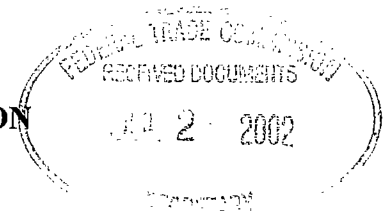

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

MSC.SOFTWARE'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF EFFICIENCIES

Complaint Counsel – apparently afraid of a fair fight at a trial on the merits – seeks to have whole swaths of MSC evidence excluded for no good reason other than that it undermines Complaint Counsel's theory of the case. Such attempts are neither the province of motions in limine nor are they consistent with a fair trial pursuant to the FTC Rules.

Complaint Counsel – improperly arguing that the weight of the evidence is not to its liking – asks Your Honor to exclude all evidence of efficiencies that resulted from MSC's acquisitions of CSA and UAI in 1999. In doing so, Complaint Counsel ***fails to cite any case*** where efficiencies evidence was excluded or even any case in which a motion in limine was granted. Instead, Complaint Counsel again asks Your Honor to step into uncharted waters based only on its argument that MSC's efficiencies evidence is "not adequately substantiated" and "does not outweigh the anticompetitive harm." (CC Brf. at 7.) Complaint Counsel invites clear error, and its motion to exclude efficiencies evidence should be denied.

EVIDENCE OF ACQUISITION-RELATED EFFICIENCIES HAS BEEN DISCLOSED THROUGHOUT DISCOVERY

Complaint Counsel mistakes its dispute over the weight of the evidence with the relevance of the evidence on the issue of efficiencies – a mistake it makes in both of its motions

in limine. Complaint Counsel's attempt to pre-try a factual question through a motion in limine is inappropriate. *See* 22 CHARLES A. WRIGHT AND KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5165 (2002) ("The judge cannot make decisions as to the weight of the evidence under the guise of determining relevance.").

Complaint Counsel does not allege that MSC withheld or refused to provide evidence of acquisition-related efficiencies during discovery – indeed it admits MSC has provided efficiencies evidence in response to Complaint Counsel's discovery requests. Complaint Counsel's own brief makes clear that MSC has been putting forth evidence of efficiencies since the start of this case:

- "An enumeration of ***Respondent's efficiencies evidence is set out in its response*** to the Commission's discovery requests"
- "***MSC's response*** to Complaint Counsel's First Set of Interrogatories ***identified efficiencies***"

(CC Brf. at 3.)

Indeed, MSC has provided an interrogatory response dedicated solely to the issue of efficiencies. (*See* Attachment A, MSC's Response to Interrogatory 26)

Faced with MSC's evidence, Complaint Counsel attempts to argue the factual merits of MSC's efficiencies in its motion in limine – a factual dispute that is properly addressed at trial before Your Honor in connection with an analysis of the competitive impact of the acquisitions at issue. In Complaint Counsel's own words, it seeks to exclude all evidence of efficiencies because, under its view of the facts, "the claimed efficiencies do not ***outweigh*** the anticompetitive harm."[1] (CC Brf. at 7.) If Complaint Counsel believes that the efficiencies are

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[1] Further demonstrating that Complaint Counsel's motion is premised on disputed factual issues, Complaint Counsel claims that MSC's efficiencies are inadequate to "outweigh the anticompetitive harm" from "a merger to monopoly." (CC Brf. at 7.) Complaint Counsel is a far

insufficient to overcome any anticompetitive harm then it should be prepared at trial to present argument on that point – and not ask Your Honor to treat a motion in limine as a mini-trial on a disputed issue without the benefit of live testimony and a complete record.

Although not the forum or setting for an argument on the factual merits of MSC's efficiencies evidence, MSC will briefly respond to Complaint Counsel's assertions to demonstrate the misrepresentations upon which Complaint Counsel's motion is premised.

