UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

MSC's EMERGENCY MOTION TO REMEDY
JIM CASHMAN'S REFUSAL TO APPEAR FOR HIS DEPOSITION

In blatant disregard of the rules of the Federal Trade Commission and with extreme disrespect for the powers of this Court, James Cashman, the president and CEO of ANSYS, refused to appear today for his deposition!

Cashman offered no legal justification for failing to appear. He did not file a Motion to Quash. And he did not object. His excuse, after agreeing to make himself available today, was no excuse: He simply said he wanted to delay the deposition while he considers whether to settle the case or let

In MSC's view, the Court should be outraged. MSC certainly is. And the background facts only raise its ire further. Accordingly, this Court should order Mr. Cashman to appear for his deposition and provide such further relief as outlined below.

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[1] Mr. Cashman stated that he would make himself available for a deposition on June 21st. But this is too late. MSC's trial pre-trial preparation activities will be severely prejudiced. Moreover, that would permit Mr. Cashman to avoid having his deposition taken until after Mr. Schaeffer's deposition is taken. Significantly, counsel for ANSYS and SAS have been in close communication.

I. WITH COMPLAINT COUNSEL's COMPLICITY, ANSYS HAS OBSTRUCTED MSC'S EFFORTS TO OBTAIN RELEVANT INFORMATION.

Despite Complaint Counsel's protestation that ANSYS is a "neutral" third party, Complaint Counsel has been working behind the scenes with this "partnership" to frame MSC.

This partnership, with Complaint Counsel's complicity, has been causing serious injury in the market. Indeed, it is already having an impact on customers' and competitors' market place conduct.

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[2] Complaint Counsel's duplicity in this "partnership" is evidenced by its interference with MSC's efforts to reach a deal with SAS, while – unbeknownst to MSC – both ANSYS and Complaint Counsel were working behind the scenes to inflict more damage on MSC. *See* September 21, 2001 Letter to from T. Smith to Joseph Simons ("Staff's outrageous conduct has exceeded all professional limits and its active interference with divestiture negotiations -- without either warning or consulting MSC -- demonstrates compellingly the absence of staff's good faith. [O]n Monday, September 17, 2001 no fewer than ***five members*** of the Commission staff... directly contacted SAS ..., inquired into the details of Schaeffer's negotiations with MSC's broker and suggested to Schaeffer which assets Schaeffer should seek to acquire from MSC .... [Such] interference ... necessarily impeded progress towards a ... remedy," which, of course would be the ***Commission's, not Complaint Counsel's, prerogative*** to accept or reject) (attached as Exhibit 4);

ANSYS's heart is no purer. It too has coordinated with the FTC, sending draft proposals to Complaint Counsel without MSC's knowledge in order to extract maximum pain on its primary competitor.[3]

[3] As ANSYS and the marketplace already know, the pain inflicted on MSC from Complaint Counsel's witch-hunt has been monumental. Of course, it is this marketplace pain that Complaint Counsel and ANSYS are banking on, since they know they do not have a case based on hard evidence. All they have is "insinuation-evidence," as typified by the "Caterpillar" anecdote that was exposed in the February 25, 2002 pre-trial hearing.

Now, it is Jim Cashman's turn to explain the egregious conduct that has occurred on his watch. But he is afraid. This is not surprising, given the "root canal" that other ANSYS employees have had to go through.[5]

During the ***first*** ANSYS deposition, Mr. Wheeler admitted that

Seeing how badly that deposition went for the "Complaint Counsel/ANSYS" team, they took a different approach in subsequent depositions. Rather than directly answering the leading

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questions (as is MSC's right when confronting hostile witnesses), ANSYS chose to engage in long-winded non-responsive speeches. But the evasiveness of this approach shines through.

