

PUBLIC VERSION

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of)

MSC SOFTWARE CORPORATION,)
a corporation.)

) Docket No. 9299

**MOTION OF THIRD-PARTY IBM FOR *IN CAMERA* TREATMENT OF
CERTAIN HIGHLY CONFIDENTIAL BUSINESS DOCUMENTS**

Pursuant to 16 C.F.R. § 3.45(b), International Business Machines, Inc. ("IBM") hereby moves for *in camera* treatment of certain highly confidential business documents that it produced in response to a third-party subpoena in this matter.¹ Each was designated as confidential under the applicable protective order governing discovery material. Respondent MSC Software Corporation ("MSC") has now notified IBM that it intends to introduce these documents into evidence, and that the deadline for seeking their *in camera* treatment is June 11, 2002. See MSC Letter dated May 28, 2002 attached hereto as Exhibit A.

The documents at issue are among IBM's most sensitive business documents for the latest version of its CATIA computer analysis and simulation software, which it zealously protects from public disclosure. Among other things, these documents describe IBM's current strategic marketing plan, contain current customer data, and are subject to confidentiality or non-disclosure agreements.

¹ Respondent MSC does not oppose this motion while the Complainant could not take a position on the motion before it is filed.

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Public disclosure of these documents would provide competitors unique insight into IBM's current push to increase its market share in this area, resulting in severe injury to IBM.

In keeping with the Commission's guidance that its proceedings should remain as transparent as possible,² IBM seeks *in camera* treatment of only the most sensitive documents listed by MSC, or parts thereof. The following documents, which are attached hereto as Exhibit B, are those for which IBM seeks *in camera* treatment:

- (1) Current CATIA Customer List, bates #s 3321-3322;
- (2) New Business Opportunities, bates #s 3350-3355;
- (3) Dassault Systemes' Business Strategy for CATIA ANALYSIS Applications, bates #s 3357-3380;
- (4) Charts from Promotional Offering for Existing AES Customers, bates #s 3385, 3387-3390;
- (5) Selling CATIA Analysis, bates #s 3397-3402;
- (6) Charts from ETS North America 1999 Analysis Domain Objectives and Marketing Plan, bates #s 3427-3428.

For the reasons stated below, each of these confidential documents should be accorded *in camera* treatment based on the factors set forth in Bristol-Myers Co., 90 F.T.C. 455, 456 (1977):

- (1) the extent to which the information is known outside of [the] business;
- (2) the extent to which it is known by employees and others involved in [the] business;
- (3) the extent of measures taken by [the business] to guard the secrecy of the information;
- (4) the value of the information to [the business] and to [its]

² See, e.g., General Foods Corp., 95 F.T.C. 352, 355 (1980).

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competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

When applying these factors, Administrative Law Judges have broad discretion in determining what information should be placed *in camera*. See In Re General Foods Corp., 95 F.T.C. 352 (1980). Moreover, as the Commission has stated, a request for *in camera* treatment by a company such as IBM, which is not a party to the FTC proceedings, should be given "special solicitude." In re Crown Cork & Seal Co., 71 F.T.C. 1714 (1967) ("[P]etitioner's plea warrants special solicitude coming as it does from a third party bystander in no way involved in the proceedings whose records, if *in camera* treatment is denied, will be open to the scrutiny of its competitors...); accord Kaiser Aluminum & Chemical Corp., 103 F.T.C. 500 (1984) (requests for *in camera* treatment by third parties should be given special solicitude because, as a policy matter, such treatment encourages the third party to cooperate with future adjudicative discovery requests).

DISCUSSION

1. Current Customer List, bates #s 3321-3322:

This current CATIA Customer List is a closely guarded secret. It is not known to either customers or competitors of IBM, and cannot be acquired or duplicated outside of IBM. It is closely guarded even within IBM -- indeed, all copies carry the legend "IBM Confidential," and internal circulation is restricted. The list reflects a significant investment in money and man-hours to develop

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business in, and support, the CATIA product. Public release of this information would significantly harm IBM by throwing open IBM's strengths and weaknesses in this area for its competitors' to examine as well as necessarily divulging IBM's marketing strategy.

