

Complaint

IN THE MATTER OF

MSC.SOFTWARE CORPORATIONCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket 9299; File No. 0010077**Complaint, October 9, 2001--Decision, October 29, 2002*

This consent order addresses the acquisitions by Respondent MSC.Software Corporation -- the largest supplier of computer-aided engineering simulation software in the world -- of Universal Analytics, Inc. ("UAI") and Computerized Structural Analysis and Research Corporation ("CSAR"), and possible effects in the market for advanced versions of Nastran, a public domain engineering simulation software program. The order, among other things, requires the respondent to divest -- to one or two acquirers approved by the Commission -- perpetual, worldwide, royalty-free, and non-exclusive licenses to the key intellectual property needed by a new competitor to compete in the sale and licensing of advanced Nastran software, including both the version of MSC.Nastran that was most current as of August 12, 2002, and all the intellectual property rights acquired by MSC in the two challenged acquisitions. The order also requires the respondent, for twelve months, to provide the acquirer or acquirers with ongoing support with respect to MSC.Nastran, in the form of personnel, information, technical assistance, advice and training. In addition, the order requires the respondent, for three years, to grant the acquirer or acquirers the right to use the trademarks or trade names of the licensed software for the purpose of identifying the acquirer as a licensee from MSC. The order also requires the respondent, for ten years, to provide the Commission with prior notice of future acquisitions of any entity engaged in the development or sales of any version of Nastran.

Participants

For the Commission: *P. Abbott McCartney, Peggy D. Bayer, J. Dennis Harcketts, Cecelia M. Waldeck, Rita Leeb, Karen Mills, Kent Cox, Stephanie Langley, Susan Moreno, Melissa Kassier, Michael Cowie, Patrick J. Roach, Richard B. Dagen, Rendell A. Davis, Jr., Daniel P. Ducore, John Yun, Jeffrey H. Fischer, and Daniel P. O'Brien.*

For the Respondent: *Tefft W. Smith and Marimichael Skubel, Kirkland & Ellis.*

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Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (hereafter “Commission”), having reason to believe that MSC.Software Corporation (hereafter “MSC” or “Respondent”) acquired Universal Analytics Inc. (hereafter “UAI”) and Computerized Structural Analysis & Research Corporation (hereafter “CSAR”) in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

RESPONDENT MSC.SOFTWARE CORPORATION

1. Respondent is a for-profit 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 had approximately \$178 million in annual revenue for the fiscal year ending December 31, 2000. Respondent is a developer and supplier of simulation computer software, including advanced simulation software used by the aerospace, automotive and other manufacturing industries. Respondent has long offered an advanced version of a linear structural analysis engineering software product called “Nastran.”
3. Respondent is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

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THE ACQUISITION OF UNIVERSAL ANALYTICS INC.

4. Prior to its acquisition by Respondent, UAI was a privately-held corporation organized, existing and doing business under and by virtue of the laws of the State of California.
5. Since before the early 1970s, UAI had been a developer and supplier of simulation computer software, including advanced simulation software used by the aerospace, automotive and other manufacturing industries. UAI had long offered an advanced version of Nastran in competition with Respondent.
6. On or about June 24, 1999, Respondent acquired UAI for approximately \$8.4 million.

THE ACQUISITION OF COMPUTERIZED STRUCTURAL ANALYSIS & RESEARCH CORPORATION

7. Prior to its acquisition by Respondent, CSAR was a privately-held corporation organized, existing and doing business under and by virtue of the laws of the State of California.
8. Since before 1986, CSAR had been a developer and supplier of simulation computer software, including advanced simulation software used by the aerospace, automotive and other manufacturing industries. CSAR had long offered an advanced version of Nastran in competition with Respondent.
9. On or about November 4, 1999, Respondent acquired CSAR for approximately \$10 million.

