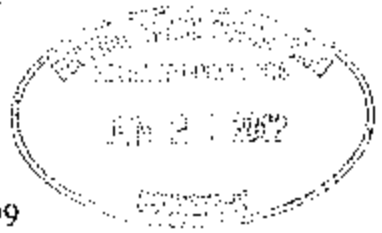
PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

THIRD-PARTY SCHAEFFER AUTOMATED SIMULATIONS' OPPOSITION TO MSC'S MOTION TO REOPEN DR. SCHAEFFER DEPOSITION FOR A LIMITED PURPOSE

Third party, Dr. Harry Schaeffer hereby submits his Opposition to MSC's Motion to Reopen Dr. Schaeffer's Deposition for a Limited Purpose.

I. INTRODUCTION

Dr. Harry Schaeffer is a third party witness, and is a retired college professor who formed a business based on an idea to develop a NASTRAN based product. That business, Schaeffer Automated Simulations LLC ("SAS"), has entered into a business relationship with yet another third party, ANSYS, toward the development and marketing of the product that SAS one day hopes to create. The existence of the "Option Agreement" between SAS and ANSYS is known to MSC, and was the subject of extensive questioning during the deposition. In their joint effort, ANSYS and SAS have the potential to compete with MSC at some point in the future with this product, at least on some level, and so MSC wanted to depose Dr. Schaeffer. Fair enough. But as with the wildly accusatory motion now before

the court, what happened at the deposition was anything but fair, and this Court should not allow MSC to conduct any further attempts to intimidate or badger Dr. Schaeffer, or to twist his words to suit its case.

Having jumped all over Dr. Schaeffer regarding everything he knows or remembers, after trying repeatedly to put words in his mouth where he didn't know or remember, and after attempting to twist and contort all of it, incredibly, MSC now asks this Court to allow it to invade the sanctity of Dr. Schaeffer's conversations with his attorneys. Under well-settled law, as well as fairness, the Court cannot compel Dr. Schaeffer, a third party, to answer questions about conversations he has had with his attorneys. MSC has already used up more than its 7 hours of deposition time as allowed under FRCP 32(D), and in that process has forced Dr. Schaeffer and his company to incur attorneys fees, lost time, and all the inconvenience and frustrations that go along with spending a very long day in a deposition with a caustic attorney. Enough is enough.

II.

Under Law, MSC Cannot Invade the Sanctity of

Dr. Schaeffer's Relationship with His Attorney.

During the deposition, counsel for MSC sought to question Dr. Schaeffer regarding a meeting that took place between himself, his counsel, and counsel for ANSYS, Mr. Tad Donovan. Counsel for SAS instructed Dr. Schaeffer not to answer, as this was a meeting between an attorney and his client, as well as an attorney of the client's business partner, and was conducted in connection with common interests they share. And counsel explained to MSC's counsel that at no time during the meeting did anyone share with Dr. Schaeffer

any information about the substance of testimony from any witness in this case.[1]

MSC asks the Court for permission to reopen Dr. Schaeffer's deposition so as to invade the sanctity of his relationship with his attorney. Ignoring the law directly prohibiting that line of questioning, MSC offers as justification for this incredible request case authority that has no relevance whatever, and a theory that the FTC has been conspiring with SAS, and ANSYS, and MSC's customers.

MSC's delusions aside, ANSYS and SAS are business partners, and the common interest privilege obviously protects the discussion that took place between counsel for ANSYS, counsel for SAS, and Dr. Schaeffer. While the "joint defense" privilege protects communications between an individual and an attorney for another when the communications are part of an ongoing and joint effort to set up a common defense strategy [*In re Grand Jury Subpoena*, 274 F.3d 563, 572 (9th Cir. 2001)], the same privilege outside the context of actual litigation "is more aptly termed the common interest rule." *Id.* In *Aiken v. Texas Farm Bureau Mut. Ins. Co.*, 151 F.R.D. 621, 624, the court noted: "[t]his privilege encompasses shared communications . . . whenever the communication was made in order to facilitate the rendition of legal services to each of the clients involved in the conference."

The common interest doctrine was explained in the recent Restatement (Third) of

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[1] Though that statement appears immediately after the conclusion of one of MSC's excerpts from the deposition, MSC chose not to share it with the Court. [H. Schaeffer Depo., p. 216, lines 5-9].

The Law Governing Lawyers § 76, which provides:

> "If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication." [emphasis added].

