

ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF)
)
MSC SOFTWARE CORPORATION,)
)
a corporation.)

PUBLIC VERSION
Docket No. 9299

**MSC's SUPPLEMENT TO ITS EMERGENCY MOTION TO REMEDY
JIM CASHMAN'S REFUSAL TO APPEAR FOR HIS DEPOSITION
AND
MOTION TO REOPEN DR. SCHAEFFER'S DEPOSITION FOR A LIMITED PURPOSE**

Not surprisingly, neither Complaint Counsel nor ANSYS denies the fundamental facts outlined in MSC's Motion to Remedy Jim Cashman's Failure to Appear for Deposition.

- They do not refute the fact that their witnesses have been evasive, claiming instead that they were somehow "forced" into admitting the truth.¹
- They do not refute the fact that ANSYS, SAS, Lockheed and Complaint Counsel have formed a partnership to _____ or _____ MSC through the use of the litigation.
- They do not refute the fact that Mr. Cashman unilaterally failed to appear for his deposition and disregarded the subpoena that compelled his appearance.

¹ ANSYS argues that its employees were somehow forced to provide testimony that hurts the ANSYS/SAS/Lockheed Martin/Complaint Counsel partnerships' case. See ANSYS Br. at 1. But they don't explain why the evidence cited in MSC's opening brief – such as the admission that ANSYS and MSC have engaged in _____ or ANSYS's efforts to walk away from documents by claiming that they don't know what they meant when they wrote them – is wrong. Indeed, neither Complaint Counsel nor ANSYS points to any misreading of *any quote or cite* in MSC's motion. Instead, ANSYS is just upset that MSC refuses to let it rest on evasive, non-responsive answers to avoid providing testimony harmful to the partnership's case. Indeed, what "speaks volumes" (in ANSYS's own words) is MSC's reliance on testimony and documents (all supported with the necessary foundation), and ANSYS's and Complaint Counsel's failure to deny these facts.

Because neither Complaint Counsel nor ANSYS deny the central facts set forth in MSC's motion the requested relief should be granted. A proposed order is attached, which makes some minor modifications to its previous request for relief, in order to account for the events of last week, namely (i) the deposition of Harry Schaeffer, (ii) his effort to hide behind an imagined "joint interest" privilege as a basis for not answering questions concerning his deposition preparation by ANSYS's attorney, and (iii) the need to reschedule Mr. Cashman's deposition to June 21st and 22nd, since the 14th and 15th have come and gone.

Significantly, the events of the last week make it all the more clear that ANSYS, SAS, and Complaint Counsel are playing games in order to manipulate the outcome of this case. For example, in its Response, ANSYS claims that Jim Cashman does not have any "special knowledge of facts relevant to this case." That is dead wrong.⁷ Mr. Cashman produced over 600 pages of

⁷ Significantly, rather than be up-front and disclose the information that Mr. Cashman does have, they seek to hide behind Mr. Donovan's legalistic undefined, weasel term "special knowledge." The inference that ANSYS wants this court to believe is that Mr. Cashman has no knowledge relevant to this litigation. The facts are otherwise. In fact, it is because Mr. Cashman has facts that are detrimental to Complaint Counsel's case, and the fact that his own conduct and those of his employees in leading the Partnership's efforts to secretly assist the FTC is improper, that the FTC conveniently avoided placing him on the FTC witness list.

Complaint Counsel is similarly playing word games, when they say "Complaint Counsel dispute most emphatically the assertions made by MSC ... that Complaint Counsel was 'complicit' in any 'partnership' with ANSYS ... to 'frame' MSC." While Complaint Counsel will not admit this – probably because they want to quibble with the definitions of the words in quotes – the fact is they have consistently supported ANSYS's efforts to evade discovery, they interfered with MSC's negotiations with SAS, they exchanged drafts with ANSYS prior to ANSYS's offer to MSC, and they relied on SAS's business plan, which they knew was drafted with the FTC case in mind, if not directly for the FTC. Moreover, as discussed below, they refused to answer any questions about their efforts to coordinate with the other members of the partnership, including whether they were involved in coordinating with counsel for third-parties in preparation for their depositions.

documents responsive to MSC's subpoena (and many, many more that he authored or received).³ Mr. Cashman has also spearheaded efforts to compete against MSC, and has numerous documents discussing ways to assist Complaint Counsel in prosecuting this case and MSC.

