UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION IN LIMINE TO EXCLUDE INVESTIGATIONAL HEARING TRANSCRIPTS

Respondent MSC.Software Corporation ("MSC"), through a motion in limine,[1] makes an indiscriminate attack on the use of investigational hearing transcripts in connection with this case. Its arguments are without merit. As discussed below, the various investigational hearing transcripts – sworn, verbatim transcripts of testimony by MSC executives and others concerning the transactions and products at issue in this case – are properly admissible as evidence or are appropriate material to be considered and relied upon by Complaint Counsel's experts in formulating and explaining the basis for their opinions.

I. The Commission's Rules Provide for the Admission of "Relevant, Material and Reliable Evidence."

The fundamental standard for admissibility of evidence in FTC administrative hearings is set forth in Rule 3.43(b), 16 C.F.R. § 3.43(b), which provides: "Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded." Longstanding precedent makes clear that while the Federal Rules of Evidence may provide a

[1] Respondent MSC.Software's Motion in Limine To Exclude Use of Inadmissible Part II Investigatory Hearing Transcripts by Complaint Counsel and its Expert Witnesses ("Motion"), June 17, 2002.

guide in assessing admissibility in FTC proceedings, the Rules of Evidence do not govern. As the Supreme Court decided long ago:

> [A]dministrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence. And of course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where the effect of the Commission's order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress.

FTC v. Cement Institute, 333 U.S. 683, 705-06 (1948) (citations omitted). The Commission itself consistently has ruled that "all relevant and material evidence – whether hearsay or not – is admissible, as long as it is reliable."[2] The Commission has further observed that "one of the purposes in establishing [tribunals such as the FTC] was to devise a way whereby the exclusionary rules of evidence would be eliminated as a bar to common sense resolution of certain classes of controverted cases."[3] Reliability is the key for admissibility of evidence in FTC

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[2]*American Home Products Corp.*, 98 F.T.C. 136, 1981 FTC LEXIS 22 *16 at n. 9 (1981). *See also Kellogg Co.*, 99 F.T.C. 8, 31-32 (1982) ("Section 3.43(b) of the Commission's rules of Practice provides for the admission of relevant, material, and reliable evidence. It does not exclude hearsay evidence, and hearsay evidence may be received.") (citations omitted); *Philadelphia Carpet Co.*, 64 F.T.C. 762, 773 (1964) ("it is long settled that hearsay evidence is not to be out of hand rejected or excluded in administrative tribunals.").

[3]*Philadelphia Carpet Co.*, 64 F.T.C. at 773. Policies underlying the administrative fact-finding process in general favor the admission of reliable evidence whether or not it strictly comports with technical evidentiary standards, as a leading treatise on administrative law has pointed out:

> There are three reasons why it makes little sense to take the risk of erroneous exclusion of reliable evidence through application of highly technical exclusionary rules in the context of agency adjudications. First, the cost of such errors is as great in the agency adjudication context as it is in the judicial context: If the ALJ erroneously excludes reliable evidence, the agency must remand for further proceedings or decide the case on the basis of an incomplete record Second, the risk of error of exclusion is greater in the agency adjudication context than in the context of a jury trial. Third, there are good reasons to take this risk in

administrative cases.

The Respondent's Motion in Limine makes no effort to examine the central issue governing admissibility – that is, whether the evidence in issue is reliable. Instead, the Motion presumes the answer to this question by its sweeping assertion that all investigational hearings are inherently unreliable. Resting in this fashion on the most result-oriented of premises, it is not surprising that the Motion comes to the conclusion that is most convenient for MSC – that such evidence, which will help show how MSC violated the FTC Act, should be excluded from the record. As discussed below, this reasoning is incorrect, and these materials may properly be admitted in evidence or relied on by Complaint Counsel's experts in forming and explaining their opinions.

II. Investigational Hearing Transcripts of MSC's Employees and Former Employees Are Reliable and Admissible.

MSC's Motion neglects to mention that all of the investigational hearing transcripts that Complaint Counsel seek to introduce in evidence in this case are testimony of current or former executives of MSC or the firms that MSC acquired. Specifically, Complaint Counsel have designated portions of the investigational hearing transcripts of the following five current executives of MSC:

Kenneth Blakely, MSC Executive Vice-President (Investigational Hearing Nov. 9, 2000)

Ronny H. Dyer, MSC Senior Director for Global Aerospace Accounts (Investigational Hearing Oct. 19, 2000)

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the jury trial context that do not exist in the case of agency adjudications.