Moreover, releasing the names of these customers along with the numbers and types of licenses they hold in this product would damage IBM's customers by providing their competitors with insight into their cost structures, technology preferences and use of various technologies, which would be valuable in assessing their cost structures and gaining insight into the engineering software employed by them. This would further damage IBM by disrupting its relationships with these important customers. Indeed, IBM does not even publicly release a customer's name, let alone detailed information about a customer, without written approval from that customer.

2. New Business Opportunities. bates #s 3350-3355:

This is a presentation that describes IBM's current marketing strategy for the newest version of CATIA, which IBM hopes will increase its share of this entire market segment. The presentation describes specific internal and external strategies, targets, potential customers, and product positioning.

This document has been shared only with a select group of people within IBM, is not available outside of IBM, and could not be duplicated outside of IBM. Indeed, the potential customers involved in pilot projects, who are familiar with

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some of the products' capabilities but not this document, are bound by confidentiality agreements even with respect to their own participation. IBM spent considerable money, time, and effort developing the business opportunity and its marketing strategy, and continues to spend considerable resources marketing and selling the product. Obviously, IBM would suffer severe injury if competitors were given access to this document, because they would have, in essence, IBM's current "playbook" for this product.

3. Dassault Systemes' Business Strategy for CATIA Analysis Applications, bates #s 3357-3380:

IBM's business partner, Dassault Systemes, created this strategic analysis at considerable expense in time and money. It is a detailed presentation on Dassault/IBM's current marketing strategy that specifically describes the area of attack for the current version of CATIA in the market segment, the resource plan required to execute the strategy, the product development strategy, opportunities on which to focus, and Dassault/IBM's current market share and revenue in this area.

Again, this document has been shown only to select people within Dassault and IBM, and its public release is governed, and prevented, by the confidentiality provision of the Dassault/IBM contract. This information is otherwise unavailable to competitors and could not be duplicated outside of the Dassault/IBM venture. As discussed above, IBM would face severe injury if competitors had access to its current strategy regarding this product.

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4. Charts from Promotional Offering for Existing AES Customers, bates #s 3385, 3387-90:

The presentation of which these charts are a part details a 2001 "Promotional Offering for Existing AES Customers." IBM diligently separated the parts of this presentation that provide information on current marketing strategies of this product from those parts of the presentation that are no longer current. The charts from this presentation for which IBM seeks *in camera* treatment provide an analysis of its sales targets, IBM's strengths and weaknesses in this area, and marketing strategy -- all of which are still current and highly sensitive.

This presentation was given only to those managers and sales representatives who are directly associated with this product. Of necessity, it was provided to IBM personnel and employees of IBM's business partners for this product, who are bound by a confidentiality agreement that protects against further disclosure. IBM prepared the presentation at great expense in time and effort, is not available to IBM's competitors or customers, and could not be duplicated. IBM would be seriously injured by its disclosure.

5. Selling CATIA Analysis, bates #s 3397-3402:

This presentation provides a competitive analysis of IBM's current product in this area with competitor's products, and IBM's strategy vis-à-vis those competitors. This analysis is current and reveals the strengths and weaknesses of this product as well as the strategy IBM is currently employing with respect to its competitors' products.

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This presentation was given only to a select group of employees and is prominently marked "IBM Internal Use Only" on the first page. Some of the presentation was based on information from Dassault, and, thus, is protected by the confidentiality provision in the IBM/Dassault agreement. The information for this presentation, as well as the presentation itself, were put together at great expense and effort, and are not available to IBM's customers or competitors. IBM would be seriously injured if this document were revealed to its competitors.