For example, in the second ANSYS deposition, rather than simply admit that ANSYS wants to Mr. Solecki fought the admission by claiming that he didn't know he meant when he personally gave a presentation to ANSYS's largest customers:

In the deposition of Brian Butcher, the same general approach was taken. Nevertheless, competition between ANSYS and MSC is so intense that not even he could avoid giving up the fact that

Similarly, Mr. Butcher caused devastating injury to ANSYS's "lock-in" theory, when he admitted that

After Mr. Butcher inflicted this damage on Complaint Counsel, ANSYS's counsel, Mr. Donovan, ***immediately*** requested a lunch break. *Id.*[8]

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[8] Complaint Counsel and ANSYS's counsel, Mr. Donovan, have also used a variety of other tactics to influence the testimony, including (i) engaging in numerous off-the-record discussions with witnesses during breaks; (ii) littering the record with almost ***800 objections*** in a single deposition; (iii) making a variety of speaking objections; and (iv) imposing a one-day, seven hour deposition limit on each deposition. *See, e.g.*, Butcher Dep. at 471:20 - 472:7; Wheeler Dep. at 344:19-22 ("Q: Did you discuss the substance of the pending question during the break? MR. DONOVAN: I direct the witness not to answer the question.")

Significantly, even though Complaint Counsel insisted on multi-day MSC depositions, it supported its "partner's" application of the one-day, seven-hour deposition rule. *See* Wheeler Dep.

Nor did Mr. Butcher do anything to prop up ANSYS's credibility, admitting at one point that he found

The same approach of avoiding "yes" answers was taken at the fourth ANSYS deposition two days later.[9] Not content with just evasive answers, however, Mr. Dunbar tried to undo some of Mr. Butcher's fatal admissions.

For example, Complaint Counsel sought to introduce a document that said

On cross-examination, however, Mr. Butcher was forced to admit that he had no foundation for making either statement, and that,

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at 7:5-8:4. Because of Mr. Cashman's importance and ANSYS's demonstrable hostility and evasiveness, MSC requests that it be given two days. *See* Fed.R.Civ.P. 30(d)(2) ("The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.").

[9] Mr. Dunbar's apparent ability to provide direct answers changed following the lunch break. Significantly, right before the lunch break, counsel for MSC explained, in light of his evasive testimony, that "if Mr. Dunbar tries to walk away from my questions ... that is something that the fact finder will have to consider in weighing Mr. Dunbar's credibility, and ANSYS's willing[ness] to cooperate with both sides in this litigation instead of the one-side favoritism we have seen [so] far." R. Dunbar Dep. at 163:4-11.

Not content with having such an admission on the record, Mr. Dunbar tried to claim that was a mistake and that

Significantly, this was after Mr. Butcher unequivocally testified that he believed

Mr. Dunbar also tried to walk away from other documents. For example, one document, which was prepared by a consultant in close consultation with Mr. Dunbar, aptly proclaims:

Five minutes later, Mr. Dunbar realized he got caught in his own lie when it was pointed out that the presentation actually related

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Mr. Dunbar also tried to walk away from the documents he himself had drafted. For example, one of Mr. Dunbar's documents reveal that

Incredibly, Mr. Dunbar tried to diffuse this by claiming

Most egregiously, ANSYS's counsel refused to allow Mr. Dunbar to disclose whether, as is apparent from the testimony, he had in fact been coached on how to walk from "bad documents:"

> *Q. Did you have any discussions on how to walk away ...from documents that you had written with anyone?*
> *MR. DONOVAN: I instruct him not to answer that question."*

R. Dunbar Dep. at 123:17 - 124:23 (attached as Exhibit 21).

Significantly, Mr. Donovan prevented MSC from asking multiple witnesses about "what ANSYS wants to obtain as a result of this litigation." R. Dunbar Dep. at 16:25 - 17:9. Mr. Donovan's instructions not to answer were not based on any privilege, just his desire to prevent this Court from considering ANSYS's " bargaining strategy," since those would obviously, and embarrassingly, impinge ANSYS's reputation and cast doubt on the self-serving testimony of its employees. *Id.*

II. CASHMAN's ELEVENTH HOUR REFUSAL TO SHOW-UP FOR HIS DEPOSITION IS IMPROPER.

Now, it is Mr. Cashman's turn to face the music. And as explained to Messrs. Donovan and Dunbar during the Dunbar deposition, he really has only two choices: (i) he can either provide truthful, complete and accurate testimony, or (ii) he can be evasive. Either way, it's a no win situation for the Complaint Counsel/SAS/Lockheed/ANSYS "partnership." If the testimony is truthful, then the partnerships' case will be torn to shreds. If he testifies evasively, then it will be further evidence of the partnership's on-going charade.