Complaint Counsel's argument that fixed-cost savings are presumptively excluded from an efficiencies analysis is wrong. In its motion, Complaint Counsel asks Your Honor to disregard fixed-cost savings as a matter of law and exclude any evidence of such savings that resulted from the acquisitions in question. (CC Brf. at 5.) Complaint Counsel cites no law for this proposition and misrepresents the Merger Guidelines' authority on this point – ***nowhere do the Merger Guidelines take the position that fixed-cost savings are not cognizable.*** Instead, the very section of the Guidelines relied upon by Complaint Counsel says that "efficiencies may result in benefits even when price is not immediately and directly affected," a recognition that cost savings do not need to be immediately passed through to be considered. (Merger Guidelines § 4.0.) Moreover, given the small marginal costs of reproducing computer

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cry and a high burden away from having its relevant product market treated as a judicially-established fact. Complaint Counsel simply assumes this Court will adopt its market definition – without any testimony or factual record on the relevant product market, what Complaint Counsel has called "the critical issue in this case." 11/8/01 Hrg. Tr. at 11:1-2.

Note also that even if it were simply assumed that Complaint Counsel has proven one of its alleged relevant markets, there are many ways in which efficiencies will be relevant. For example, Complaint Counsel argues that one adverse effect of the acquisitions is the loss of choice by a few customers that Complaint Counsel claims might have preferred the combination of low quality and low price offered by CSA and UAI. Any supposed loss of choice for this handful of customers would have to weighed against the vast improvements in quality for the ***vast majority*** of customers, something Complaint Counsel's expert, Dr. Spiller acknowledges. Spiller Dep. Tr. at 315:17-316:5 (agreeing that any "competitive effect on a subset" would have to be contrasted to the "efficiency gain throughout").

software, virtually all costs in the software industry are fixed costs. Under Complaint Counsel's flawed approach, software industry participants would be precluded as a matter of law from demonstrating acquisition efficiencies.

Complaint Counsel's argument that the efficiencies set forth by MSC are not merger-specific is wrong and a factual dispute for trial. Complaint Counsel's dispute with MSC over the factual issues surrounding efficiencies is clear from its argument that MSC's efficiencies are not merger-specific. (CC Brf. at 5-6.) Complaint Counsel asserts some of the efficiencies (*e.g.*, the innovation and enhancements to MSC.Nastran that would not have been possible without acquiring CSA and UAI engineers) are not merger-specific because they "***could have*** been accomplished independently" of the acquisitions. In making this argument, Complaint Counsel ignores the Merger Guidelines' caution that it will only consider alternatives that "could have" occurred if the alternatives are "practical in the business situation faced by the firms." (Merger Guidelines § 4.0.)

First, Complaint Counsel says that the efficiencies could have been obtained by hiring new engineers rather than acquiring the engineers from CSAR and UAI, citing Mr. Perna's Part II transcript. (CC. Brf. at 6.) But hiring untrained engineers (as Complaint Counsel suggests when it argues that MSC should have hired engineers "off the street") is not practical given training costs and MSC's desire to add new features to its product as soon as possible. As Mr. Perna explains in his Part II transcript, an "experienced, competent engineer has a replacement value of a million dollars" because if an engineer without experience is hired "by the time you teach them and they gain all the experience necessary to be a real producer, it takes four to five years." (Perna Dep. Tr. at 152-153.) MSC further discusses these facts in its interrogatory response where it is explained how hiring an untrained engineer (versus acquiring

experienced engineers such as MSC acquired from CSA and UAI) has a cost of over $1 million per engineer including opportunity costs. (*See* Attachment A)

Indeed, Complaint Counsel's economic expert on remedies, Dr. Spiller, bases his remedy proposal requiring transfer of human capital to a licensee on these facts, stating that "MSC acknowledges that NASTRAN engineers are at a premium" and "that it may take five years to get a good engineer up to speed," specifically citing the passage from Mr. Perna's testimony referenced above. (Spiller Expert Report ¶ 62.)[2] Hence, the very evidence Complaint Counsel seeks to preclude is being used by its own expert to justify its remedy proposal.