6. Charts from ETS North America 1999 Analysis Domain Objectives and Marketing Plan, bates #s 3427-3428:

These two charts come from a larger presentation entitled "ETS North America: 1999 Analysis Domain Objectives." While the presentation was produced and given to IBM employees in 1999, the two charts for which IBM seeks *in camera* treatment remain current, sensitive, and confidential. Although there is a presumption that *in camera* treatment will not be provided to information that is three or more years old, In re General Foods Corp., 95 F.T.C. at 353 (1980), the Commission has recognized that this presumption is rebuttable and has granted *in camera* protection to older documents. See, e.g., Kaiser Aluminum & Chemical Corp., 103 F.T.C. 500 (1984) (extending protection to information over five years of age); In re E.I. Dupont de Nemours & Co., 97 F.T.C. 116 (1981) (protecting 6-year-old information).

These two charts provide a complete list of the IBM employees who were responsible for the Analysis Domain (i.e., engineering area), by position, as well as

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certain statistics regarding their sales responsibilities. Most of the listed employees still have the same positions, and the sales responsibilities are similarly allocated. These lists, and the manner in which they are presented, are proprietary to IBM.

This listing is not available to IBM's customers or competitors. While some of the individual names are known outside of IBM, there is no outside access to a chart with the complete listing of names and responsibilities. Public release of these two charts would severely injure IBM because they show how IBM has allocated its sales resources for different products in various regions, which would expose IBM's strengths, weaknesses, and marketing strategy to its competitors. Further, it would expose IBM's employees, whom IBM has spent considerable effort and money to train, to predation by its competitors.

RELIEF REQUESTED

For the foregoing reasons, IBM respectfully requests that the Administrative Law Judge enter an order under 16 C.F.R. § 3.45(b) granting *in camera* treatment to the IBM confidential business documents described above and attached as Exhibit B, and specifying that they not be placed in the public record of this proceeding for at least the next five years.

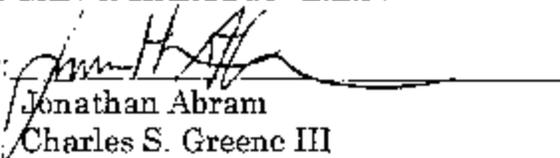
In the event that the Commission intends to disclose *in camera* IBM information, IBM respectfully requests that the Commission notify both Jonathan Abram, Hogan & Hartson L.L.P., 555 13th Street, N.W., Washington, D.C. 20004, telephone: (202) 637-5681, facsimile: (202) 637-5910, and Cari Robinson, Corporate

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Litigation, 44 South Broadway, White Plains, New York 10601, telephone: (914)
288-4922, facsimile: (914) 288-1260.

Respectfully submitted,

HOGAN & HARTSON L.L.P.

By: 

Jonathan Abram
Charles S. Greenc III

OF COUNSEL:

Cari S. Robinson, Esq.
Corporate Litigation
44 South Broadway
White Plains, NY 10601

555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

Dated: June 11, 2002

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Exhibit A

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KIRKLAND & ELLIS

To Call Writer Directly:
(202) 878-3882
hedy_aponte@dc.kirkland.com

May 28, 2002

VIA U.S. Mail

Louise Novak
IBM Corporation
New Orchard Road
Armonk, NY 10504

Re: In the Matter of MSC Software
Docket No. 9299

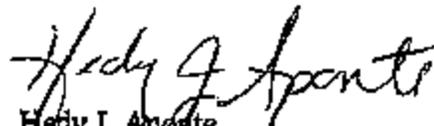
Dear Ms. Novak:

This letter is to provide notice that MSC Software intends to introduce into evidence in the above-captioned matter the documents identified on the attached list.

Pursuant to 16 C.F.R. § 3.45(b) you have the right to petition the court to request *in camera* treatment. For your convenience we have attached a copy of 16 C.F.R. § 3.45 which sets forth the standard under which *in camera* treatment will be given.

The deadline for filing a motion for *in camera* treatment is June 11, 2002. If you should have any questions please feel free to call me.

Sincerely,


Hedy J. Aponte
Senior Legal Assistant

Attachments

ATTACHMENT A

IBM	003320	003322
IBM	003350	003355
IBM	003358	003380
IBM	003381	003395
IBM	003396	003412
IBM	003413	003430
IBM	003431	003438
IBM	003440	003444
IBM	003530	003571

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thereon except as ordered by the Administrative Law Judge. Rulings on all objections shall appear in the record.