Rather than be put in this awkward Catch-22, Mr. Cashman unilaterally decided not to show up for his deposition.[12] But Mr. Cashman cannot play the game when it suits him, and turn around, pick up the ball and go home, when things don't look so bright.

Unfortunately, that is exactly what he did. At 3:30 p.m. on Friday, June 7th, Mr. Donovan told MSC that Mr. Cashman would not appear for his deposition on June 10th, the following

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[12] Mr. Cashman's deposition was originally noticed for May 14th. That deposition was postponed to May 31st, with Complaint Counsel's approval so that the parties could engage in good faith settlement negotiations. Late on May 29th, Mr. Cashman requested that his deposition be postponed again until June 10th. That request was granted. Again, ostensibly so negotiations could continue.

Monday.[13] MSC told Mr. Donovan that Mr. Cashman's day of reckoning had come, and that a subpoena required Mr. Cashman's attendance. Mr. Donovan simply said "you know our position."

Tellingly, by the time ANSYS reneged on its agreement to make Mr. Cashman available, ANSYS had already obtained Complaint Counsel's approval, not just for him but also for Mr. Schaeffer (from SAS), to postpone the deposition. Complaint Counsel's willingness to accommodate the two other members of the partnership, stands in stark contrast to Complaint Counsel's vehement opposition to postponing Mr. Schaeffer's deposition at MSC's. *See* Complaint Counsel's Non-Opposition to Harry Schaeffer's Motion to Quash Deposition Subpoena. ***Its amazing how Complaint Counsel's tune changes when another member of the duplicitous partnership, rather than MSC, asks for a postponement!!***

III. MR. CASHMAN's FAILURE TO APPEAR, IN LIGHT OF ANSYS's PRIOR EFFORTS TO RESIST DISCOVERY, ARE DERAILING THESE PROCEEDINGS AND SUBSTANTIALLY IMPAIRING MSC's DUE PROCESS RIGHTS.

Mr. Donovan never filed a Motion to Quash. Nor has Mr. Donovan stated any legal objection as to why Mr. Cashman cannot appear. The June 10th date was set as a convenience to Mr.

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[13] Mr. Donovan first requested that Mr. Cashman's deposition be postponed at approximately 2:00 p.m. on Friday, June 10th, and instructed MSC's counsel to get back to him within an hour with an answer. Significantly, MSC's met with both ANSYS and Complaint Counsel to discuss possible a settlement of this matter. Trial counsel for MSC was not involved in those meetings. After the meeting, Mr. Donovan called trial counsel and requested this postponement. MSC's trial counsel promptly advised Mr. Donovan that the deposition would go forward at approximately 3:00. At that point, Mr. Donovan indicated that Mr. Cashman would not attend his deposition, but when pressed about whether he would ignore the outstanding subpoena, Mr. Donovan said he wanted to talk with "your colleagues" [meaning the MSC representatives at the settlement meeting] before making a decision. At 3:30, Mr. Donovan stated that Mr. Cashman would not show up for the deposition, and sent a confirmatory fax at 3:57 p.m. No one from MSC agreed with Mr. Donovan or Mr. Cashman that the deposition would be postponed. Indeed, as explained, MSC expressly refused to agree to, and did not consent to, ANSYS's unilateral postponement of the deposition. *See* June 7, 2002, 3:57 p.m Letter From T. Donovan to C. Kass. (attached as Exhibit 22).

Cashman and at Mr. Cashman's request. His refusal to appear now is not only unjustified, it is prejudicial to MSC.[14]

ANSYS's refusal to play according to the rules jeopardizes MSC's due process rights. Discovery is now ostensibly closed, and MSC must prepare its final exhibit list (due on Wednesday) and its pre-trial brief and proposed findings of fact (due on June 17th). Deposition designations, counter-designations, objections to Complaint Counsel's exhibits and designations all have looming deadlines. The fact is, MSC was given only one month after the official close of discovery to engage in pre-trial preparation.

