its discovery regarding documents produced by Respondent to Complaint Counsel after May 28, 2002, or any documents or events reasonably related thereto, Respondent shall make available any of its employees for deposition in Washington, DC, at a location specified by Complaint Counsel, at Complaint Counsel's request, and upon three calendar days' notice, notwithstanding any other commitments of Respondents' employees. Witnesses failing to appear for such depositions shall be barred from testifying for Respondent.

7. In order to give Complaint Counsel some opportunity to target and plan its review of the huge volume of documents submitted by Respondent after May 28, 2002, and make some beneficial use of them in preparing for cross-examination of Respondents' witnesses, despite the exigencies of time and trial of this matter, Respondent shall give Complaint Counsel 5 business days' notice before the testimony of each of Respondent's witnesses. In the absence of such notice, Respondent's witnesses shall not be permitted to testify.

Dated: _____

_____
D. Michael Chappell
Administrative Law Judge

EXHIBIT 7

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

Shorn of its rhetoric, Complaint Counsel's Motion states nothing more than Complaint Counsel's belief that Respondent MSC.Software Corporation ("MSC") has no right to object to the burdensomeness of Complaint Counsel's twenty-three immensely broad requests for the production of documents, which demand virtually every document produced over the last seven years in dozens of MSC offices worldwide. Complaint Counsel seeks these documents regardless of whether copies of such documents have been in Complaint Counsel's possession for at least a year or whether such documents are reasonably calculated to lead to the discovery of admissible evidence. Complaint Counsel's attempt to force MSC to produce untold tens of thousands of pages of documents from around the world in twenty days is the very definition of burdensomeness.

Notwithstanding the burden of Complaint Counsel's requests – and the fact that Complaint Counsel has delayed in producing its own documents and failed to provide substantive responses to MSC's First Set of Interrogatories – MSC has been working diligently with Complaint Counsel to provide responses to Complaint Counsel's document requests. This motion unnecessarily involves

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 [illegible] 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

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[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 were the requests might be narrowed. Since then, MSC has attempted to meet Complaint Counsel's demands and is continuously endeavoring to [illegible] responsive to Complaint Counsel's [illegible] 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*.[4]

Complaint Counsel has also refused to answer MSC's contention interrogatories – served the same way 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.

[4] 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 in order to delay MSC's receipt of critical information, and then [illegible] 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 Court'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 proposed [illegible] this Court's intervention.[4]

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

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[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 the 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***

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[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. 061-0077, 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.[9]

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).[10]

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

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

[10] Complaint Counsel's contention that objections not made in response to its document requests is inconsistent with its contention in it 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.

II. 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 1st, 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 the time 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,

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EXHIBIT 8

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONDENT MSC.SOFTWARE CORPORATION'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO COMPEL AN EXPEDITED ANSWER TO THIS MOTION AND COMPLIANCE WITH COMPLAINT COUNSEL'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

After many months of diligent, yet often one-sided, negotiations regarding the scope of Complaint Counsel's First Request for the Production of Documents and Things, several facts are evident: MSC has spent an unconscionable amount of money attempting to meet with Complaint Counsel's unrealistic discovery demands; MSC has already produced an extraordinary amount of responsive documents; Complaint Counsel has thwarted an efficient flow of discovery; and MSC is deserving of relief from Complaint Counsel's excessively burdensome and expensive discovery demands.

In Complaint Counsel's May 10, 2002, Motion to Compel, Complaint Counsel conveniently ignores the fact that MSC has produced 322 boxes of documents to date and Complaint Counsel is silent on the delay caused because of its rigid insistence that the search list be finalized before the documents were searched. Complaint Counsel, however, has made it clear that it expects to receive all requested documents, regardless of the burden imposed on MSC. To date MSC has spent over $1.5 million to comply with Complaint Counsel's document request -- an amount totaling almost fifteen percent of MSC's 2001 reported net income. Finally, Complaint Counsel mischaracterizes

MSC's "promise to complete production of responsive documents" by a date certain, and disregards the importance of MSC's financial condition as an encumbrance to the completion of the production

ARGUMENT

MSC has attempted to work with Complaint Counsel to attempt to narrow the substantive scope and physical reach of Complaint Counsel's First Request for Production of Documents and Things, and, in fact, even highlighted the pending disagreements with this Court at the February 25, 2002, status hearing. At that time, MSC offered to search electronic files of ten key MSC personnel in response to Complaint Counsel's outstanding document request. Since that time, MSC and Complaint Counsel have been involved in ongoing negotiations regarding the persons to be searched and the terms used in performing the electronic search.[1] Complaint Counsel adamantly refused,

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[1] Brief chronology of the negotiations