II Davis & Pierce, *Administrative Law Treatise* (1994) § 10.3 at 125-26.

Harold Mattson, MSC Senior Director for Business Management and Analysis (Investigational Hearing Oct. 24 2000)

Michael Morgan, MSC Vice-President of Software Development and formerly principal shareholder of UAI (Investigational Hearing July 28, 2000)

Frank Perna, Jr., MSC Chairman and Chief Executive Officer (Investigational Hearing Nov. 10, 2000)

In addition, Complaint Counsel have designated portions of the investigational hearing transcripts of two individuals who are former executives of MSC or the acquired firms:

Rakesh Allahabadi, former MSC Nastran Senior Product Manager (Investigational Hearing April 12, 2000)

R. Swami Narayanaswami, founder, President and principal shareholder, CSAR (Investigational Hearing Aug. 30, 2000)

The Motion in Limine, therefore, is not merely a theoretical exercise. Its unstated tactical purpose is to keep out of the record sworn testimony of MSC's most senior executives and others intimately involved in the transactions that are the subject matter of this case.

As to the five current MSC executives, there can be little doubt that their investigational hearing testimony is admissible in evidence, even under the strict standards of the Federal Rules of Evidence. The Commission itself has recognized that "[i]t is a familiar rule of evidence, even in judicial proceedings where perhaps more rigid rules prevail, that any relevant and nonprivileged statement of an opposing party or his agent may be received in evidence under the 'admissions' exception to the hearsay rule." *Frito-Lay, Inc.*, 66 F.T.C. 1521, 1964 FTC LEXIS 182 at *5-6 (1964) (citation omitted). This rule is currently embodied in Rule 801(d)(2)(D) of the Federal Rules of Evidence, which provides that a statement made by a party opponent is not inadmissible hearsay if it is "a statement by the party's agent or servant concerning a matter

within the scope of the agency or employment, made during the existence of the relationship."

Perhaps the most notable recent application of this familiar rule was by your Honor in the recent case of *Schering-Plough Corp.*, Docket No. 9297. Although MSC in its motion mischaracterizes the ruling, in that case your Honor ruled to admit into evidence the investigational hearing transcripts of current employees of the respondents Schering-Plough and Upsher-Smith on grounds that they were "clearly admissions of a party opponent" and fell within the scope of Rule 801(d)(2) of the Rules of Evidence "which states that a party's own statement in either an individual or representative capacity is not hearsay." Pretrial Hearing, Jan. 23, 2002, at 297 (attached as Exhibit A).[4] The ruling in no way suggests, as MSC contends, that investigational hearing transcripts are unreliable or generally inadmissible. In fact, the ruling directly supports the admissibility, under the standards set forth in the Federal Rules of Evidence, of the investigational hearing transcripts given by the five MSC executives which Complaint Counsel seek to have admitted in evidence.[5] Because these transcripts consist of statements

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[4]MSC's Motion at 3-4 flatly misrepresents your Honor's ruling on this issue in *Schering*. While your Honor did hold that the investigational hearings were not depositions within the meaning of FTC Rule 3.3 and therefore were not admissible on that basis, your Honor did not suggest in any way that investigational hearings were "generally inadmissible at trial" as MSC represents. In fact your Honor held that the transcripts were admitted as party admissions against the respective corporate respondents despite the inapplicability of Rule 3.3. MSC's representation that the transcripts could be used only "for impeachment or as admissions against the specific individual who made the statements" is simply wrong. Since the case against MSC does not involve multiple respondents, those portions of your Honor's ruling in *Schering* limiting the use of the admitted transcripts of one corporate respondent as against another (Pretrial Hearing at 297-98) are inapplicable in this case.

[5]MSC's citations to two cases in support of the supposed proposition that "[i]t is settled FTC law that Part II investigatory hearing transcripts are unreliable and, therefore, inadmissible at trial" (Motion at 3) could not be further from the mark. In *Resort Car Rental System, Inc.*, 83 F.T.C. 234, 1973 FTC LEXIS 231 at *88-90 (1973), the Commission on appeal of an initial decision refused to disturb an ALJ's ruling excluding from evidence an investigational hearing

made by MSC's executives concerning matters within the scope of their employment by MSC, and made while they were employed by MSC, the transcripts are admissible under the plain language of Rule 801(d)(2)(D).

As for the admissibility of the two other investigational hearings from which Complaint Counsel have designated portions to offer in evidence, this cannot be determined simply by reference to the evidentiary rules of the federal courts. Under FTC Rule 3.43(b), if the testimony is "relevant, material, and reliable," it is to be admitted in evidence. Both transcripts have sufficient indicia of reliability to warrant their admission.