It is bad enough that Complaint Counsel has insisted on an unconstitutional rush to judgment. *Fitzgerald v. Penthouse Intern., Ltd.*, 776 F.2d 1236, 1238 n. 13 (4th Cir. 1985) ("our system of justice" requires that "the district court ... avoid creating an appearance of unfairness through an unnecessary rush to judgment."); *Local 174, Intern. Union, United Auto., Aerospace and Agr. Implement Workers of America, (UAW) v. N. L. R. B.*, 645 F.2d 1151, 1153 (D.C.Cir. 1981) (noting that a "rush to judgment ... diminishes respect for the Board," and can be "at odds with traditions of due process and orderly administrative procedure.").

But now its duplicitous "partners" – SAS two weeks ago, ANSYS this week – are further derailing any semblance of justice. *FTC v. Ernstthal*, 607 F.2d 488, 490-91 (D.C. Cir. 1979) ("If anything, the right of nonparties to derail the entire administrative proceeding in the context of a petition for subpoena enforcement is ***even less*** than that of a party.")

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[14] Significantly, FTC Rules required that Mr. Cashman file a Motion to Quash in order to preserve any objection to the subpoena. 16 C.F.R. § 3.34(c). His failure to file a motion to quash the subpoena or seek a Protective Order waives any argument that he may offer for failing to comply.

The prejudice becomes more clear when put in context of ANSYS's other efforts to prevent MSC from obtaining relevant evidence. Since the beginning of the litigation, ANSYS has resisted discovery. Perhaps with a guilty conscience, ANSYS initially refused to comply with the subpoena's due date and obtained an automatic extension by filing a Motion to Quash.[15]

Next, ANSYS sought to limit its compliance with the subpoena, based primarily on its assertion of relevance. Although when facing this Court, ANSYS reluctantly admitted that it competed for new customers, it claimed that such information was "too voluminous" to turn over. ANSYS also resisted providing evidence, relying on a litigation-concocted market definition, designed solely to conceal evidence of substantial competition

While this Court rejected ANSYS's effort to hide behind such narrow, legalistic market definitions,[17] this Court did not enforce the subpoena, nor did it rule on ANSYS's motion to quash. *See* March 15, 2002, Letter from C. Kass to Victoria Arthaud. (attached as Exhibit 23).

Thus, MSC was forced to satisfy itself with substantially limited discovery from ANSYS. Most significantly, ANSYS refused to provide documents relating to its negotiations to purchase the UAI or CSA codes. ANSYS did not rely on any claim of privilege. Nor could it. In mid-December, ANSYS sought to shield those settlement discussions from the Court as privileged

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[15] Notably, it's motion for an extension of time was basically rejected, and granted only in so far as the date for compliance had already passed. *See* January 14, 2002 Order on ANSYS's Motion For Extension of Time.

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[17] *See* 2/25/02 Hr'g Tr. at 35:17-20 ("I can tell you that the relevant market is broader than you're claiming...") (attached as Exhibit 24).

or inadmissible under Federal Rule of Evidence 408. This was an attempt that MSC rejected outright, noting that there was no legal basis for concealing such information. (Indeed, Federal Rule of Evidence 408, is an evidence rule and does not establish privileges. Nor does it bar the introduction "evidence ... offered for another purpose, such as proving bias or prejudice of a witness..." Fed. R. Evid. 408.

Moreover, despite the fact that this evidence is clearly relevant and admissible "to prove bias or prejudice of a witness," ANSYS improperly instructed its witnesses not to answer questions relating to its efforts to obtain a bounty from this litigation.[18] Thus, preventing MSC from obtaining either documents or testimony on this clearly relevant issue.

Now, ANSYS seeks to go a step further and delay – if not ultimately prevent – MSC from obtaining and making use of Mr. Cashman's deposition testimony. But this is not supposed to be guerrilla warfare. ANSYS cannot attack from behind (by coordinating with the FTC and SAS) and refuse to fight face-to-face when called upon to do so.

The prejudice to MSC from this member refusing to subject himself to timely cross-examination is obvious.