Indeed, Mr. Cashman, himself, acknowledges his pivotal role. In one e-mail, Mr. Cashman instructs his team to

Other e-mails directly contradict ANSYS's pleading that Mr. Cashman has no "special knowledge," demonstrating that he is a direct participant. For example, in one e-mail, Mr. Cashman exhorts his employees to

ANSYS's claim that, as CEO, Mr. Cashman doesn't know what is going on at his company is belied by these e-mails, as well as the fact that he was Chief Operating Officer at around the time of the acquisitions.

Given Mr. Cashman's personal effort to his claimed excuse for not appearing for his deposition is nothing less than pretextual.⁴ ANSYS claims that he did not show

³ The second subpoena was so narrowly tailored in response to ANSYS's resistance that not even they can claim that any responsive material is irrelevant to this litigation.

⁴ ANSYS now asserts that Mr. Cashman chose to disregard the subpoena because MSC's counsel could not get "authority" to postpone the deposition. This is another falsehood. As explained in MSC's opening brief, MSC's counsel told Mr. Donovan that they were affirmatively instructed to go forward with the deposition as scheduled. MSC's counsel never said that he could not get in

up for his deposition because he needed time to prepare a settlement proposal. That settlement proposal was a joke, another litigation ploy just like the one they proposed last December. Indeed, despite their initial representation, that the asking price is based on ANSYS's own assessment of the rate of return on investment, their demands keep *increasing*, as they realize the impact the litigation costs have had on MSC's share value.

As ANSYS's Mr. Dunbar explained,

Not only is Mr. Cashman's reason for failing to show-up for his deposition pretextual, it is clear that his resistance to providing two days of testimony is designed to maximize the

touch with the people who had authority to postpone the deposition. In fact, MSC's counsel stated clearly that MSC expressly refused to agree to, and did not consent to, ANSYS's unilateral postponement of the deposition.

ANSYS next asserts that it had some understanding with MSC's settlement team that they would consider getting authority for postponing the deposition. What ANSYS fails to acknowledge is that no one from MSC *ever* agreed to postpone the June 10th deposition date. Any notion it may have had about the prospect of postponing the deposition would have been dispelled after discussing the matter with MSC's counsel.

Finally, ANSYS asserts that it was pressed for time and had to make a last minute decision about whether to appear for its deposition. This is also not true. ANSYS's counsel again falsely states that MSC's counsel returned Mr. Donovan's call at 4:00 pm. The correct time line was set forth in MSC's opening brief. Mr. Donovan initially contacted MSC's counsel at approximately 2:00 p.m. and requested a postponement. Mr. Donovan instructed MSC's counsel to get back to him within an hour with an answer. At approximately 3:00 p.m., MSC's trial counsel told Mr. Donovan that the deposition would go forward as scheduled. At that point, Mr. Donovan indicated that Mr. Cashman would not attend his deposition, but when pressed about whether he would ignore the outstanding subpoena, Mr. Donovan said he wanted to talk with "your colleagues" [meaning the MSC representatives at the settlement meeting] before making a decision. At 3:30, Mr. Donovan stated that Mr. Cashman would not show up for the deposition, and sent a confirmatory fax at 3:57 p.m. See June 7, 2002, 3:57 p.m Letter From T. Donovan to C. Kass.

effectiveness of ANSYS's strategy of providing evasive answers. Dr. Schaeffer's deposition illustrates this approach. At one point, Dr. Schaeffer – just like ANSYS's Mr. Solecki – refused to answer questions if it meant agreeing with counsel for MSC in any way, shape, or form.