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TRADE AND COMMERCE

10. Developers of new industrial and consumer products may use computer-aided engineering analysis to simulate and evaluate the robustness of new product designs.
11. Computer simulations in the product development process typically utilize an analytical method called “finite element analysis” (“FEA”). FEA simulates how a structure would perform in response to a defined load. With finite element analysis, computerized models of structures are first divided into small elements, which form a finite element model, and then subjected to computer analysis to simulate the structure’s performance. The software performing this computer analysis is often called a “solver” or “FEA solver.”
12. FEA solvers have been developed to perform many different types of engineering analyses.
13. FEA solvers are differentiated software products with varying features and capabilities. FEA solvers may be differentiated by, among other characteristics, the types of analyses performed, price level, ease of use, speed, size and complexity of problems that can be analyzed, ability to perform system-type analysis, availability of complementary software, type of output and input file format utilized, and computer platform and operating system on which the solver operates. FEA solvers are also differentiated by their record of reliability.
14. “Nastran” is an FEA solver first developed by the U.S. National Aeronautics and Space Administration (“NASA”) over 30 years ago to perform structural analysis for NASA projects. In developing Nastran, NASA wanted a solver to perform a broad range of structural analyses and have the capacity to be further developed and enhanced. After the initial development of Nastran, NASA released the Nastran

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source code into the public domain to allow broader use and commercial development. NASA registered “Nastran” as a U.S. trademark in 1976.

15. MSC, UAI and CSAR obtained the public domain version of Nastran from NASA and for many years have developed and further enhanced Nastran for licensing to commercial and government users. Each has used the Nastran trademark with permission from NASA. At the time of Respondent’s acquisitions, the features and capabilities of each of these three advanced versions of Nastran were very similar.
16. The aerospace and automotive industries began using the advanced versions of Nastran in the 1970s for advanced linear structural analysis. Nastran has become the standard linear structural solver in these industries. Certain other manufacturing industries also utilize Nastran for advanced linear structural analysis.
17. Prior to Respondent’s acquisitions, users of the advanced versions of Nastran offered by MSC, UAI, or CSAR could readily switch between these versions without substantial loss of functionality because each version offered very similar features and capabilities. Differences in functionality discourage switching from advanced versions of Nastran to other solvers even in response to a significant and nontransitory increase in price.
18. Prior to Respondent’s acquisitions, users of the advanced versions of Nastran offered by MSC, UAI, or CSAR could readily switch between these versions relatively quickly and without spending significant switching costs and time. The advanced versions of Nastran were all derived from the same Nastran public domain code, offered very similar features and capabilities, and used generally the same input and output file formats. Differences in computer code, features and capabilities, and file formats discourage

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switching from advanced versions of Nastran to other solvers even in response to a significant and nontransitory increase in price.

19. Industry practices or the requirements of multi-party development projects sometimes dictate the use of advanced versions of Nastran, thereby discouraging substitution away from advanced versions of Nastran even in response to a significant and nontransitory increase in price.
20. Prior to Respondent's acquisitions, competition between MSC, UAI, and CSAR to license or sell advanced versions of Nastran was direct and vigorous and helped to hold down prices and to promote product innovation. Prior to Respondent's acquisitions, users had switched and had considered switching between these advanced versions of Nastran in response to relative changes in price and other competitive variables including product features, capabilities, and enhancements.

RELEVANT PRODUCT MARKETS

21. One relevant product market in which to assess the likely effects of Respondent's acquisitions of UAI and CSAR is the licensing or sale of advanced versions of Nastran.
22. Another relevant product market in which to assess the likely effects of Respondent's acquisitions of UAI and CSAR is the broader market consisting of the licensing or sale of FEA solvers for advanced linear structural analysis.
23. Within each of the relevant product markets, separate markets exist for the licensing or sale of the relevant product for specific industries or customer categories, in particular, the aerospace industry and the automotive industry.

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RELEVANT GEOGRAPHIC MARKETS

24. The relevant geographic markets in which to assess the likely effects of Respondent's acquisitions of UAI and CSAR are
- a. the United States; and
 - b. the world.

CONCENTRATION

25. Prior to Respondent's acquisitions, MSC, UAI, and CSAR were the only firms competing in the licensing or sale of advanced versions of Nastran. MSC was the dominant competitor with an estimated market share of 90 percent. The remaining share was roughly split between UAI and CSAR. The market for advanced versions of Nastran prior to the acquisitions was highly concentrated with a Herfindahl-Hirschman Index ("HHI") exceeding 8100. (An HHI of 1800 characterizes a highly concentrated market.) Respondent's acquisitions of UAI and CSAR, together and individually, substantially increased that concentration so that the HHI is now 10,000.
26. Prior to Respondent's acquisitions, there were few suppliers competing in the licensing or sale of FEA solvers for advanced linear structural analysis other than MSC, UAI, and CSAR. Prior to Respondent's acquisitions, the market for FEA solvers for advanced linear structural analysis was highly concentrated. Respondent's acquisitions of UAI and CSAR, together and individually, substantially increased that concentration.

