

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**



In the Matter of
MSC SOFTWARE CORPORATION,
a corporation.

Docket No. 9299

**COMPLAINT COUNSEL'S MOTION TO COMPEL DEPOSITIONS AND
TO SHORTEN THE TIME FOR RESPONDING TO THIS MOTION**

Complaint Counsel file this Motion seeking Your Honor's intervention in order to depose six executives from MSC Software Corporation ("MSC") and the former CEO of Computerized Structural Analysis Research Corporation ("CSAR"), with MSC's counsel, Kirkland and Ellis, now represents. MSC counsel has been unwilling to make these witnesses available for depositions. Additionally, MSC has sought to limit the duration of any depositions, if conducted. With so little time remaining to take these depositions, Complaint Counsel also seek by this Motion to shorten the time for Respondent to answer this Motion, namely, to May 2, 2002. For this reason, Your Honor's assistance is necessary.

I. Complaint Counsel Seek to Depose Six MSC Executives and the Former CSAR CEO.

On April 15, 2002, Complaint Counsel first raised with MSC counsel scheduling the following top executives from MSC and the former CEO of CSAR, before the close of discovery on May 28, 2002:

WITNESS	TITLE
Frank Perna	Chairman & CEO of MSC
Ken Blakely, Sr.	MSC's Vice President & General Manager
Lou Greco	MSC's Chief Financial Officer
Rick Murphy	MSC's V.P. of America's Operations
Jeff Morgan	MSC's V.P. of Software & Business Development, and former CEO of UAI
Ron Dyer	MSC's Director of Aerospace Corporate Accounts
R. Swami Narayanaswami	former CEO of CSAR

Since the matter was first raised, MSC counsel has refused to confirm that the witnesses will be available for depositions. *See* Statement of P. Abbott McCartney pursuant to 16 C.F.R. § 3.22(f).

II. Complaint Counsel Has the Right and Need to Depose These Witnesses.

In accordance with Rule 3.35 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.35, Complaint Counsel "[m]ay take a deposition of a named person or of a person or persons described with reasonable particularity, provided that such deposition is reasonably expected to yield information within the scope of discovery under § 3.31(c)(1)." Each of these depositions will clearly yield information that is relevant to the allegations in the Commission's complaint, to the proposed remedy, and to the Respondent's defenses.

First, all of these MSC executives and Dr. Narayanaswami are on MSC's March 1, 2002, witness list. Complaint Counsel has an obvious need to determine the knowledge that each of these witnesses has regarding the complaint allegations, the proposed remedy and any defenses

Respondent might offer at trial.

Second, even if MSC were to remove these persons from its witness list, Complaint Counsel still need to depose them because each possesses information relevant to the issues in the proceeding. Each of the MSC executives has been directly involved in MSC's pricing and product development decisions, customers relationships, and MSC's competitive strategies. Many of these witnesses also directly participated in the acquisitions of UAI and CSAR.

The participation of these executives in pricing decisions includes recent changes that MSC has made in its pricing policy since the acquisitions: MSC no longer plans to offer annual leases for MSC Nastran, and has adopted a policy to force its customers to purchase paid-up licenses. This change in pricing policy is a significant shift in MSC's post-acquisition business activities and clearly affects customers and Complaint Counsel's proposed remedy. The change occurred long after Complaint Counsel conducted investigational hearings with some of these MSC executives, so Complaint Counsel have not had an opportunity to address this particular issue, among others, with the MSC executives.

Another example that these persons possess relevant information, is MSC's announced 2001 strategic alliance with Dassault Systemcs, the supplier of a standalone solver called Elfini as well as CAD-embedded solver with the same name. MSC has claimed that MSC Nastran competes with Elfini. However, Dassault became a nine percent owner of MSC as part of the strategic alliance. MSC announced its strategic alliance with Dassault and Dassault's acquisition of an ownership interest in MSC after MSC acquired UAI and CSAR. Complaint Counsel are entitled to inquire of each these witnesses whether and what knowledge they have regarding the strategic alliance.

Third, MSC has recently turned over, and is still in the process of turning over, documents from these seven witnesses. Many of the documents pre-date the acquisitions but were never produced by MSC during the investigation in this case. Complaint Counsel should be given the opportunity to address these recently-produced documents with the witnesses.

Therefore, Complaint Counsel request that Your Honor order these seven persons to appear for depositions before the end of the discovery period.¹

III. Length of the Depositions.

Complaint Counsel may need more than one day to depose some of these witnesses. There are numerous issues and documents that need to be explored with each witness as noted above. Additionally, MSC's recent change in policies has broadened the issues that Complaint Counsel needs to explore with each of these witnesses. Thus, Complaint Counsel needs to continue the depositions into a second day if needed.

Complaint Counsel had proposed a one-day cap on all depositions, including expert witnesses, as an effort to resolve the matter. However, MSC counsel rejected the proposal.