III. MSC IS ENTITLED TO A QUICK AND EFFECTIVE REMEDY

Mr. Donovan knew that if he waited until the afternoon of the last business day before the deposition to disclose Mr. Cashman's decision to dodge his obligations, MSC would have no

[18] Significantly, it is ANSYS's burden to move for, and obtain, a Protective Order if it believes that certain information should not be disclosed. See Fed.R.Civ.P. 30(d) (1) ("A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion [for Protective Order]."). None of these bases were satisfied.

practical remedy. In essence, Mr. Donovan correctly calculated that, by waiting to the eleventh hour to tell MSC that Mr. Cashman would not show up, ANSYS would be able to game the system and obtain an automatic extension of time.[19]

ANSYS's attempt to avoid its discovery obligations should not be allowed. As an initial matter, this Court should order Mr. Cashman to appear and should "certify to the Commission a request that court enforcement of the subpoena or order be sought." *In re Intel Corp.*, 1998 FTC LEXIS 153 (Nov. 30, 1998) (certifying respondent's motion to certify request for enforcement of subpoena duces tecum to the Commission with a recommendation "that it seek ***prompt*** court enforcement of the subpoena issued to" non-party)

But this is not enough. ANSYS has completely ignored its obligation to move to quash the subpoena, choosing instead to simply ignore it. This is unacceptable and unprofessional behavior. ANSYS simply should not be permitted to railroad its primary competitor with Complaint Counsel's consent and encouragement. At some point, the conduct of Complaint Counsel and the third-parties with whom it is coordinating becomes too egregious to idly accept. We are far past that point. ANSYS's refusal to answer critical questions going to their bias, Complaint Counsel's interference with MSC's efforts to dispose of this costly litigation, and SAS's and Lockheed's conduct calculated to influence and take advantage of these proceedings is too much to bear.

While the "Partnership" does not care about MSC's due process rights, this Court should and the Commission must. *In re Trans Union Corp.*, 123 F.T.C. 393 (Feb. 11, 1997) ("The

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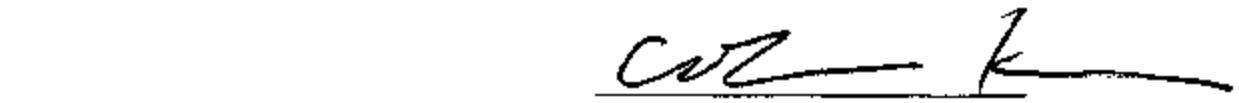
[19] This is not the first time ANSYS has succeeded in obtaining a unilateral extension of its discovery obligations. *See* Third-Party ANSYS, Inc.'s Motion to Extend Time to Respond and/or Move to Limit or Quash Subpoena Duces Tecum Served by MSC.Software Corporation. Here, however, ANSYS has not even made a pretense of seeking permission from the court to extend its discovery obligations.

Commission [has a] strong interest in ensuring the integrity of its adjudicative process."). Under FTC Rule 3.38(c), this Court has the duty and power to "grant ... appropriate relief as may be sufficient to compensate for withheld testimony." 16 C.F.R. § 3.38(c). Thus, MSC requests this Court to:

- Order Mr. Cashman to attend ***a two-day deposition*** beginning on Friday, June 14th and continuing to June 15th; and
- Order Mr. Cashman to answer ***all questions*** regarding any negotiation that ANSYS may have had with SAS or Complaint Counsel; and
- Permit MSC to ***reschedule Mr. Schaeffer's deposition*** in order to preserve the order of the testimony.

In addition, this Court should "certify to the Commission a request that court enforcement of the subpoena or order be sought." MSC also respectfully requests that sanctions be imposed, pursuant to 16 C.F.R. § 3.38(c) for Mr. Cashman's failure to comply with subpoena.

Respectfully submitted,



Tefft W. Smith (Bar No. 458441)
Marimichael O. Skubel (Bar No. 294934)
Michael S. Becker (Bar No. 447432)
Colin R. Kass (Bar No. 460630)
Bradford E. Biegon (Bar No. 453766)
Larissa Paule-Carres (Bar No. 467907)
KIRKLAND & ELLIS
655 15th Street, N.W., 12th Floor
Washington, DC 20005
(202) 879-5000 (Phone)
(202) 879-5200 (Facsimile)

Counsel for Respondent
MSC.Software Corporation

Dated: June 10, 2002

CERTIFICATE OF SERVICE

This is to certify that on June 10, 2002, I caused a copy of the non-public, non-public redacted, and public versions of MSC's Emergency Motion To Remedy Jim Cashman's Refusal To Appear For His Deposition to be served upon the following persons by hand delivery:

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

Richard B. Dagen, Esq.
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, DC 20580