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CONDITIONS OF ENTRY

27. Entry into licensing or sale of advanced versions of Nastran would not be timely, likely, or sufficient to prevent the anticompetitive effects. Entry is difficult because of the substantial cost and time needed to develop an advanced version of Nastran, validate simulation results, and establish a reputation for reliability.
28. Entry into the licensing or sale of FEA solvers for advanced linear structural analysis would not be timely, likely, or sufficient to prevent the anticompetitive effects. Entry is difficult because of the substantial cost and time needed to develop an FEA solver for advanced linear structural analysis, validate simulation results, and establish a reputation for reliability.

COUNT I

THE ACQUISITIONS VIOLATE CLAYTON ACT § 7 AND FTC ACT § 5

29. Respondent's acquisitions of UAI and CSAR, together and individually, have had or will have the effect of substantially lessening competition and tending to create a monopoly in the relevant markets by, among other things:
 - a. eliminating actual, direct, and substantial competition between MSC, UAI, and CSAR, all of which had the ability and incentive to compete, and before the acquisitions did compete, on price and product development and enhancements;
 - b. creating or enhancing MSC's power to raise prices above a competitive level or to withhold or delay product development and enhancements, thereby adversely affecting price and product innovation; and

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- c. preventing other suppliers of engineering software from acquiring UAI and CSAR and increasing competition.
- 30. Absent the relief described in the attached Notice of Contemplated Relief, Respondent's acquisitions of UAI and CSAR, together and individually, will continue to cause the effects on competition identified above.
 - 31. The effect of Respondent's acquisitions of UAI and CSAR, together and individually, may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

COUNT II**THE ACQUISITIONS CONSTITUTE UNLAWFUL
MONOPOLIZATION IN VIOLATION OF FTC ACT § 5**

- 32. The allegations contained in Paragraphs 1 through 28 are repeated and realleged as though fully set forth here.
- 33. Respondent has obtained or enhanced monopoly power in the markets for advanced versions of Nastran through the acquisitions.
- 34. Respondent acted willfully to acquire or enhance monopoly power in the markets for advanced versions of Nastran through the acquisitions.
- 35. Through the acquisitions, Respondent has engaged in unfair methods of competition in or affecting commerce by monopolizing the markets for advanced versions of Nastran in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

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COUNT III

**THE ACQUISITIONS CONSTITUTE AN
UNLAWFUL ATTEMPT TO MONOPOLIZE IN
VIOLATION OF FTC ACT § 5**

36. The allegations contained in Paragraphs 1 through 28 are repeated and realleged as though fully set forth here.
37. Respondent has engaged in an anticompetitive course of conduct by willfully seeking to obtain or enhance monopoly power in the markets for advanced versions of Nastran through the acquisitions.
38. Respondent acted with a specific intent to monopolize, and to destroy competition in, the markets for advanced versions of Nastran through the acquisitions.
39. At the time Respondent acquired UAI and CSAR, it had a dangerous probability of success in monopolizing the markets for advanced versions of Nastran.
40. Through the acquisitions, Respondent has engaged in unfair methods of competition in or affecting commerce by attempting to monopolize the markets for advanced versions of Nastran in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

NOTICE

Proceedings on the charges asserted against you in this complaint will be held before an Administrative Law Judge (ALJ) of the Federal Trade Commission, under Part 3 of the Commission's Rules of Practice, 16 C.F.R. Part 3. A copy of Part 3 of the Rules is enclosed with this complaint.

You may file an answer to this complaint. Any such answer must be filed within 20 days after service of the complaint on you.

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If you contest the complaint's allegations of fact, your answer must concisely state the facts constituting each ground of defense, and must specifically admit, deny, explain, or disclaim knowledge of each fact alleged in the complaint. You will be deemed to have admitted any allegations of the complaint that you do not so answer.