Second, Complaint Counsel argues that improvements to MSC.Nastran resulting from the acquisitions should be excluded as evidence of efficiencies because ***"[a]lthough the fixed costs of incorporating these new features may be higher*** [without the acquisitions], ultimately the company [***could***] achieve a comparable result through a less anticompetitive means than a merger." (CC Brf. at 6.) In other words, Complaint Counsel says new product innovation resulting from the acquisitions is not "merger-specific" if it could have been obtained at ***higher cost*** without the acquisitions. Under Complaint Counsel's radical standard, no company could ever testify about efficiencies because it is always ***possible*** to achieve a result through alternative means ***if cost is not an issue***. Indeed, Complaint Counsel's approach would turn the Merger Guidelines' efficiency section on its head and require companies to incur higher costs (*i.e.*, inefficiencies) to innovate.

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[2] At his deposition, Dr. Spiller further agreed that it "seems to be the case" that engineers are at a premium, although he had not calculated the extent of the premium. (Spiller Dep. Tr. at 170:5-11.)

Complaint Counsel's factual claims on merger-specificity are spurious and, in any case, these type of hypothetical "possibilities" and factual disputes raised by Complaint Counsel are not the proper basis for a motion in limine.

Complaint Counsel's argument that the efficiencies are not verifiable is wrong and a factual dispute for trial. Complaint Counsel's last argument is that MSC's efficiencies evidence is not verifiable. Its argument in this section makes it clear it has not bothered to understand Mr. Perna's testimony or MSC's response to its interrogatory on efficiencies. Complaint Counsel claims it is not "coherent" to say (as Mr. Perna does) that engineers cost $150,000 per year and that an experienced, competent engineer has a replacement value of a million dollars. If Complaint Counsel had bothered to read the passage it cited, it would have seen, as already discussed above, that Mr. Perna discusses how it takes four to five years to train an engineer and that given these costs (and the lost opportunities to enhance MSC's products during the period it is paying to train an engineer rather than paying an engineer to add features), an engineer with a salary around $150,000 can have a replacement value that is much higher than their annual salary. (Perna Dep. Tr. at 152-153.) That is precisely what MSC discusses in more detail in its interrogatory response. (Attachment A)

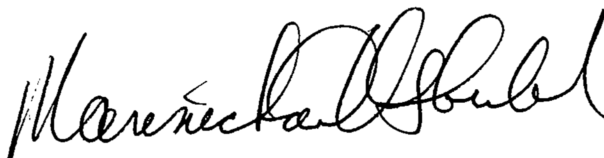
It is odd that Complaint Counsel should be raising issues about "verifiability" in this case, where, unlike most mergers and acquisitions, one need not speculate on whether efficiencies will occur. The Merger Guidelines express concern about the verification of efficiencies in considerable part because most mergers ***that are reviewed have yet to be consummated***, and therefore one must assess whether the claimed efficiencies will actually occur. Here, by contrast, MSC's acquisitions of CSAR and UAI took place in 1999, and there is three years of post-acquisition evidence that can be examined at trial on efficiencies.

Complaint Counsel cannot seriously contend that MSC's efficiencies are speculative three years after the acquisitions at issue. Instead, its belief that MSC's efficiency evidence is "not adequately substantiated" (CC Brf. at 7.) is just another way for Complaint Counsel to argue about factual issues that should be assessed at trial.

CONCLUSION

Complaint Counsel has done nothing more in its motion than raise a disputed question of fact as to whether MSC's efficiencies evidence is sufficient to outweigh what Complaint Counsel believes to be the anticompetitive harm. Complaint Counsel's request is not an appropriate motion in limine and should be denied.

Respectfully submitted,



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Counsel for Respondents,
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Dated: July 1, 2002

ATTACHMENT A

THIS ATTACHMENT HAS BEEN REDACTED PURSUANT TO PROTECTIVE ORDER

CERTIFICATE OF SERVICE

This is to certify that on July 2, 2002, I caused a copy of the Public Version of MSC.Software's Opposition to Complaint Counsel's Motion in Limine to Exclude Evidence of Efficiencies to be served upon the following persons by hand delivery:

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