Dr. R. Swami Narayanaswami, though he is not currently employed by MSC, has interests as closely aligned with MSC's for purposes of this litigation as any of its employees. Dr. Swami was the founder, President and principal shareholder of CSAR. He was the person who negotiated with Frank Perna, MSC's CEO, for the sale of CSAR to MSC, and received the lion's share of the consideration paid by MSC for the purchase of that firm. His business interests continue to be closely aligned with MSC's: through a firm he owns with offices in California and Bangalore, India, Dr. Swami acts as the exclusive distributor for MSC products on the Indian subcontinent. In addition to his investigational hearing in August 2000, Dr. Swami

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transcript. The Commission, however, pointedly did not address the merits of the ALJ's exclusion ruling below but rather held that the evidence sought to be admitted through the transcript was "proven through several independent sources" and was therefore excludable as cumulative. 1973 FTC LEXIS 231 at *90. The decision therefore contradicts the proposition that investigational hearings are inherently unreliable. The other case cited by MSC – *Hannah v. Larche*, 363 U.S. 420 (1960) – involved a due process challenge to the procedural rules of the U.S. Civil Rights Commission, which were upheld by the Supreme Court in part by analogizing to the FTC's investigatory procedures, *id.* at 446. The case does not even remotely speak to the issue of the reliability or admissibility of investigational hearing transcripts.

was deposed in this case in May 2002, at which time he was represented by MSC's trial counsel.[6] For purposes of admissibility, Dr. Swami's position and interests make his testimony at least as reliable as the admissions of MSC's employees involved in the acquisitions challenged in this case.

Rakesh Allahabadi is the former Senior Product Manager for MSC with responsibility for MSC Nastran. His position and responsibilities make him knowledgeable about the marketing and competitive environment faced by MSC in its Nastran sales during the period prior to MSC's acquisitions of the two firms challenged in this case. He is the author of several contemporaneous documents reflecting MSC's views of the market dynamics faced by MSC in its sales of Nastran. His investigational hearing testimony bears strong indicia of reliability because it is consistent with these and other contemporaneous documents of MSC. Admitting the testimony will provide a reliable context within which to assess these contemporaneous records from MSC's own files.

In short, there are abundant grounds for admitting the investigational hearing transcripts that Complaint Counsel have designated for admission into evidence.

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[6]At the time of Dr. Swami's deposition in May 2002, MSC's counsel objected to any inquiry into matters about which Dr. Swami had been questioned during his earlier investigational hearing, insisting that such matters had been dealt with extensively in the investigational hearing, and in fact directed Dr. Swami to refuse to answer such questions. Swami Dep. at 7-9, 160-185 (Attached as Exhibit B). This posture is of course fundamentally inconsistent with any assertion now that the testimony given at the investigational hearing was inherently unreliable. At the time of the May 2002 deposition, MSC's counsel also declined the opportunity to cross-examine Dr. Swami to correct any errors in the deposition or earlier investigational hearing transcripts. Swami Dep. at 214-215.

III. Investigational Hearing Transcripts May Be Considered and Relied upon by Complaint Counsel's Experts in Formulating and Explaining Their Opinions.

Although Complaint Counsel seek to admit into evidence portions of only the investigational hearings listed above, their experts rely on other investigational hearings in reaching their opinions, and make reference to these other hearings in explaining the basis for their opinions in their expert reports. This use of the investigational hearings by experts is entirely proper. Under Federal Rule of Evidence § 703, an expert is permitted to base his opinion on statements that are not admissible into evidence. Investigational hearings are of the type of evidence relied upon by economic experts and readily qualify for use by an expert in reaching his opinion. Moreover, the expert is permitted to reveal the content of the Investigational Hearing in a non-jury trial in order to explain to the court the basis of his conclusions.

The language of Rule 703 of the Federal Rules of Evidence could not be clearer in stating that an expert in formulating his opinion may rely on factual information that is not admitted or even admissible into evidence:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

The rule was intentionally written in broad terms, recognizing that it would often be difficult for litigants to lay a proper foundation for each piece of evidence an expert relies on in reaching his opinion. The rule is intended to relieve parties of the burden of such substantiation. 4 *Weinstein & Berger, Weinstein's Federal Evidence* § 703.02 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997) at 703-15.