P. Abbott McCartney, Esq.
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, DC 20580

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

and that I cause the non-public redacted and public versions of MSC's Emergency Motion To Remedy Jim Cashman's Refusal To Appear For His Deposition to be served upon the following person by facsimile and overnight mail:

Thomas Donovan, Esq.
Kilpatrick & Lockhart
Henry W. Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222-2312

David Secunda, Esq.
Ansys, Inc.
Southpointe
275 Technology Drive
Canonsburg, PA 15317

Hedy J. Aponte

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

EXHIBIT 1

REDACTED PURSUANT TO
PROTECTIVE ORDER

EXHIBIT 2

REDACTED PURSUANT TO
PROTECTIVE ORDER

EXHIBIT 3

REDACTED PURSUANT TO
PROTECTIVE ORDER

KIRKLAND & ELLIS
PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

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

202 879-5000

Facsimile:
202 879-5200

Tefft W. Smith
To Call Writer Directly:
(202) 879-5212
Tefft_Smith@DC.Kirkland.com

September 21, 2001

Via Hand Delivery

Joseph Simons, Esq.
Director
Bureau of Competition
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Mr. Simons:

We write to bring to your attention disturbing information regarding staff's misconduct during its investigation of acquisitions made two years ago by MSC.Software Corporation ("MSC"). Staff's outrageous conduct has exceeded all professional limits and its active interference with divestiture negotiations – without either warning or consulting with MSC – demonstrates compellingly the absence of staff's good faith in pursuing a resolution. Staff's actions raise a further public concern: whether parties in the future may have any confidence in staff's good faith when dealing with the FTC to remedy concerns without litigation.

As you know, the FTC is conducting a non-public investigation of MSC's 1999 acquisition of two small companies, Computerized Structural Analysis Research Corporation and Universal Analytics, Inc. Although no anticompetitive effect has resulted from these acquisitions, MSC has decided to divest the acquired Nastran codes to avoid the expense, delay, and negative customer impact of the on-going investigation.

To that end, MSC engaged in preliminary negotiations with several potential buyers (two of whom were specifically identified by staff) and retained a commissioned broker to complete the sale. MSC kept staff informed of its activities, updating them with regular progress reports. When it proved that neither firm identified by staff had the level of interest that staff had suggested, MSC identified a potential buyer with genuine interest in at least some of the disputed assets. MSC then specifically informed staff that Schaeffer Automated Simulation ("SAS") had expressed a strong interest in purchasing the assets and that detailed, concrete negotiations over terms were now proceeding.

MSC was shocked to then learn that on Monday, September, 17, 2001, no fewer than five members of the Commission staff, including Rendell Davis of the Bureau's Compliance Division, directly contacted SAS. Staff then inquired into the details of Schaeffer's negotiations with MSC's broker and suggested to Schaeffer which assets Schaeffer should seek to acquire from MSC. The FTC's interference in the negotiations has necessarily impeded progress towards a divestiture of the assets and may have made it impossible for MSC to pursue a remedy. Were staff legitimately committed to pursuing a remedy in the public interest, it would not have disrupted an on-going negotiation.

Staff's interference with the Schaeffer negotiation sheds further light on staff's decision to conduct customer interviews after staff ordered MSC to cease all substantive efforts towards preparing its case, placing MSC at a disadvantage in the event that a remedy could not be found. Staff demanded that MSC stop contacting its own customers, efforts MSC was undertaking to understand the nature of the their concerns and to further understand why the FTC believes that competitive concerns have been raised by these acquisitions of two small, marginal, declining firms.

Staff first told MSC that it contacted Mr. Schaeffer because he is a potential witness on entry. MSC was then told that the purpose of the call was to learn more about entry for purposes of making a determination about the merits of the case. However, since we understand that a complaint recommendation was at the Commission a few months ago, we assume that the entry issue would surely have been resolved before that recommendation was forwarded. Moreover, Mr. Davis' participation in the call undermines even those "explanations." Finally, it would have been helpful for MSC to know this information before MSC engaged in negotiations with Schaeffer. In any event, staff's failure to raise these issues once staff knew of a potential sale to Schaeffer is simply inexplicable.