- March 13, 2002, MSC forwarded to Complaint Counsel a list of electronic terms for consideration, however, never received a response;
- March 25, 2002, MSC forwarded to Complaint Counsel another list of electronic terms for consideration;
- April 3, 2002, MSC and Complaint Counsel agree on list of persons to search;
- April 4, 2002, Complaint Counsel responded to MSC's March 25 list of electronic terms, adding 438 search terms to the already existing 192 terms, creating a new list of 630 terms;
- MSC responded promptly on April 5, 2002, explaining why many of the terms listed by Complaint Counsel were either unnecessary, or likely to lead to an over-encompassing collection of documents, and suggested another revised listing;
- Two weeks later, on April 18, 2002, MSC received complaint Counsel's response to its April 5th letter;
- MSC determined on April 19, 2002, not to argue or burden this Court over minutia, and accepted the terms contained in Complaint Counsel's April 18 letter, despite believing many of the terms to be unnecessary or over-broad (such as simulat*, test*, pric*, saving*, enter*, entry*, charg*, valu*). MSC notified Merrill of the 343 terms to be included in the query (*See* Exhibit A); and

(continued...)

however, to negotiate these items simultaneously, but rather ***insisted on resolution of who would be searched prior to discussing what would be searched***. See 4/3/02 letter from M. Skubel to K. Mills, attached as exhibit B.) MSC's hands were tied, for it began the process of searching based on the terms already identified to Complaint Counsel, and then Complaint Counsel refused to accept those terms. MSC would be forced to perform yet another round of searches and reviews all at great expense to MSC. This document production could have been much further along had Complaint Counsel not been so unreasonable; the prolonged delay in the completion of this document production is a result of Complaint Counsel's own creation. Clearly there was no reason for Complaint Counsel to link the search terms to the search list terms. Both MSC and Complaint Counsel agreed on February 25 that certain key individuals would have to be searched, yet due to the recalcitrance of Complaint Counsel, this search did not begin until April 25, 2002.

In the midst of the above events, MSC's stock value tumbled forty percent, causing a ripple effect in the company. Forced cutbacks were implemented at the same time that the electronic discovery was finally coming [illegible] Despite significant setbacks, MSC has not "refused to comply" with discovery; to the contrary, it has been diligently gathering and reviewing a voluminous amount of material responsive to Complaint Counsel's overly-broad document requests. MSC has been forced, however, due to its current financial conditions, to limit the number of people reviewing documents to six, down from thirty.[2] MSC simply cannot afford to spend untold thousands

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[1] (...continued)

- April 25, 2002, Merrill completes creation and testing of the query and begins to process documents.

[2] MSC has limited its resources company-wide. As announced on May 14, 2002, by Reuters (continued...)

of dollars to review and produce every piece of paper that may be potentially responsive to Complaint Counsel's requests in an expedited review -- especially when the review could have been taking place months ago, absent Complaint Counsel's refusal to negotiate.

The purpose of discovery is to glean information from the parties to a case, not to bankrupt the same. To date, MSC has provided Complaint Counsel with 3.2 boxes, at a cost of over $1.5 million, this is hardly "refusing to comply with discovery." Furthermore, despite the aforementioned corporate cutbacks, MSC has collected 306 boxes of electronic documents, 32 of which have been produced to Complaint Counsel. MSC intends to continue its review of the 274 boxes, many of which contain single page e-mails and privileged documents; however, MSC cannot afford to hire an army of people to review them on an expedited basis. Rule 3.31(d)(1) provides specifically, that "[t]he Administrative Law Judge may deny discovery or make any order which justice requires to protect a party or other person from . . . undue burden or expense." 16 CFR § 3.31 (d)(1). Given MSC's current financial condition, and the amount of discovery already afforded Complaint Counsel, it is appropriate for the Court to invoke the relief encompassed in this [illegible] of the remaining documents.

Finally to clarify, in an effort in good faith to accommodate Complaint Counsel's request for information, MSC did suggest that it ***may be able*** to complete the production by May 10, 2002. At

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[4] (. . .continued)
News Service. "[d]esign software maker MSC Software Corp. (MNS, Trade) on Tuesday said it laid off 8 percent of its staff, or about 140 people, in a bid to reduce operating expenses by 5 percent to 7 percent this year. . . . In April, shares of MSC plunged after the company said it expected to post a first-quarter loss instead of a profit because of weak international markets and legal costs related to an investigation by the U.S. Federal Trade Commission regarding two acquisitions completed in 1999." *See* Reuters News Service "MSC Software Lays Off 140 Workers, 8 Percent of Staff" at ETRADE Financial - Investing.htm (May 14, 2002).

no time was this a promise to complete the production on a date certain. MSC made this representation before it was aware that certain executives would be submitting dozens, and in one case over 100, boxes for attorney review, or that it would be forced to respond to an enormous financial loss. Moreover, MSC informed Complaint Counsel in a letter that it was impossible to complete the production by May 10. (*See* 5-10-02 letter from M. Skubel to K. Mills, attached as Exhibit C.)

For the foregoing reasons, Complaint Counsel's Motion to Compel an Expedited Answer to this Motion and Compliance with Complaint Counsel's First Request For Production of Documents and Things must be DENIED.

Respectfully submitted,

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Dated: May 20, 2002

EXHIBIT 9