Only under extraordinary circumstances may an expert's opinion be kept out of evidence on grounds that its evidentiary basis is unreliable. First, the evidence underlying the expert's opinion must be "so lacking in probative force and reliability that no reasonable expert could base an opinion on them." *Agent Orange Prod. Litig.*, 611 F. Supp. 1223, 1245 (E.D.N.Y. 1985). Second, the court must conclude that the opinion was based solely on evidence that met the aforementioned test for unreliability. *Id.* Neither circumstance is remotely present here.

The investigational hearings in this case, which are the stenographically transcribed testimony, taken under oath, of businessmen and users of the products who are involved on a day to day basis with the markets and products at issue, are far more reliable than the type of information courts routinely permit experts to rely on. For instance, courts routinely allow experts to testify based on interviews that they have conducted. (4 *Weinstein & Margaret A. Berger, Weinstein's Federal Evidence §* 703.03, 703.05 (Joseph M. McLaughlin ed., Mathew Bender 2d ed. 1997) at 703-16, citing *United States v. Corey*, 207 F.3d 84, 89-92 (1st Cir. 2000) (opinion of FBI agent admissible when partially based on conversation with gun historian); *Stevens v. Cessna Aircraft Co.*, 634 F. Supp. 137, 142-143 (E.D. Pa. 1986) (opinion based on interviews conducted by expert found admissible); *United States v. Brown*, 7 F.3d 648, 653 (7th Cir. 1993) (expert's opinion admissible when based in part on police report). Moreover, because the investigational hearings record the actual words chosen by the witnesses in describing the matters that are the subject of their testimony, they are likely to be even more reliable than affidavits drafted by counsel, which courts have allowed as a basis for an expert's opinion. *Doe v. Cutter Biological, Inc.* 971 F. 2d 375, 385-386 (9th Cir. 1992). Courts have in fact permitted experts to rely in formulating their opinions on statements made by a firm's former employees.

United States v. Affleck, 776 F. 2d 1451, 1456-1458 (10th Cir. 1985).

Investigational hearing testimony plainly satisfies the standard of Rule 703, that is, that it is routinely relied on by experts in merger cases. MSC's own economic expert Dr. Kearl includes at least 120 references to investigational hearing transcripts in his principal expert report in this case. Expert Report of James R. Kearl, March 1, 2002. MSC essentially concedes this point in its Motion by quoting with approval a recent statement by Dr. David Scheffman, the Director of the FTC's Bureau of Economics, that in merger analysis "[i]nformation gleaned from customer, competitor, and third party opinions, documents, and depositions are often used as a basis of conclusions of important factual issues." Motion at 2 n.2. Although MSC attempts to make much of Dr. Scheffman's unremarkable further observation that information from such sources may not always be reliable, *id.*, this in no way suggests that reliance on investigational hearing testimony is categorically improper. As with any opinion offered by an expert for consideration by a trier of fact, the soundness of the opinions offered by the experts here will depend in part on the care with which they considered and weighed the information they reviewed.

In part for this very reason, an expert can, in a non-jury trial such as this, refer to the underlying statements when explaining the bases upon which he reached his opinion. (4 *Weinstein & Berger, Weinstein's Federal Evidence* § 703.05 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997) at 703-27. *See also Wright & Gold, Federal Practice and Procedure: Evidence* § 6273 at 317.[7] The reason for this rule is straightforward. Judges

[7] Even in a jury trial, "facts or data that are otherwise inadmissible" can be disclosed to the jury if the court determines that "their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703.

routinely hear inadmissible evidence and can give it the weight they deem appropriate. *Id.*, *citing Harris v. Rivera,* 454 U.S. 339 (1981). Thus, it is perfectly appropriate for an expert witness presenting his opinion to a non-jury trier of fact to cite to inadmissible evidence when explaining the bases for his opinion; doing so in fact assists the trier of fact to determine the weight it should afford to the expert opinion.[8]

In short, there is nothing incorrect in the use by Complaint Counsel's experts of investigational hearing transcripts in forming their opinions, or in referring to the transcripts in explaining the basis for their opinions.

[8]MSC's reliance on *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721 (6th Cir. 1994), Motion at 9-10, a case involving the presentation of expert opinions to a jury, is therefore inapposite.

IV. Conclusion.

For the reasons set forth above, Respondent's Motion in Limine directed to the use of investigational hearing transcripts should be denied.

Respectfully submitted,

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Dated: July 1, 2002

CERTIFICATE OF SERVICE

This is to certify that on July 1, 2002, I caused a copy of Complaint Counsel's Opposition to Respondent's Motion in Limine to Exclude Investigatory Hearing Transcripts to be served by hand delivery on the following persons:

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

ORDER DENYING RESPONDENT'S MOTION IN LIMINE

IT IS HEREBY ORDERED that Respondent's June 17, 2002, Motion in Limine to Exclude Investigatory Hearing Transcripts is DENIED.

