

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: Timothy J. Muris, Chairman
Sheila F. Anthony
Mozelle W. Thompson
Orson Swindle
Thomas B. Leary

In the Matter of

MSC.SOFTWARE CORPORATION,
a corporation.

Docket. No. 9299

**AGREEMENT CONTAINING
CONSENT ORDER**

This Agreement Containing Consent Order (“Consent Agreement”), by and between MSC.Software Corporation (“Respondent”), by its duly authorized officer and attorneys, and counsel for the Federal Trade Commission (“Commission”), is entered into in accordance with the Commission’s Rules governing consent order procedures. In accordance therewith the parties hereby agree that:

1. Respondent MSC.Software Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 2 MacArthur Place, Santa Ana, California 92707.
2. Respondent has been served with a copy of the Complaint issued by the Commission charging it with violations of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended, and has filed its Answer to the Complaint denying those charges and asserting affirmative defenses but admitting the jurisdictional facts set forth therein.
3. Respondent admits all the jurisdictional facts set forth in the Complaint.
4. Respondent waives:
 - a. any further procedural steps;

- b. the requirement that the Commission's Decision and Order ("Decision and Order"), attached hereto and made a part hereof, contain a statement of findings of fact and conclusions of law;
 - c. all rights to seek judicial review or otherwise challenge or contest the validity of the Decision and Order entered pursuant to this Consent Agreement; and
 - d. any claim under the Equal Access to Justice Act.
5. This Consent Agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this Consent Agreement is accepted by the Commission, it will be placed on the public record for a period of thirty (30) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this Consent Agreement and so notify Respondent, in which event it will take such action as it may consider appropriate, or issue and serve its Decision and Order in disposition of the proceeding.
6. This Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in the Complaint, or that the facts as alleged in the Complaint, other than jurisdictional facts, are true.
7. This Consent Agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Commission Rule 3.25(f), 16 C.F.R. § 3.25(f), the Commission may, without further notice to Respondent: (1) issue its Decision and Order, and (2) make information public with respect thereto. When final, the Order shall have the same force and effect, and may be altered, modified or rescinded in accordance with the provisions of Commission Rule 3.25(f), 16 C.F.R. § 3.25(f). This Consent Agreement shall not be construed as an admission by Respondent that the law has been violated as alleged in the Complaint, or that the facts as alleged in the Complaint, other than jurisdictional facts, are true.

comply with the Decision and Order from the date it signs this Consent Agreement. Respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the Decision and Order after it becomes final.

MSC.SOFTWARE CORPORATION

FEDERAL TRADE COMMISSION

By: _____
Frank Perna, Jr.
Chief Executive Officer and Chairman
MSC.Software Corporation
Dated: _____, 2002

P. Abbott McCartney
Peggy D. Bayer
Michael G. Cowie
Kent E. Cox
Andrew J. Heimert
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Kirkland & Ellis
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Dated: _____, 2002

Patrick J. Roach
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In the Matter of

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Dkt. No. 9299

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having heretofore issued its complaint charging MSC.Software Corporation (“Respondent”) with violations of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended, and Respondent having been served with a copy of that complaint, together with a notice of contemplated relief, and Respondent having answered the complaint denying said charges and asserting affirmative defenses but admitting the jurisdictional allegations set forth therein; and

The Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the Respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission’s Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having thereafter considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. MSC.Software Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 2 MacArthur Place, Santa Ana, California 92707.

- a. all customer files acquired by MSC as a result of the Acquisition of UAI and the Acquisition of CSAR; and
 - b. all marketing information, sales training materials, and current (as of the Divestiture Date) customer lists, customer contact information, and customer support log database contents relating to customers who use MSC.Nastran in the United States.
- F. “Complementary Software” means any Software intended to be used in conjunction with Nastran, including but not limited to pre- and post-processors and meshers.
- G. “Commission” means the Federal Trade Commission.
- H. "Divestiture Agreement" means any agreement or agreements pursuant to which Respondent or a trustee divests the Assets to Be Divested pursuant to this Order.
- I. “Divestiture Date” means for each Acquirer the date on which Respondent has completed divestiture of all the Assets To Be Divested to that Acquirer.
- J. “Intellectual Property” means Software, inventions, technology, formulations, specifications, patents, patent applications, trade secrets, copyrights, know-how, research materials, technical