(f) *Exceptions.* Formal exception to an adverse ruling is not required.

(g) *Excluded evidence.* When an objection to a question propounded to a witness is sustained, the questioner may make a specific offer of what he expects to prove by the answer of the witness, or the Administrative Law Judge may, in his discretion, receive and report the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

32 FR 8449, June 13, 1967; 32 FR 8711, June 17, 1967, as amended at 48 FR 41766, Sept. 30, 1983; 61 FR 50630, Sept. 26, 1996.

§ 3.44 Record.

(a) *Reporting and transcription.* Hearings shall be stenographically reported and transcribed by the official reporter of the Commission, under the supervision of the Administrative Law Judge, and the original transcript shall be a part of the record and the sole official transcript. Copies of transcripts are available from the reporter at rates not to exceed the maximum rates fixed by contract between the Commission and the reporter.

(b) *Corrections.* Corrections of the official transcript may be made only when they involve errors affecting substance and then only in the manner herein provided. Corrections ordered by the Administrative Law Judge or agreed to in a written stipulation signed by all counsel and parties not represented by counsel, and approved by the Administrative Law Judge, shall be included in the record, and such stipulations, except to the extent they are capricious or without substance, shall be approved by the Administrative Law Judge. Corrections shall not be ordered by the Administrative Law Judge except upon notice and opportunity for the hearing of objections. Such corrections shall be made by the official reporter by furnishing substitute type pages, under the usual certificate of the reporter, for insertion in the official record. The original uncorrected pages shall be retained in the files of the Commission.

16 CFR Ch. I (1-1-01 Edition)

(c) *Closing of the hearing record.* Immediately upon completion of the evidentiary hearing, the Administrative Law Judge shall issue an order closing the hearing record. The Administrative Law Judge shall retain the description to permit or order correction of the record as provided in § 3.44(b).

32 FR 8449, June 13, 1967, as amended at 61 FR 50630, Sept. 26, 1996.

§ 3.45 In camera orders.

(a) *Definition.* Except as hereinafter provided, material made subject to an in camera order will be kept confidential and not placed on the public record of the proceeding in which it was submitted. Only respondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review may have access thereto, provided that the Administrative Law Judge, the Commission and reviewing courts, may disclose such in camera material to the extent necessary for the proper disposition of the proceeding.

(b) *In camera treatment of material.* The Administrative Law Judge may order material or portions thereof, offered into evidence, whether admitted or rejected, to be placed in camera on a finding that their public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting their in camera treatment. This finding shall be based on the standard articulated in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961); see also *Bristol-Myers Co.*, 90 F.T.C. 453, 458 (1977), which established a three-part test that was modified by *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). No material or portion thereof offered into evidence, whether admitted or rejected, may be withheld from the public record unless it falls within the scope of an order issued in accordance with this section, stating the date on which in camera treatment will expire, and including:

- (1) A description of the material;
- (2) A statement of the reasons for granting in camera treatment; and
- (3) A statement of the reasons for the date on which in camera treatment will expire. Such expiration date may not be omitted except in unusual circumstances, in which event the order

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§ 3.46

shall state with specificity the reasons why the need for confidentiality of the material, or portion thereof at issue is not likely to decrease over time, and any other reasons why such material is entitled to *in camera* treatment for an indeterminate period. Any party desiring, in connection with the preparation and presentation of the case, to disclose *in camera* material to experts, consultants, prospective witnesses, or witnesses, shall make application to the Administrative Law Judge setting forth the justification therefor. The Administrative Law Judge, in granting such application for good cause found, shall enter an order protecting the rights of the affected parties and preventing unnecessary disclosure of information. Material subject to an *in camera* order shall be segregated from the public record and filed in a sealed envelope, or other appropriate container, bearing the title, the docket number of the proceeding, the notation "In Camera Record" under § 3.45, and the date, if any, on which *in camera* treatment expires.