If you elect not to contest the allegations of fact set forth in the complaint, your answer shall state that you admit all of the material allegations to be true. Such an answer will constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the ALJ will file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. Such an answer may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice.

If you do not answer within the specified time, you waive your right to appear and contest the allegations of the complaint. The ALJ is then authorized, without further notice to you, to find that the facts are as alleged in the complaint and to enter an initial decision and a cease and desist order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

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A hearing on the complaint will begin on January 9, 2002, at 10 a.m., in Room 532, or such other date as determined by the ALJ. At the hearing, you will have the right to contest the allegations of the complaint and to show cause why a cease and desist order should not be entered against you.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the acquisitions of UAI and CSAR violate Section 7 of the Clayton Act, as amended, or Section 5 of the Federal Trade Commission Act, as amended, as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including but not limited to:

1. An order to create and divest up to two viable on-going businesses each engaged in the licensing or sale of an advanced version of Nastran in competition with MSC Nastran to up to two acquirers acceptable to the Commission, including but not limited to:
 - a. divesting all software, intellectual property, and other assets for the operation of such businesses, including but not limited to the following for MSC Nastran and all MSC Nastran applications, features, enhancements, and library functions for all operating systems and computer platforms: the source code, object libraries, executable programs, test problems, test results, regression test software, development support software, trade secrets, trademarks, patents, know-how, interfaces with complementary software, APIs, manuals, guides, reports, and other documentation;
 - b. facilitating the acquirers' recruitment of Respondent's employees, including but not limited to providing employee lists, personnel files, opportunities to interview and negotiate with the acquirers, eliminating any restrictions on or disincentives to accepting employment with the

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acquirers, and providing incentives for such employees to accept employment with the acquirers;

- c. providing Respondent's customer lists and account information to the acquirers;
- d. allowing Respondent's customers to terminate or rescind contracts or license agreements and to deal with the acquirers, including but not limited to eliminating any restrictions on or disincentives to terminating or rescinding such contracts or license agreements and otherwise refunding or returning consideration paid in advance pursuant to such contracts or license agreements;
- e. furnishing to the acquirers such personnel, information, technical assistance, advice and training as are necessary;
- f. for a defined period of time, maintaining open architecture for MSC Nastran and all input and output file formats so that users of MSC Nastran would not be impeded or penalized if they switched models, files, or complementary software to the divested versions of Nastran;
- g. for a defined period of time, not restricting, precluding, or influencing a supplier of complementary software or services from dealing with the acquirers or the acquirers' products;
- h. for a defined period of time, supporting fully the divested versions of Nastran with Patran and other MSC complementary software products, without charge to the acquirers and on the same basis as MSC Nastran is supported by Patran and other MSC complementary software products; and
- i. such other or additional relief as is necessary to ensure the creation of up to two viable, competitive, and independent

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entities offering advanced versions of Nastran with the level of features and capabilities offered by MSC.

2. An order to provide prior notice of any acquisitions of firms engaged in the licensing or sale of advanced versions of Nastran or other solvers for advanced linear structural analysis.
3. Such other or additional relief as is necessary to correct or remedy the violations alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this ninth day of October, 2001, issues its complaint against said Respondent.

By the Commission.

Appendix A

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order with MSC.Software Corporation (“MSC”) to resolve matters charged in an Administrative Complaint issued by the Commission on October 9, 2001. The Agreement has been placed on the public record for thirty (30) days for receipt of comments from interested members of the public. The Agreement is for settlement purposes only and does not constitute an admission by MSC that the law has been violated as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

I. The Commission’s Complaint

The Complaint alleged that Respondent MSC.Software Corporation (“MSC”) unlawfully acquired Universal Analytics, Inc. (“UAI”) and Computerized Structural Analysis and Research Corporation (“CSAR”) in 1999 in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. The Complaint alleged that the acquisitions may substantially lessen competition or lead to a monopoly in the market for advanced versions of Nastran, a public domain engineering simulation software program. Neither acquisition had been reportable under the Hart-Scott-Rodino reporting thresholds, 15 U.S.C. § 18a.