From staff's conduct it can only be inferred that the goal was to give staff additional time to prepare to litigate (while denying the same to MSC) and then to sabotage efforts to find a remedy by directly interfering with the negotiations. Staff's conduct has now put MSC in an untenable situation. MSC may not be able to effectively pursue a divestiture remedy because its relationship with the most likely buyer and MSC's broker has been tainted by staff's

interference. Staff's actions are not in the public interest, since divestiture of the assets is the remedy that staff would obtain even if it prevailed at trial. Therefore, litigation is not a good use of public resources.

Thus, MSC requests that two immediate actions be taken: First, the case should be immediately taken off the clock while MSC assesses whether any viable path forward remains; Second, MSC wishes to meet with you at your earliest possible convenience – not to discuss the merits of the case – but, rather, to discuss how this investigation will be conducted in the future, or whether it should be allowed to go on at all.

Respectfully,

Tefft W. Smith

TWS:vh

cc: Frank Perna, Chairman & CEO, MSC.Software
David Beddow, Esq., O'Melveny & Myers LLP
Richard Dagen, Esq., Federal Trade Commission

EXHIBIT 5

REDACTED PURSUANT TO
PROTECTIVE ORDER

EXHIBIT 6

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PROTECTIVE ORDER

EXHIBIT 7

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PROTECTIVE ORDER

EXHIBIT 8

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EXHIBIT 10

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PROTECTIVE ORDER

EXHIBIT 20

REDACTED PURSUANT TO
PROTECTIVE ORDER

EXHIBIT 21

REDACTED PURSUANT TO
PROTECTIVE ORDER

Kirkpatrick & Lockhart LLP

Henry W. Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222-2312
412.355.6500
Fax: 412.355.6501
Fax: 412.355.6461

FAX

Date • June 7, 2002

No. of Pages, Including coversheet • 2

Transmit To •

Name	Company	Phone	Fax
Colin Kass, Esq.	Kirkland & Ellis	202.879.5000	202.879.5200

From • Thomas A. Donovan — **Phone** • 412.355.6466
Secretary • Darlene Tchirkow — **Phone** • 412.355.6467

COMMENTS:

When you are sending to us, please be sure to include a cover sheet with your transmittal and a telephone number where you can be contacted in case of equipment malfunction.

Transmitted by: **Time:**

Kirkpatrick & Lockhart LLP

Henry W. Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222-2312
412.355.6500
www.kl.com

June 7, 2002

Thomas A. Donovan
412.355.6466
Fax: 412.355.6501
tdonovan@kl.com

VIA FACSIMILE

Colin R. Kass, Esquire
Kirkland & Ellis
655 Fifteenth Street, N.W. Suite 1200
Washington, DC 20005

RE: In Re: MSC.Software Corporation
FTC Docket No. 9299 ("Case No. 9299")

Dear Mr. Kass:

This letter is to advise you that James Cashman will not be available for deposition on Monday, June 10, 2002. He will be devoting time to the settlement offer which ANSYS has agreed to forward to MSC.Software on Monday, June 10 and which MSC has agreed to consider at that time. He will be available for deposition in Pittsburgh on June 21, if such a deposition is necessary at that time.

Sincerely,

Thomas A. Donovan

TAD:drt

cc: David Secunda, Esq.
Peggy Bayer, Esq.
David Beddow, Esq.

KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

655 Fifteenth Street, N.W.
Washington, D.C. 20005-5793

(202) 879-5000

Facsimile:
(202) 879-5200

Colin R. Kass
To Call Writer Directly:
(202) 879-5172
colin_kass@dc.kirkland.com

March 15, 2002

Via Hand Delivery

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: *In re MSC.Software Corp., Docket No. 9299*

Dear Judge Chappell:

This letter responds to this Court's March 14, 2002 letter, requesting that MSC inform the Court of the status of its negotiations with ANSYS. This letter does not address Complaint Counsel's February 5, 2002 motion or MSC's cross-motion (both of which will be addressed in a different letter).