4. For a period of twelve (12) months following the Divestiture Date, the right of the Acquirer to obtain from the Respondent, upon reasonable notice and at reasonable times and levels, such personnel, information, technical assistance, advice and training to the Acquirer as are necessary or appropriate to effectuate the purposes of this Order; PROVIDED that Respondent shall be under no obligation to provide any such personnel, information, technical assistance, advice or training relating to the items identified in Paragraph I.L.1.b. and I.L.1.c of this Order. Such assistance shall include reasonable consultation with knowledgeable

Property used to develop, upgrade, maintain, test, enhance or add features, capabilities, elements or improvements to the licensed items;

- c. all Software programs, instructions, manuals, documentation or materials of any kind used or supplied to a user of any of the licensed items to facilitate installation or operation of any of the licensed items, or to facilitate migration or conversion by any user to or from any of the licensed items;
 - d. all executable programs, test problems, test results, regression test Software, development support Software, interfaces with Complementary Software, APIs, manuals, guides, reports, and other documentation; and
 - e. all other Intellectual Property and intangible property rights that may be reasonably necessary to facilitate the use by the Acquirer of the Licensed Rights for the purposes set forth in this Order.
- M. “MSC.Nastran” means the proprietary version of Nastran developed, distributed or licensed by MSC, excluding the following MSC products: MSC.Nastran for Windows, MSC.Dytran, MSC Working Model products, MSC.FEA, MSC.AFEA, MSCAKUSMOD, MSC.Construct, MSC.Patran, MSC.SuperModel, MSC.FlightLoads, MSC.Ultima, the MSC V5i family, MSC.Fatigue and MSC.Actran.
- N. “Nastran” means the finite element analysis solver software first developed by the U.S. National Aeronautics and Space Administration (“NASA”) during the 1960's to perform structural analysis for NASA projects, which was thereafter released by NASA into the public domain to allow broader use and commercial development. The term includes not only the version of the Nastran software that NASA has placed in the public domain, but also the proprietary versions of the software developed and enhanced by private parties based on the source code made available by NASA.
- O. "Person" means any natural person, partnership, corporation, company, association, trust, joint venture or other business or legal entity, including any governmental agency.
- P. “Pro rata portion for the remaining term of the contract or license” means the percentage calculated by dividing the amount of time remaining on the term of a contract or license by the amount of time of the total term of that contract or license, and by converting the resulting ratio into a percentage by multiplying by one hundred (100).
- Q. “Relating to” means in whole or in part constituting, containing, concerning, discussing, describing, embodying, analyzing, identifying, or stating.

- R. “Software” means any type of computer code, including, but not limited to, source code, object code, executable programs, software scripts, modules, add-ons, patches, library functions, object libraries, test programs, test results, regression test software, interfaces with Complementary Software, enhancements, customizations, development tools, development environments, and proprietary programming languages.

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by the Respondent to comply with any provision of such Divestiture Agreement shall constitute a failure to comply with this Order.

III.

IT IS FURTHER ORDERED that:

- A. At any time after the Commission issues this Order, the Commission may appoint one or more Monitors to assure that Respondent expeditiously complies with its obligations under this Order and the Divestiture Agreement.
- B. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities and responsibilities of any Monitor appointed pursuant to Paragraph III.A.:
 - 1.

Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.

10 of 10 days. If the appointment of a trustee is not made by Respondent, the Commission may, at its discretion, appoint a trustee. I.A. 390 at TD -0.3241 467 0.

B.

divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestitures shall be made only in a manner that receives the prior approval of the Commission, and only to an acquirer that receives the prior approval of the Commission. Provided, however, if the trustee receives bona fide offers for an asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity and to allow the Respondent to choose from among them, then the trustee shall divest such asset to the acquiring entity or entities selected by Respondent from among those approved by the Commission; provided further, however, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.
7. The trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.
8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph IV.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish divestitures required by this Order.

11. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
12. The trustee shall report in writing to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestitures required by this Order.

V.