MSC is the largest supplier of computer-aided engineering simulation software in the world. In 2001, its annual worldwide revenue was \$236 million. MSC has an estimated 1350 employees located around the world. MSC has grown substantially through acquisitions, having acquired six other engineering software vendors or resellers since 1998. MSC is a publicly-traded company.

The Complaint alleged that MSC, UAI, and CSAR had long been vigorous competitors, each offering an advanced version of Nastran to customers in the aerospace, automotive and other industries. These competing versions of advanced Nastran all

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derived from a program originally developed by NASA and placed into the public domain. The common origin of these three advanced Nastran versions made switching between them relatively easy. For these reasons, UAI Nastran and CSAR Nastran were close substitutes for MSC.Nastran. Non-Nastran solvers, however, were more distant substitutes. The Complaint alleged that competition among the three advanced Nastran suppliers helped to hold down prices and to promote product innovation.

The Complaint further alleged that MSC was the dominant supplier of advanced versions of Nastran, with an estimated 90 percent of worldwide Nastran revenue. Prior to MSC's acquisitions, UAI and CSAR were the only other firms offering advanced versions of Nastran. They held substantially smaller market shares. Each had about five percent of worldwide advanced Nastran revenues.

The Complaint alleged that the acquisitions were anticompetitive because they increased the level of concentration in already highly concentrated markets. The Complaint further charged that the acquisitions eliminated competition on price and product development and enhancements, created or enhanced MSC's power to raise prices above a competitive level or to withhold or delay product development and enhancements, and prevented the increased competition that MSC expected if other suppliers of engineering software were to acquire UAI and CSAR. Even if other solvers offering advanced analysis capabilities were included in the market, the markets remain highly concentrated and the acquisitions anticompetitive. The Complaint also alleged that MSC's acquisitions were unlawful in separate markets that exist for specific industries or customer categories. According to the Complaint, the appropriate geographic market in which to analyze MSC's acquisitions is the world, although a U.S. market may also exist.

The Complaint also alleged that MSC's acquisitions constitute unlawful monopolization and an attempt to monopolize in

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violation of Section 5 of the FTC Act. It further alleged that MSC's dominant market share prior to and after the acquisitions satisfied the showing required for monopoly power and dangerous probability of success. Moreover, the Complaint alleged that MSC acted willfully and with the specific intent to obtain and maintain a monopoly in the market for advanced versions of advanced Nastran when it made the acquisitions.

The Complaint further charged that entry is not likely, nor, if it did occur, would it likely be timely or sufficient to prevent the anticompetitive effects of the acquisitions.

II. Terms of the Proposed Consent Order

The proposed Order would provide relief for the alleged anticompetitive effects of the acquisitions principally by means of a divestiture intended to restore competition. In addition, the proposed Order contains further provisions intended to facilitate the restoration of competition.

Divestiture. The principal relief under the proposed Order is to require the Respondent to divest, within 150 days after entry of the Order and to up to two acquirers to be approved by the Commission, perpetual, worldwide, royalty-free, and non-exclusive licenses to the key intellectual property needed by a new competitor to compete in the sale and licensing of advanced Nastran software. ¶ II.A. The licensed intellectual property rights would consist of the version of MSC.Nastran that is most current as of the date that the Consent Agreement is accepted for public comment by the Commission, as well as all the intellectual property rights acquired by MSC in the two challenged acquisitions. ¶ I.L.1.

The licenses would permit the acquirer (or acquirers) to use the licensed rights to sell advanced Nastran software, sublicense others without restriction, and prepare derivative works so as to further develop and enhance the software without further remuneration to MSC once the divestiture is completed. The

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licenses granted would be non-exclusive, meaning that MSC would continue to retain full rights itself to the licensed intellectual property. ¶ II.A. The basic approach reflected in the settlement, therefore, is to replicate in the hands of the acquirer(s) the crucial intellectual property held by MSC in the aftermath of the challenged acquisitions.

The Order language providing for divestiture to “up to two” acquirers tracks the language of the Notice of Contemplated Relief accompanying the Complaint. It reflects MSC’s removal of two independent competitors from the marketplace through the challenged acquisitions. The language is intended to leave open to the Commission the option of requiring that two competitors be re-established.