Restatement (Third) of The Law Governing Lawyers § 76(1) (2000).

The common interest doctrine operates as an exception to the rule that the attorney-client privilege (or another independently existing privilege) is waived by disclosure to a third person, where the third person shares a common interest with the holder of the privilege. *See, e.g., Cavallaro v. United States*, 153 F.Supp.2d 52, 59-60 (D. Mass. 2001) (applying § 76); *Smithkline Beecham Corp. v. Apotex Corp.*, 193 F.R.D. 530, 539 (N.D. Ill. 2000); *Griffith v. Davis*, 161 F.R.D. 687, 692 (C.D. Cal. 1995) (collecting cases). The "touchstone" of the doctrine is that the communication refer to a matter of common interest. Cavallaro, 153 F. Supp.2d at 60.

Here, the purpose of the common interest agreement, and the conference between the attorneys, was to facilitate the attorneys' representation of ANSYS and SAS. Indeed, it was the expressed understanding of both attorneys that the meeting was to be a protected attorney-client meeting under the common interest doctrine. Obviously, communications

between Dr. Schaeffer and his attorney in connection with his deposition are privileged, and MSC can make no claim that Dr. Schaeffer has waived this attorney-client privilege with respect to that preparation. It is likewise obvious that SAS (and Dr. Schaeffer) and ANSYS share a common interest with respect to preparing for depositions by MSC, through which MSC seeks extensive discovery into proprietary, jointly-owned information concerning ANSYS's and SAS's joint efforts to develop the product that is the subject of their contractual relationship. This is the exact type of "common interest" that lies at the very heart of the common interest doctrine. *See Smithkline Beecham Corp.*, 193 F.R.D. at 539 (common interest doctrine applies to parties jointly developing patents).

And beyond their common desire to develop and market their product, and protect their proprietary information from improper disclosure through discovery, SAS and ANSYS share a common legal interest to ensure that to the extent such information is discovered, it is complete and accurate. And just as importantly, ANSYS and SAS also share a common legal interest concerning the terms and conditions under which they might acquire certain assets from MSC. Since MSC threatens to compromise all of these joint legal interests through discovery in this case, SAS and ANSYS share a common legal interest in relation to that discovery, and thus the attorney client privilege is preserved.

A. The two cases that MSC cites are wholly inapposite.

MSC's brief cites cases that do not deal with the common interest doctrine that is applicable here. Boudin v. Thomas, 533 F. Supp. 786 (S.D.N.Y. 1982) contains no legal analysis of the common interest doctrine. Rather, the case involved a petition for habeas

corpus relief by a pretrial detainee subjected to unconstitutional administrative detention conditions. See id. at 787-88. The portion of the opinion cited by MSC is *dicta* stating that the attorney-client privilege would not apply to "joint counsel visits" involving the petitioner and her co-defendant. See id. at 792 n. 5. The court's footnote contains no analysis of, or citation to authority construing, the scope of common interest doctrine, and it is apparent that the court did not consider whether or to what extent the doctrine might apply.

Klonski v. Mahlab, 953 F. Supp. 425 (D.N.H. 1996), also cited by MSC, is similarly inapposite. The issue in Klonski was whether interviews of lower level hospital employees conducted by the hospital's counsel were covered by the work product doctrine or the attorney-client privilege. See id. at 527-31. Significantly, the employees did not assert a common interest privilege with the hospital, but instead relied solely on the theory that the hospital's counsel was simultaneously acting as their own attorney. See id. at 430 n. 3.

MSC offers no justification in law, and certainly none exist in fact or fairness, to allow MSC to invade Dr. Schaeffer's communications with his attorney. MSC's request to do so should be rejected.

III.

MSC Has Already Used up its Allotted 7 Hours of Deposition, and Dr. Schaeffer, a Third Party, Has Already Been Forced to Spend Enough Time and Money in this Case.

Dr. Schaeffer's deposition commenced at 9:00a.m., but the questioning did not

actually start until 11:28 a.m. due to MSC's counsel's refusal to start the deposition until the issue of videotaping had been decided by this Court. There were a number of ten minute breaks, and at MSC's counsel's urgency, and in the interest in ensuring the completion of the deposition, Dr. Schaeffer took just 20 minutes for a lunch break! And at MSC's attorney's request, Dr. Schaeffer agreed to remain after hours to ensure the deposition would be completed - the deposition did not conclude until 6:37 p.m.