(c) *Release of in camera material.* *In camera* material constitutes part of the confidential records of the Commission and is subject to the provisions of § 4.11 of this chapter.

(d) *Briefs and other submissions referring to in camera information.* Parties shall not disclose information that has been granted *in camera* status pursuant to § 3.45(b) in the public version of proposed findings, briefs, or other documents. This provision does not preclude references in such proposed findings, briefs, or other documents to *in camera* information or general statements based on the content of such information.

(e) *When in camera information is included in briefs and other submissions.* If a party includes specific information that has been granted *in camera* status pursuant to § 3.45(b) in any document filed in a proceeding under this part, the party shall file two versions of the document. A complete version shall be marked "In Camera" on the first page and shall be filed with the Secretary and served upon the parties in accordance with the rules in this part. Any time period within which these rules allow a party to respond to a document

shall run from the date the party is served with the complete version of the document. An expurgated version of the document, marked "Public Record" on the first page and omitting the *in camera* information that appears in the complete version, shall be filed with the Secretary within five days after the filing of the complete version, unless the Administrative Law Judge or the Commission directs otherwise, and shall be served upon the parties. The expurgated version shall indicate any omissions with brackets or ellipses.

(f) *When in camera information is included in rulings or recommendations of the Administrative Law Judge.* If the Administrative Law Judge includes in any ruling or recommendation information that has been granted *in camera* status pursuant to § 3.45(b), the Administrative Law Judge shall file two versions of the ruling or recommendation. A complete version shall be marked "In Camera" on the first page and shall be served upon the parties. The complete version will be placed in the *in camera* record of the proceeding. An expurgated version to be filed within five (5) days after the filing of the complete version shall omit the *in camera* information that appears in the complete version, shall be marked "Public Record" on the first page, shall be served upon the parties, and shall be included in the public record of the proceeding.

(32 FR 8449, June 13, 1967, as amended at 52 FR 22231, June 11, 1987; 60 FR 37748, July 21, 1995; 61 FR 50650, Sept. 25, 1996)

§ 3.46 Proposed findings, conclusions, and order.

(a) *General.* Upon the closing of the hearing record, or within a reasonable time thereafter fixed by the Administrative Law Judge, any party may file with the Secretary of the Commission for consideration of the Administrative Law Judge proposed findings of fact, conclusions of law, and rule or order, together with reasons therefor and briefs in support thereof. Such proposals shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on. If a party includes in the proposals information that has been granted *in camera* status

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Exhibit B

[Exhibit B is comprised of the documents for which IBM is seeking *in camera* treatment. These documents have been omitted from the public version.]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of June 2002, a copy of the foregoing MOTION OF THIRD PARTY IBM FOR *IN CAMERA* TREATMENT OF CERTAIN HIGHLY CONFIDENTIAL BUSINESS DOCUMENTS and the Public Version of the MOTION OF THIRD PARTY IBM FOR *IN CAMERA* TREATMENT OF CERTAIN HIGHLY CONFIDENTIAL BUSINESS DOCUMENTS was served upon the following parties as indicated:

The Honorable Donald S. Clark
Federal Trade Commission
600 Pennsylvania Avenue, N. W.
Room 159
Washington, D.C. 20580

ORIGINAL, & TWO
HARDCOPIES, & ONE
COPY ON DISK
BY HAND DELIVERY

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
Washington, D.C. 20580

TWO COPIES BY
HAND DELIVERY

Richard Dagen
Assistant Director
Complaint Counsel
Federal Trade Commission
601 Pennsylvania Avenue, N. W.
Suite 3031
Washington, D.C. 20580

BY HAND DELIVERY

Kent Cox
Complaint Counsel
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Suite 3031
Washington, D.C. 20580

BY HAND DELIVERY

Marimichael O. Skubel
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
Counsel for MSC Software Corporation

BY HAND DELIVERY

John D. Harkrider
Axinn, Vestrop, Harkrider
1370 Avenue of the Americas
New York, New York 10019
Counsel for MSC Software Corporation

BY FEDERAL EXPRESS


Charles S. Greene, III