Purpose. Paragraph II.C. of the proposed Order contains a recitation of the Commission’s purpose in ordering the divestiture. That provision recites that the purpose of the divestiture is to remedy the lessening of competition alleged in the complaint by establishing one or more viable and effective competitors to MSC engaged in the sale, distribution and licensing of advanced Nastran software for use by customers, including customers in the aerospace and automotive industries, and with the ability to engage in further development and enhancement of advanced Nastran software. It states that, in determining whether the licensing of more than one acquirer may be required, or whether to approve the grant of a license to a particular prospective acquirer, the Commission will consider, among other things, the likely future capability of the prospective acquirer or acquirers to provide effective price and innovation competition to MSC. It also recites that the Commission will consider as well, among other things, any provisions for the hiring by the acquirer(s) of personnel knowledgeable concerning the design, development, maintenance, customer support, sales and marketing of the licensed rights.

The Software To Be Licensed. The intellectual property to be licensed includes all rights relating to the version of MSC.Nastran

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that is most current as of the date the consent agreement is accepted by the Commission for public comment. ¶ I.L.1.a. Divestiture of rights to MSC's current version of MSC Nastran is a necessary remedial measure to facilitate the re-establishment of the competition that MSC allegedly eliminated with its two acquisitions. Such divestiture addresses the switching of former UAI and CSAR customers to MSC's own version of advanced Nastran, including former UAI and CSAR customers who may have adapted their prior procedures and customer-written software routines to the MSC version. In addition, such divestiture addresses the fact that MSC has incorporated new features in its releases of MSC.Nastran, including features taken from the CSAR and UAI versions acquired in 1999, and has not carried on any further development of the UAI and CSAR versions of Nastran following the acquisitions. Divestiture of the acquired assets alone would not restore the competitive conditions that existed before the acquisitions (the *status quo ante*), because the 3-year old UAI and CSAR codes are no longer as commercially viable as they were when MSC acquired them. Licensing of the current version of MSC.Nastran is required to give the acquirer or acquirers what UAI and CSAR formerly had: an up-to-date product upon which to base sales and future development efforts.

In addition to the current version of MSC.Nastran, MSC is also required to license to the acquirer(s) all of the intellectual property acquired in the UAI and CSAR acquisitions. ¶ I.L.1.b. and -c. This relief is integral to the fundamental approach reflected in the settlement, which is to replicate in the hands of the acquirer(s) the intellectual property held by MSC in the aftermath of the challenged acquisitions. Licensing all the UAI and CSAR computer codes (in addition to MSC.Nastran) is justified to permit an acquirer(s) to offer all the computer codes formerly available from UAI and CSAR, including the ability to select aspects of the UAI Nastran and CSAR Nastran codes for possible inclusion in its future advanced Nastran product that have not been incorporated into MSC.Nastran since the acquisitions.

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The Order details a broad range of intellectual property rights to be licensed to the acquirer(s). See ¶ I.L.2. In addition to the licensed intellectual property and physical or electronic copies embodying the intellectual property, MSC is also required to divest copies of other materials useful to an acquirer in establishing itself as a competitor to MSC. These include all of the customer files acquired by MSC as a result of the challenged acquisitions, as well as 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. ¶ I.E.2. The latter information should be of particular use by an acquirer that may wish to differentiate itself from MSC by its responsiveness to customer needs. In the past, both UAI and CSAR used such tactics to compete against MSC.

Post-Divestiture Rights. In addition to the licensed rights described above, the Order provides for further rights by the acquirer(s) in the post-divestiture period:

For twelve months after the divestiture date, the acquirer has the right to obtain from MSC ongoing support with respect to MSC.Nastran, in the form of personnel, information, technical assistance, advice and training. This includes reasonable consultation with knowledgeable employees of MSC to ensure that the acquirer's personnel can maintain, develop and support the Licensed Rights in a manner comparable to MSC. This continuing support does not extend to the licensed UAI and CSAR intellectual property, and will be provided at MSC's direct cost. ¶ I.K.4. This continuing support obligation complements the hiring opportunities afforded to the acquirer under other provisions of the Order discussed below.

For not less than three years after the divestiture date, the acquirer has the right to use the trademarks or trade names of the licensed software for the purpose of identifying the acquirer as a licensee from MSC. The acquirer does not otherwise obtain any

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rights of any kind to the name “MSC” or “MSC.Nastran” or related logos and trademarks of MSC. ¶ I.K.4.