IV. Request for Expedited Response.

Complaint Counsel requests that Your Honor require MSC to respond to this Motion by

¹ MSC questions whether Complaint Counsel need to depose the MSC executives who were questioned in investigational hearings prior to the Complaint in this case. These investigational hearings occurred eighteen to twenty-two months ago, and Complaint Counsel has not had an opportunity to question these witnesses regarding the acts, events, or evidence that have come to our attention in the period since. (Morgan, July 28, 2000; Dr. Narayanaswami, August 30, 2000; Ron Dyer, October 19, 2000, Ken Blakely, November 9, 2000 and Frank Perna, November 10, 2000). For example, since these investigational hearings, MSC has produced several hundred additional boxes of documents. Additionally, Complaint Counsel have not had an opportunity to question these executives about the Complaint's allegations, the proposed relief, and Respondent's defenses.

5:00 pm on Thursday, May 2, 2002. This Motion addresses a crucial discovery request, and a prompt response by Respondent is necessary in order to allow the matter to be resolved quickly. MSC has been engaged for several weeks in discussions with Complaint Counsel regarding the scheduling of these depositions, has been informed that Complaint Counsel intends to file a motion addressing these issues, and should not need additional time to respond.

V. Conclusion

For the reasons set forth above, Complaint Counsel request that their Motion be granted.

Respectfully Submitted,



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Dated: April 30, 2002

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Statement of P. Abbott McCartney Pursuant to 16 C.F.R. § 3.22(f)

Pursuant to 16 C.F.R. § 3.22(f), P. Abbott McCartney states as follows:

1. I am an attorney for the Federal Trade Commission. I serve as one of the Complaint Counsel in *MSC Software Corporation*, Docket No. 9299. I submit this declaration to represent that I conferred with Counsel for Respondent, Tefft Smith, numerous times between April 15, 2002 and the present both by phone and in person, in a good faith effort to resolve by agreement the issues raised in Complaint Counsel's Motion to Compel Depositions and to Shorten the Time for Responding to this Motion.
2. I met with Mr. Smith on April 15, 2002, to discuss, among other issues, the scheduling of depositions for MSC executives and experts. At that time, we sought to schedule the depositions of Lou Greco, Rick Murphy, Ron Dyer, Ken Blakely, Jeff Morgan, Frank Perna, and Dr. Narayanaswami. We stated that there might be other people at MSC that we may need to depose.
3. By letter dated April 17, 2002, we confirmed our request to schedule dates for those depositions as well as three additional persons. We also requested that MSC identify any other MSC employees that MSC would call at trial so that we could also schedule their depositions.
4. Thereafter, I communicated with Marimichael Skubel, another of Respondent's Counsel, and discussed dates for the depositions of Lou Greco, Rick Murphy, Ron Dyer, Ken Blakely, Jeff Morgan, and Frank Perna. Ms. Skubel suggested possible dates for the depositions as follows: Lou Greco (May 2), Rick Murphy (May 7), Ron Dyer (May 23), Ken Blakely (May 16), Jeff Morgan (May 21), Frank Perna (May 29). We subsequently responded with alternative dates.
5. Despite these discussions, MSC has been unwilling to confirm the availability of these witnesses for the depositions.

6. Complaint Counsel sent subpoenas to MSC's counsel for depositions of these persons on April 26, 2002. Additionally, during a telephone conversation on April 26, 2002, Complaint Counsel proposed a one-day cap on all depositions, including expert witnesses, as an effort to resolve any dispute regarding the length of the depositions. However, MSC counsel rejected the proposal.
7. On April 26, 2002, Respondent's counsel faxed a short letter to Complaint Counsel. The letter stated that MSC would be unwilling to make the executives available on a voluntary basis unless certain conditions were met, among other things, including a limitation that the depositions would not be longer than one day.
8. On April 29, 2002, I called Respondent's counsel, Tefft Smith, to try again to set up dates for the depositions of the six MSC executives and Dr. Narayanaswami. Respondent's counsel stated that he was waiting to receive instructions from his client, and could not make any decisions at this time, including whether or not the deposition tentatively scheduled for Thursday, May 2, 2002, would proceed as scheduled.
9. At the end of the day on April 29, 2002, we spoke further. Mr. Smith stated that he was still waiting to receive instructions from his client. He stated that he expected to hear from his client on Tuesday, April 30, 2002. He stated that he would let us know at 6:00 pm. I stated that I would telephone in the afternoon to learn of his client's plans so that we could file our motion in the event that MSC was not making the witnesses available. During the conversation, Mr. Smith also stated that Mr. Greco was otherwise occupied on May 2, 2002, and that he would look for another day, presuming that MSC was going to make Greco available for a deposition. He stated that he was not saying that MSC would not make him available.
10. I spoke with Tefft Smith and Marimichael Skubel on the afternoon of April 30, 2002, who stated that Respondent was moving for a protective order to limit the scope and duration of the depositions.


P. Abbott McCartney

CERTIFICATE OF SERVICE

This is to certify that on April 30, 2002, I caused a copy of Complaint Counsel's Motion to Compel Depositions and to Shorten the Time for Responding to this Motion to be served by hand-delivery to the following person:

The Honorable D. Michael Chappell
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

and by facsimile transmission with hand-delivery of a copy the next business day to the following person.

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P. Abbott McCartney