Following this Court's February 25, 2002 status conference, it was MSC's understanding that this Court did not intend to either enforce the subpoena as written or to enter the Proposed Order submitted by MSC in response to ANSYS's Motion to Quash. MSC has not withdrawn that subpoena because it believes that the scope of the discovery sought in its initial subpoena is appropriate, and it further believes that the discovery called for in its Proposed Order is necessary. Nevertheless, pursuant to this Court's instructions, MSC held further discussions with counsel for ANSYS and issued a new subpoena to ANSYS on March 8, 2002. (*See* Attachment A). The specifications in this new subpoena are substantially narrower than those propounded in MSC's original subpoena and in MSC's Proposed Order. Since MSC served the March 8th subpoena, counsel for ANSYS has requested a number of minor modifications to the subpoena, to which MSC has not objected. (*See* Attachments B and C). At this point, MSC is not aware of any pending dispute concerning the scope of this March 8, 2002 subpoena.

Sincerely,

Colin R. Kass

cc: Victoria C. Arthaud, Esq.
P. Abbott McCartney, Esq.
Thomas A. Donovan, Esq.

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modifications that's in our proposal.
So I think I would do that, but that's only based on conversations with them and hearing what their objections are that I would do that. You know, the initial subpoena that we issued was based before we had a chance to talk to them, and in fact we asked them before we issued the subpoena is there a way that we can discuss the scope of the subpoena, and they said just issue your subpoena, which is what we did.
JUDGE CHAPPELL: Well, that tends to get your attention when the real subpoena comes in, you would agree?
MR. KASS: Exactly. Exactly.
JUDGE CHAPPELL: Anything else?
MR. KASS: That's it, Your Honor.
JUDGE CHAPPELL: Anything, Mr. Donovan?
MR. DONOVAN: Just a couple of things, Your Honor.
One is that counsel has intimated that we haven't obtained anything from the North American sales organization from my client, and that's simply incorrect.
We have gone to the senior-most individuals within that organization and obtained from them the information that they have maintained, including

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numerous e-mails from their subordinates. That's where the information is. That's the way this company runs. It's the way it's organized. As is evidenced by Mr. Secunda's affidavit.
JUDGE CHAPPELL: Let me tell you what I'm going to do for the parties.
I'm going to make what you can call a partial ruling if you want. I'm going to make some suggestions. I've read these pleadings. I've tried to draft an order five or six different ways.
I have never seen parties in such disagreement on different wavelengths, so you can imagine what it's like trying to draft an order in this case with this subpoena.
I mean, you're starting out objecting to the definitions and instructions. Then you go to specific specifications. Then I hear from the other side that, well, we just want two things. I think, well, it's getting narrowed down. Then I hear, Wait, wait, it's not just two things, it's two million things.
I'm giving you a little background here. I'm the one that has to issue this order, and let me tell you, somebody is going to be very upset when it goes out, and it's going out soon.
So what I suggest — I am not going to order

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named people to have to search files. I'm not going to do that. But I will tell you, the responsibility of the recipient of that subpoena is to produce information that is responsive to these requests. How you do it, that's your business. But if someone comes to me later and demonstrates that it wasn't done right, then any kind of motion, any kind of motion to compel can be renewed.
So I suggest that you people at some point get together, reissue that subpoena, agree to respond quicker than the normal time, and if you can't work it out, bring it back to me, tailor it down a little bit, and I'll get an order out very quickly.
Is that acceptable?
MR. DONOVAN: We'll be happy to try to work with the other side.
JUDGE CHAPPELL: And I can tell you that the relevant market is broader than you're claiming and it's narrower than you're claiming (indicating). Is that understood?
So go forth, work something out, bring something back to me that I'm going to be able to work with, or you're going to get an order that is going to upset an awful lot of you.
Anything else?

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MR. DONOVAN: No, Your Honor.
MR. KASS: No, Your Honor.
MR. SMITH: Next issue that Your Honor would like to address? Do you want to address the motion to compel our document production or do you want to address the motion as to the schedule?
MR. McCARTNEY: Our motion on the document production, Your Honor, I believe was first.
JUDGE CHAPPELL: Let me address what I think is an easy one first.
There is pending, as far as I could tell, according to the secretary of the Commission, an emergency motion filed by complaint counsel to compe compliance with discovery.
My attorney advisers have informed me that there was a telephone conference with all the parties and it was represented to her that that was going to be withdrawn.
And so I need to know, is that going to be withdrawn by way of pleading so that the record is clear? Or are you still pushing that?
MR. McCARTNEY: Yes, Your Honor, we can withdraw that motion.
I believe it covered two issues. One issue was the depositions. That was the depositions where MSC