Hiring of MSC Personnel. In order to ensure the ability of the acquirer to provide effective competition, the Order contains procedures to facilitate the acquirer’s hiring of valuable MSC personnel. ¶ V. In the aftermath of the acquisitions, MSC was essentially the only employer of computer programmers with thorough knowledge of the proprietary versions of advanced Nastran. The future success of the acquirer in providing ongoing innovation competition in developing advanced Nastran may depend to a significant degree on its hiring of personnel (particularly programmers and customer support engineers) with knowledge of this large and complex body of computer code.

Customer Contracts. Prior to the acquisitions, most of MSC’s advanced Nastran customers purchased the software on an annual lease basis – that is, for one-year terms with annual payments and in quantities determined according to annual needs. In the aftermath of the acquisitions, and especially in the 2001-2002 period, many customers converted annual leases for advanced Nastran to “paid-up” licenses – that is, licenses to use the software for an extended term, generally 25 years, for a larger advance payment and continuing maintenance fees during the contract term. This conversion may disadvantage future advanced Nastran competitors who may no longer have access to these customers at competitive prices.

To address the effect of these conversions on the acquirer’s ability to attract a customer base, the proposed Order provides that, for a period of one year after the divestiture date, any customer who was converted from an annual lease to a paid-up license for MSC.Nastran in the period since the acquisitions has the right to terminate or rescind its license in whole or in part in order to deal with the acquirer. If a customer chooses to do so, MSC is required to refund or return a pro rata portion of the consideration paid in advance for its paid-up MSC.Nastran license. ¶ VII.A. The Order also provides that MSC is to provide

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affected customers with written notice of such rights within fourteen days following the divestiture date. ¶ VII.B.

The formula for such refunds bases the pro-rata allocation on the lesser of four years or the contract term. ¶ VII.A. This refund formula should provide substantial incentive for affected customers to consider switching to the acquirer in whole or in part. Under this formula, customers who converted to a paid-up license since mid-year 2001 and who determine to switch to the acquirer at mid-year 2003 will be entitled to a refund of one-half or more of their advance payment for the paid-up MSC.Nastran license.

Although these provisions authorize refund payments by MSC to some customers, they are neither a penalty nor disgorgement. Their purpose is not to punish MSC or deprive it of ill-gotten gains. Rather, the provisions are in furtherance of the principal divestiture relief provided under the Order. They are intended to remove any penalty or disincentive on customers who had no alternative to MSC's terms after 1999, but who might now consider doing business with the acquirer of the divested assets. Indeed, no payment will be due from MSC to a customer unless and until the customer chooses to do business with the acquirer.

Post-Divestiture Conduct. The Order includes provisions intended to prevent MSC from disadvantaging the acquirer in its post-divestiture dealings with customers or suppliers.

Advanced Nastran software is used in conjunction with other complementary software. Complementary software includes programs known as "pre- and post-processors" or "meshers" that are used to process input to or output from advanced Nastran and make it useful with other computer data, such as designs produced by CAD software. Complementary software of this sort is produced by various suppliers and by MSC itself. The Order requires MSC, for three years after the divestiture date, to maintain the interoperability of the current and any future versions of MSC's complementary software (including but not limited to

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its product MSC.Patran) with the licensed software (¶ VIII.A.); and prohibits MSC from influencing a supplier of complementary software or services to refuse to deal with the acquirer or stop supporting interoperability with any of the licensed software (¶ VIII.B.).

During the same three-year period, MSC is required to maintain all current input and output file formats for MSC.Nastran. This is to ensure that users of MSC.Nastran would not be impeded or penalized in their use of models, files, or complementary software if they switched to the version of advanced Nastran offered by the acquirer. ¶ VIII.C. The Order also requires that MSC not refuse to deal with any customer or prospective customer for the reason, in whole or in part, that such customer or prospective customer deals with the acquirer. ¶ VIII.D. The latter provision is intended to prevent MSC from inhibiting the pre-acquisition practice of many customers to maintain simultaneous licenses for more than one source of advanced Nastran software.