Dated: _____

_____
D. Michael Chappell
Administrative Law Judge

EXHIBIT A

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JUDGE CHAPPELL: Those are not admitted under the deposition rule; however, as I said yesterday, subject to my satisfaction that you've properly proved a conspiracy and all the required elements under Rule 801, the co-conspirator rule, they will be admitted, but only narrowly, as I've indicated, after they're connected up. So, they're conditionally admitted like the — just like the exhibits I referred to yesterday under the co-conspirator rule, and that rule is — actually, it's the AMA case here at the Commission, and in that case the judge used the rule of evidence, Rule 802 — I'm sorry, 801-E, a statement by a co-conspirator of a party during the course or in furtherance of a conspiracy.

The Judge used Rule 801-E as a basis for admitting the co-conspirator evidence. His decision was upheld, the Commission used that evidence in the Commission's opinion, and they did not disagree with that.

MR. MEIER: That's correct.

JUDGE CHAPPELL: That's why I'm applying the co-conspirator rule, but only under the circumstances we discussed yesterday and as I've reiterated today. The Government has to convince me — we've got a question of timing, as was raised in objection, and the

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other elements that are going to be required before those documents are admitted.

Is that clear?

MR. MEIER: That's clear, Your Honor.

(Commission Exhibit Numbers 1482, 1492, 1547 and 1548 were admitted into evidence.)

JUDGE CHAPPELL: Regarding the transcripts of hearing — of investigational hearings of Schering-Plough and of Upsher-Smith, as I ruled earlier, those transcripts will not be admitted under the deposition rule, 3.33; however, they are clearly admissions of a party opponent, so therefore, as the earlier judge and the Commission endorsed, has used Rule 801, I am going to use Rule 801-A, 801-2-A, I believe — let me correct that. I believe it's 801-D-2-A to be correct, which states that a party's own statement in either an individual or representative capacity is not hearsay, and the rule I stated earlier, 801-D-2-E, the co-conspirator rule, also makes the statement of a conspirator, a co-conspirator, not hearsay, so that's the basis for that ruling.

So, I'm allowing them. I'm allowing those transcripts only as admissions. I want to make it clear, very clear, that these are to be admitted

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pursuant to this rule. That means only to be used against the party who uttered this statement. Is that clear?

MR. MEIER: That's clear, Your Honor.

JUDGE CHAPPELL: I want to make real clear that if there is anything cumulative, duplicative, I will not get into that if someone points it out. I want to make it clear that I do not want anyone citing to a statement from a Schering-Plough witness in one of these hearings to be used against an Upsher-Smith witness or an Upsher-Smith — or the Upsher-Smith case. Is that clear?

MR. MEIER: Yes, Your Honor.

JUDGE CHAPPELL: That type of cite — that type of reference will not support a decision or an opinion of the Court. Is that clear?

MR. MEIER: Yes, Your Honor.

JUDGE CHAPPELL: And with that ruling in mind, would you read again the exhibits, the transcripts of the investigational hearing exhibits regarding Schering-Plough's employees, please.

MR. MEIER: The Schering investigational hearing excerpts are CX 1483, 1494, 1508, 1510, 1515 and 1531.

JUDGE CHAPPELL: Those are admitted as I've

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just described.

(Commission Exhibit Numbers 1483, 1494, 1508, 1510, 1515 and 1531 were admitted into evidence.)

JUDGE CHAPPELL: And the investigational hearing transcripts of the Upsher-Smith employees, what are those exhibit numbers?

MR. MEIER: The Upsher investigational hearing transcripts are CX 1513, 1520, 1523 and 1529.

JUDGE CHAPPELL: Those are admitted as I've just described.

(Commission Exhibit Numbers 1513, 1520, 1523 and 1529 were admitted into evidence.)

JUDGE CHAPPELL: Have we covered all the exhibits which were offered?

MR. MEIER: Yes, Your Honor. Thank you.

JUDGE CHAPPELL: Thank you, Mr. Meier. You may be seated.

The attorney for Upsher-Smith who argued your exhibits yesterday, is he here?

MR. CURRAN: Yes, that would be Mr. Carney, Your Honor.

JUDGE CHAPPELL: Mr. Carney, would you please step forward?

Yesterday, to support an objection you made, you handed me I believe it was an affidavit?

EXHIBIT B

Confidential