Under Federal Rules of Civil Procedure Rule 32(d), a deposition is limited to one day of seven hours. MSC used more than their time allowed. Dr. Schaeffer, as a third party, should not be forced to incur additional time and legal costs defending against yet another day of deposition.

IV.

MSC's Conduct at the Deposition was Outrageous.

Beyond the dispositive legal reasons why Dr. Schaeffer cannot be compelled to share communications he has had with his attorney, it would simply be unfair and wrong to force him to appear for any further abuse by MSC's attorneys. Dr. Schaeffer showed up prepared to testify at 9:00 a.m. on the day of the deposition, and was forced to sit around for more than two hours because MSC's counsel refused to begin the questioning until he had exhausted his attempt to convince this Court to convert the deposition into a video deposition. Following that unsuccessful effort, MSC's attorney was apparently furious (perhaps blaming Dr. Schaeffer for MSC's own failure to properly notice the deposition), channeling the frustration into a badgering line of questioning apparently designed to exact

revenge.

The tone was set with the **very first question, literally,** at the deposition - a question not likely to lead to the discovery of admissible evidence, and obviously only intended to intimidate or vex the witness, especially when coupled with the abrasive tone and demeanor of MSC's attorney's questioning:

> "Q. Dr. Schaeffer, do you believe ethics is something like being pregnant, there is no middle ground?" [Exh. 1, Schaeffer Depo. Transcript, p. 8:25, 9:1-5].

And the questions that followed were nothing short of a 30 minute tirade of verbal abuse and badgering, interrupting counsel's objections, interrupting the witness, attempting to put words in his mouth, and mischaracterizing his testimony, to such an extent that Dr. Schaeffer became visibly upset and unable to proceed, leading himself and his attorney to fear for Dr. Schaeffer's health if the deposition continued.

To try to put an end to the abuse, Dr. Schaeffer's attorney admonished MSC's counsel to calm down, warning that given Dr. Schaeffer's age and health, the deposition would need to be suspended if counsel wanted to continue to abuse him. Following several objections to the badgering tone, the admonishment and explanation of the abuse appears at pages 34 and 35. The written transcript obviously does not audibly convey the abrasive tone and volume of MSC's attorney's questioning, a fact known to MSC's attorney given the exclusion of the video cameras. But in his admonishment, Dr. Schaeffer's counsel demanded that MSC's court reporter preserve the cassette tape recording of the deposition,

fearing the deposition would need to be suspended, and that in any motion regarding the deposition, the Court should be made aware of the tenor of questioning being advanced under its subpoena. Despite counsel's request, we have not yet been able to obtain a copy of the tape from MSC's reporter..

Throughout the deposition, MSC's counsel provoked Dr. Schaeffer, twisted his words, attempted to confuse his testimony, and argued with him at every turn. For MSC to suggest, as it does in its footnote 6, that Dr. Schaeffer was "playing games" is an more than just an insult - it is outrageous! MSC taints its motion with tortured and incomplete excerpts of the deposition taken out of context, in a continuing effort to embarrass or intimidate Dr. Schaeffer, perhaps to demean him before this Court, or to make him resist testifying if called by the FTC. But even a cursory review of the transcript reveals that any ambiguity in the record is of MSC's own making and is the result of MSC's counsel's persistent badgering and abuse of Dr. Schaeffer during the deposition, and refusal to ask questions in a way that would elicit the witness' own knowledge, as opposed to sound bites of testimony taken out of context responding to MSC's attorney's own poorly concealed efforts to disguise his own testimony as questioning.

MSC's attempt to conform Dr. Schaeffer's testimony to its version of the truth is just plain wrong. Almost every one of MSC's citations to Dr. Schaeffer's testimony is an example of creative interpretation, at best, and a deliberate attempt to mislead the Court, at worst. Although these distortions are too numerous to present in their entirety here (and are not relevant to the narrow issue presented, and should not have been made the subject of

MSC's motion in any event), the Court should review the carefully selected snippets of testimony in their context before giving the version contained in MSC's motion any credence. A contextual review of the record will demonstrate that it was MSC's counsel's improper questioning, and abusive and intimidating tone, that led to the communication problems reflected in the transcript.

Dr. Schaeffer, **a third party,** should not be forced to endure one more minute of questioning by MSC's counsel.

V. CONCLUSION

For all the foregoing reasons, MSC's motion to reopen the deposition of Dr. Schaeffer should be denied.

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Respectfully submitted,
HILL, FARRER & BURRILL LLP

By: _____

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