Prior Notice of Future Acquisitions. For a period of ten years, the Order requires MSC to provide prior notice of future acquisitions of any entity engaged in the development or sales of any version of Nastran. ¶ IX. This provision is warranted under existing Commission policy because of the risk that MSC may in the future carry out anticompetitive acquisitions that otherwise would not come to the attention of the Commission because the transactions are likely to fall below the Hart-Scott-Rodino reporting thresholds. See Statement of FTC Policy Concerning Prior Approval and Prior Notice Provisions (June 21, 1995).

Monitor, Trustee and Reporting. The proposed Order contains standard monitor and trustee provisions. The Monitor provisions, set out in Paragraph III, authorize appointment of a person to oversee MSC's compliance with the terms of the Order. Such a monitor is warranted in light of the technical nature of the products at issue and the potential complexity of some compliance issues, including employee hiring and customer refunds. The

Analysis

trustee provisions, set out in Paragraph IV, contemplate appointment of a trustee to complete the required divestiture if MSC does not do so within the 150 days specified in the Order. Under these provisions, the Commission will appoint a trustee who will undertake to accomplish the required divestiture at no minimum price. The trustee will have one year to complete the divestiture. Finally, the proposed Order contains provisions for MSC to file regular reports concerning its compliance with the Order terms. ¶ X.

III. Opportunity for Public Comment

The Proposed Order has been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Agreement and comments received, and will decide whether it should withdraw from the Agreement or make final the Order contained in the Agreement.

By accepting the Proposed Order subject to final approval, the Commission anticipates that the competitive issues described in the Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the Proposed Order. It is not intended to constitute an official interpretation of the Agreement and Proposed Order or to modify their terms in any way.

Statement

Statement of Commissioner Mozelle W. Thompson

The Commission has made final a consent agreement to resolve the Commission's administrative complaint against MSC.Software. I voted to accept the agreement; however, I am concerned that industry and the private bar do not mistakenly make too much of the fact that the Commission did not require an up-front buyer for this licensing divestiture.

As a general rule, the Commission is more likely to require that parties present up-front buyers for assets when divesting less than an ongoing business. In this unique case, however, the Commission decided to resolve its concerns about MSC.Software's two consummated acquisitions by accepting an order requiring a prompt divestiture to restore lost competition, instead of potentially delaying relief further by first forcing MSC.Software to negotiate an asset sale to a potential buyer. The Commission makes such remedial assessments on a case-by-case basis, and such assessments would likely vary between relief proscribed for consummated mergers and relief for mergers prior to their consummation under Hart-Scott-Rodino reviews – the vast majority of Commission merger work. I am comfortable with the remedial action in this particular instance because the Commission has fully vetted the divestiture package's market acceptability with industry incumbents. Thus, I am fully confident that the asset package will function successfully in the marketplace and facilitate viable competition.

Complaint

IN THE MATTER OF

AMERICAN INSTITUTE FOR CONSERVATION OF
HISTORIC AND ARTISTIC WORKSCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4065; File No. 0110244**Complaint, October 30, 2002--Decision, October 30, 2002*

This consent order addresses practices used by Respondent American Institute for Conservation of Historic and Artistic Works ("AIC"), an association of professional conservators – who manage, care for, preserve, or treat cultural objects, including artistic, historical, archeological, scientific, and religious objects – with approximately 3,100 members, many of whom provide professional services for a fee or who are employed by organizations that provide such services for a fee. The order, among other things, prohibits the respondent from maintaining or enforcing any policy, ethical rule, interpretation, commentary or guideline that impedes or restricts price competition among conservation professionals, including the provision of free or discounted services. The order also requires the respondent to remove the provisions that are inconsistent with the order from the *AIC Code of Ethics*, from the *Guidelines for Practice of the AIC*, from the *Commentaries to the Guidelines*; and from the respondent's Web site, and to publish the revisions of these documents in those places. In addition, the order requires the respondent to publish a copy of the order and complaint in the *AIC News* and on its Web site.

Participants

For the Commission: *L. Barry Costilo, Richard B. Dagen, Joseph Eckhaus, Roberta S. Baruch, Russell Porter, Louis Silvia, and Mary T. Coleman.*

For the Respondent: *Barbara Ryland, Crowell & Moring.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the American Institute for