This refusal to admit what should be uncontroverted facts extended to *denying the existence* of a written agreement with and refusing to agree with statements he had written himself.⁵ Indeed, it took five questions just to find out how he initially got in contact with the FTC.⁶

⁵ Compare Denial of existence of written agreement with written agreement ; Compare also refusal to agree with his own written statement, with his own written statement, Schaeffer Dep. Ex. 1001 (attached as Exhibit 7).

⁶ In response to a simple question about whether it was he or the FTC that initiated contact, Dr. Schaeffer played games until even his counsel realized that enough is enough.

Dr. Schaeffer's evasiveness is not his doing alone. It is directly attributable to ANSYS's interference in the deposition process. During Dr. Schaeffer's deposition, it became clear that SAS and ANSYS are hiding behind a ginned-up "joint interest" privilege to prevent their conduct from being disclosed.⁷ And this joint interest extends far beyond simply reaching an agreement It goes so far as to involve discussions about how to give deposition testimony:

⁷ The "joint interest" or "common interest" privilege does not apply in this case because neither ANSYS nor SAS are parties to the suit, or even "real parties in interest." To the contrary, ANSYS and SAS both style themselves as "neutral" third-party *fact* witnesses. They have no claim against MSC and they are neither actual nor potential defendants in this litigation. Their attempt to assert a common interest privilege would vitiate the rule, since it would permit all witnesses for a party to get in a room and coordinate their testimony free from any risk of discovery. That is not the law, and this court should not embrace such an absurd proposition. *See, e.g., Boudin v. Thomas*, 533 F.Supp. 786 (S.D.N.Y. 1982) ("A lawyer or group of lawyers can only serve one client. *Should there be joint counsel visits then the attorney-client privilege obviously does not cover such visits and the lawyers involved can be called upon to testify about what was said by people other than their own clients.* Needless to say, by eliciting such testimony from all of the lawyers, all of the conversation can be discovered. The only privilege available to a lawyer in a situation would be their Fifth Amendment privilege which might indicate that the clients were being coached to perjure themselves in a manner which would not be contradictory."); *Klonoski v. Mahlab*, 953 F.Supp. 425, 427-31 (D.N.J.1996) (observing that common interest privilege was not asserted because it was not between parties to a litigation, and vague statements concerning potential future litigation against witnesses are insufficient to create a privilege).

MR. KASS: Just so I'm clear, is this a discussion that involved -- that related to this deposition?

MR. PORTER: It is a discussion that related to in some way at least [to] this deposition, yes.⁸

MSC believes that Complaint Counsel is also coordinating with members of the ANSYS/SAS/Lockheed partnership as well. When counsel for MSC asked Complaint Counsel's Peggy Bayer whether the FTC was involved in coaching Dr. Schaeffer. Ms. Bayer said, "the FTC does not coach" their witnesses. When MSC's counsel followed-up by asking whether Complaint Counsel was involved in preparing their witnesses, she declined to answer. The obvious inference is that they were, and MSC suspects that this effort is done through Mr. Donovan as the conduit in order to preserve privilege. It is clear from documents produced to MSC that ANSYS has engaged in off-the-record conversations with Complaint Counsel, dating as far back as December (without MSC's prior knowledge). Mr. Donovan's, and now SAS's counsel's, refusal to allow MSC to inquire about these efforts contacts is *unconscionable*.

Significantly, Mr. Porter's instruction impeded MSC's counsel from inquiring into clearly permissible areas. In *Geders*, Chief Justice Burger, for a unanimous Court, endorsed cross-examination as the swift antidote for witness coaching:

"The opposing counsel in the adversary system is not without weapons to cope with 'coached' witnesses. A prosecutor may cross-examine a defendant as to the extent of any 'coaching'.... Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond....