IT IS FURTHER ORDERED that:

- A. No later than one week after the execution of a Divestiture Agreement, Respondent shall provide the proposed Acquirer with the following lists, stating each individual's name, position, business address and business telephone number, to the extent known by MSC:
 1. a list of all non-clerical employees of MSC in the United States who are then currently involved in the design, development, maintenance or customer support of MSC.Nastran;
 2. to the extent permissible under applicable laws and with the permission of such individuals (which permission MSC shall in good faith seek promptly upon execution of the Agreement Containing Consent Order), a list of all former non-clerical employees of MSC in the United States who at any time since June 24, 1999, were involved in the design, development, maintenance, customer support, sales or marketing of MSC.Nastran; and
 3. to the extent permissible under applicable laws and with the permission of such individuals (which permission MSC shall in good faith seek promptly upon execution of the Agreement Containing Consent Order), a list of all former non-clerical employees of UAI or CSAR who were employed by either of those firms at any time within two years prior to the firms' respective acquisitions by MSC.
- B. Respondent shall make available to any proposed Acquirer, for inspection, the personnel files and other documentation relating to the individuals identified pursuant to this Paragraph to the extent permissible under applicable laws and with the permission of such individuals (which permission MSC shall in good faith seek promptly upon execution of the Agreement Containing Consent Order).
- C. Until six (6) months following the Divestiture Date:
 1. Respondent shall provide the Acquirer with an opportunity to interview such individuals identified pursuant to this Paragraph and negotiate employment with any of them;

2. Respondent shall not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict any

from an annual contract or license for MSC.Nastran (or for multiple MSC products including MSC.Nastran) to a paid-up contract or license for MSC.Nastran (or for multiple MSC products including MSC.Nastran), to terminate or rescind such contract or license in whole or in part in order to deal with the Acquirer, including but not limited to eliminating any restrictions or disincentives to terminating or rescinding such contracts or licenses as they relate to MSC.Nastran and otherwise refunding or returning a pro rata portion of the consideration paid in advance for MSC.Nastran under such contract or license. The existing customers affected by this provision include at least those listed on Confidential Appendix B. If the contract or license is for multiple MSC products including MSC.Nastran, Respondent shall bear the burden of proof, in any proceeding either before the Commission or in a court, to show that the consideration paid in advance for MSC.Nastran under any such contract or license is less than the entire consideration paid in advance under the contract or license. In the event that the customer is listed on Confidential Appendix B, the amount of the advance consideration shall be no less than shown. For those customers not listed on Confidential Appendix B, the amount of the advance consideration shall be the greater of that set forth in the express terms of the contract or license, or the amount determined by allocating the advance consideration using the same methodology used to generate Confidential Appendix B. For purposes of this provision, the advance consideration to be refunded or returned shall be the pro rata portion for the remaining term of the contract or license as of the time the customer elects to deal with the Acquirer, provided however that for purposes of calculating such refund or return of consideration the total term of the contract or license shall be deemed to be the lesser of four (4) years or the term specified in the contract or license.

- B. Respondent shall, within fourteen (14) days after the Divestiture Date, provide notice by first class mail to any customer of MSC described in this Paragraph of its rights as set forth in this Paragraph. Such notice shall be made by means of a letter substantially similar to Appendix A to this Order, shall disclose the amount of advance consideration allocable to MSC.Nastran under the customer's contract or license, and shall make reference to and enclose a complete copy of the complaint and Order in this matter. Respondent shall include with any new paid up contract or license for MSC.Nastran (or for multiple MSC products including MSC.Nastran) that results from a conversion as described in the preceding Subparagraph A a provision embodying the rights set forth in this Paragraph.

VIII.

IT IS FURTHER ORDERED, for a period of three (3) years following the Divestiture Date:

- A. Respondent shall maintain the interoperability of the current and any future versions of MSC's Complementary Software (including but not limited to MSC.Patran) with the Licensed Rights.

Decision and Order

X.

IT IS FURTHER ORDERED that:

- A. Within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until it has fully complied with its obligations under Paragraphs II, IV, V, VI, and VII.B. of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs II, IV, V, VI, VII.A., and VII.B of this Order. Respondent shall include in such compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.
- B. Within six (6) months after the date this Order becomes final and every six (6) months thereafter until it has fully complied with its obligations under Paragraph VII.A. of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied and is complying with Paragraph VII.A. of this Order.
- C. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

XI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

XII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and

documents in the possession or under the control of Respondent relating to any matters contained in this Order; and

- B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, employees, independent contractors, or agents of Respondent, who may have counsel present, relating to any matters contained in this Order.

XIII.

IT IS FURTHER ORDERED that this Order will terminate ten (10) years after the date it becomes final.

By the Commission.

Donald S. Clark
Secretary

SEAL:

ISSUED:

APPENDIX B

CONFIDENTIAL

[LIST OF AFFECTED CUSTOMERS]