Geders, 425 U.S. at 89-90; see also *U.S. v. Carrillo*, 16 F.3d 1046 (9th Cir. 1994) ("Coaching is a proper subject of impeachment in cross-examination."); *Hardaway v. Withrow*, 147 F.Supp.2d 697 (E.D.Mich. 2001) ("it is permissible to cross-examine a petitioner about whether his or her attorney improperly coached his or her testimony without violating either a defendant's right to the effective assistance of counsel or the attorney-client privilege.")

The efforts by Complaint Counsel, ANSYS, and SAS to minimize the extent of their coordination would be comical, if it weren't so tragic. Despite their claim that this is a newly created "partnership" or "consortium," Dr. Schaeffer admitted that it has a long history, most of which has been hidden from MSC's view. Dr. Schaeffer had numerous meetings and conversations with Complaint Counsel, beginning as early as March 2000.

And SAS has manufactured evidence to assist the FTC's prosecution of this case. For example, SAS's business plan, which Complaint Counsel seeks to rely upon in the pre-trial brief and findings, was created immediately after Complaint Counsel contacted SAS, and was sent to them shortly after

it was completed.⁹ Significantly, Dr. Schaeffer admitted that the FTC was the

, around

the time the business plan was created:

Of course, when asked about what was said

during these conversations with Complaint Counsel, Dr. Schaeffer conveniently could not recall.

Id.

Because ANSYS is so heavily involved in competing against MSC and seeking to use the litigation to _____, it is imperative that Mr. Cashman be deposed. ANSYS's efforts to limit inquiry into ANSYS's efforts to use its partnership with SAS and Complaint Counsel by saying all such information goes to its "negotiating strategy with MSC" is disingenuous. While MSC agreed that ANSYS need not produce documents relating to ANSYS's negotiation strategy with MSC, it never agreed to allow ANSYS to withhold information it shares with *third-parties* regarding how to manipulate the FIC's proceedings to ANSYS's advantage.¹²

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¹¹ Significantly, ANSYS now seeks much more than _____ it wants to deal a serious, if not crushing blow to MSC, simply because it purchased a couple of two "lifestyle" vendors of Cosmic Nastran-based solvers.

¹² Significantly, MSC's agreement was limited to the production of documents, and MSC specifically reserved its right to ask for this information at a later point, which it did in the depositions of Messrs. Wheeler and Dunbar. Moreover, as pointed out in MSC's initial brief, MSC only agreed to limit the scope of its second subpoena, because the ALJ refused to rule on MSC's initial subpoena either as written or as modified.

In short, communications *with the Complaint Counsel* as to what pressure the partnership can collectively exert on MSC is not negotiating strategy over the value of the assets. It is an attempt to whipsaw its primary competitor using the FTC as its sledge-hammer carrying puppet. Neither such conduct, nor ANSYS's counsel's efforts to coach Dr. Schaeffer, qualify as negotiation strategy or privileged information.

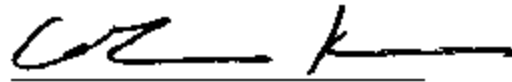
As such MSC requests the Court order the following relief:

- Order Mr. Cashman to appear for his deposition on June 21st and 22nd.
- Order Mr. Cashman to answer *all questions* regarding any discussions that ANSYS may have had with SAS or Complaint Counsel; and
- Re-open the deposition of Dr. Schaeffer and require Dr. Schaeffer to answer questions relating to his deposition preparation by Mr. Donovan.

In addition, MSC requests that this Court “certify to the Commission a request that court enforcement of the subpoena or order be sought.” MSC also respectfully requests that sanctions be imposed, pursuant to 16 C.F.R. § 3.38(c) for Mr. Cashman’s failure to comply with subpoena.¹³

¹³ This brief is not designed to respond directly to Complaint Counsel’s Response to MSC’s Unopposed Motion to Amend the Revised Scheduling Order. However, since Complaint Counsel decided to address both Mr. Cashman’s deposition and the scheduling order in an omnibus filing, MSC feels compelled to address the misstatements in Complaint Counsel’s brief. Complaint Counsel tries to characterize MSC’s production as a “dump.” But Complaint Counsel fails to disclose that this is a result of Complaint Counsel’s overbroad document request, and Complaint Counsel’s unyielding refusal to agree to any limitation. Complaint Counsel also fails to acknowledge that, despite the fact MSC’s CD production is perfectly acceptable, MSC has volunteered to give Complaint Counsel a searchable data base for the entire 127 CD production. Indeed, MSC has been working with the vendor to obtain the files in the format best suited to Complaint Counsel’s needs. Finally, Complaint Counsel claims that MSC failed to produce certain documents. But Complaint Counsel omits the most critical facts. MSC moved heaven and earth to produce documents on May 28th, and in fact produced 394 boxes of documents (and 127 CDs, which is approximately the equivalent of an additional 450 boxes of documents) in the course of this litigation. While it is true that MSC’s vendor had misplaced a number of documents (which Complaint Counsel failed to disclose in its brief), Complaint Counsel was well-aware that this was beyond MSC’s control. When MSC found out about this issue, it promptly informed Complaint

Respectfully submitted,



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Dated: June 17, 2002

Counsel, and last week, MSC produced an additional 29 CDs. With minor exceptions of which Complaint Counsel is aware, MSC has now fully complied with the document request and believes that there is no outstanding issue. Moreover, Complaint Counsel certainly was *not prejudiced* by not receiving the document in Exhibit 1. This document clearly supports MSC's position that it has not raised prices since the acquisitions.

CERTIFICATE OF SERVICE

This is to certify that on June 17, 2002, I caused a copy of the non-public, redacted non-public (ANSYS), redacted non-public (SAS) and public versions of MSC's Supplement to its Emergency Motion to Remedy Jim Cashman's Refusal to Appear for His Deposition and Motion to Reopen Dr. Schaeffer's Deposition for a Limited Purpose to be served upon the following persons by hand delivery:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Av Avenue, N.W.
Washington, DC 20580

Richard B. Dagen, Esq.
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and that I caused a copy of the non-public redacted (SAS) and public versions of MSC's Supplement to its Emergency Motion to Remedy Jim Cashman's Refusal to Appear for His Deposition and Motion to Reopen Dr. Schaeffer's Deposition for a Limited Purpose to be served upon the following person by facsimile and overnight mail:

Paul Porter, Esq.
Hill, Farrer & Burrell LLP
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and that I caused a copy of the non-public redacted (ANSYS) and public versions of MSC's Supplement to its Emergency Motion to Remedy Jim Cashman's Refusal to Appear for His Deposition and Motion to Reopen Dr. Schaeffer's Deposition for a Limited Purpose to be served upon the following person by facsimile and overnight mail:

Thomas A. Donovan
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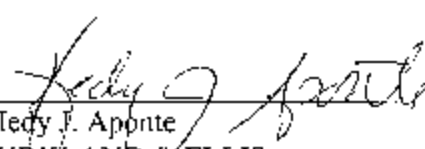

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Exhibit 1

**Redacted Pursuant to
Protective Order**

Exhibit 2

**Redacted Pursuant to
Protective Order**

Exhibit 3

**Redacted Pursuant to
Protective Order**

Exhibit 4

**Redacted Pursuant to
Protective Order**

Exhibit 5

**Redacted Pursuant to
Protective Order**

Exhibit 6

**Redacted Pursuant to
Protective Order**

EXHIBIT 7

**Redacted Pursuant to
Protective Order**

Exhibit 8

**Redacted Pursuant to
Protective Order**

Exhibit 9

**Redacted Pursuant to
Protective Order**

Exhibit 10

**Redacted Pursuant to
Protective Order**

Exhibit 11

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Exhibit 12

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Protective Order**

Exhibit 13

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Protective Order**