

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



In the Matter of  
MSC.SOFTWARE CORPORATION,  
a corporation.

Docket No. 9299

**ORDER GRANTING RESPONDENT MSC.SOFTWARE CORPORATION'S  
MOTIONS FOR THE ISSUANCE OF SUBPOENAS *DUCES TECUM* AND  
*AD TESTIFICANDUM* TO THE DEPARTMENT OF DEFENSE AND  
TO THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

I.

On April 16, 2002, Respondent MSC.Software Corporation ("MSC") filed two motions, pursuant to Commission Rule 3.36, for orders authorizing the Secretary of the Commission to issue subpoenas *duces tecum* and *ad testificandum* to the Department of Defense ("DOD") and to the National Aeronautics and Space Administration ("NASA"). Complaint Counsel filed one opposition to both motions on April 25, 2002. Oral argument was heard on the motions on April 25, 2002. For the reasons set forth below, MSC's motions are GRANTED.

II.

MSC's motion for issuance of subpoenas to be served upon DOD seeks subpoenas *duces tecum* to be served on four DOD locations and subpoenas *ad testificandum* to be served on four DOD employees. MSC asserts that the discovery it seeks is designed to determine the sites' experience using the products of MSC and of its competitors. MSC also seeks discovery on the DOD sites' ability to switch to another FEA solver. According to MSC, the documents and testimony requested are designed to obtain needed information regarding the variety of solvers used and considered by the DOD sites, their abilities to switch between solvers, and their reasons for selecting particular solvers.

MSC also seeks to take the depositions of four DOD employees. All four of these individuals appear on Complaint Counsel's revised witness list as expected to testify about the practices employed at four separate DOD sites and three of these individuals have provided Complaint Counsel with statements during the Part II investigation. Three of the individuals

have been designated by Complaint Counsel as expected to testify about the operation of Carderock; the evaluation, selection, procurement, and use of Nastran by Carderock, the history of Nastran pricing and contract negotiations, switching and interchangeability among solvers, including Nastran, principles and methods of engineering and computing, competition among FEA solvers in the defense industry, including Nastran, and MSC's acquisition of UAI and CSAR.

MSC's motion for issuance of subpoenas to be served upon NASA seeks subpoenas *duces tecum* to be served on seven NASA centers and subpoenas *ad testificandum* to be served on seven NASA employees. As with its motion for issuance of subpoenas to be served on DOD, MSC seeks discovery from the NASA centers pertaining to their experience using the products of MSC and of its competitors.

MSC also seeks to take the depositions of seven NASA employees. All seven of these individuals appear on Complaint Counsel's revised witness list. MSC represents that Complaint Counsel's witness list indicates that five of these individuals are expected to testify about their center's operation; their center's evaluation, selection, procurement, and use of Nastran; the history of Nastran pricing and contract negotiations; the process of switching and interchangeability among solvers, including Nastran; competition among FEA solvers in the aerospace industry; MSC's acquisition of USAI and CSAR; and the history of Nastran. One of the witnesses is expected to testify about all of those topics, except the history of Nastran. All seven of these individuals have provided Complaint Counsel with statements during the Part II investigation.

Complaint Counsel's opposition to both motions asserts that MSC has failed to demonstrate that MSC has been unable to obtain the information voluntarily from DOD and NASA. Complaint Counsel further asserts that MSC's requests are not reasonable in scope. In addition, Complaint Counsel argues that *Exxon Corp.*, 95 F.T.C. 919 (1980) requires that any demand for documents directed to another agency proceed first under Section 8 of the FTC Act, 15 U.S.C. § 48.

### III.

Commission Rule 3.36 requires that a motion for the issuance of a subpoena to be served on governmental agencies other than the Commission make a specific showing that (1) the material sought is reasonable in scope; (2) the material falls within the limits of discovery under § 3.31(c)(1); and (3) the information or material sought cannot reasonably be obtained by other means. 16 C.F.R. § 3.36(b). The opinion in *Exxon Corp.*, cited by Complaint Counsel, was issued in June 1980, almost 22 years ago. The Commission has amended its Rules of Practice numerous times and specifically amended Rule 3.36 at least twice since 1980. In no instance did the Commission incorporate the subpoena procedure detailed in *Exxon* in its Rules of Practice governing the applications for subpoenas to be issued to executive agencies. Section 3.36(b) of

the Commission's Rules of Practice is not ambiguous and does not contain a requirement that these requests be certified to the Commission or proceed under Section 8 of the FTC Act.

The material sought appears reasonable in scope. Without an opposition filed by either of the agencies, it is difficult to evaluate the reasonableness of the specifications. It is reasonable for MSC to examine relevant documents and depose individuals identified by Complaint Counsel as trial witnesses in this case. A cursory review indicates that the subpoenas are reasonable in consideration of the designations made by Complaint Counsel of the testimony Complaint Counsel expects these witnesses to provide. Further, MSC has represented that it will work with the agencies to narrow the scope of the subpoenas. MSC is expected to do so.

The material sought appears to fall within the limits of discovery under § 3.31(c)(1). Complaint Counsel does not dispute the relevancy of the requested material. According to MSC, one of its defenses in this litigation is that MSC competes aggressively with others in the FEA solver market. MSC seeks discovery from DOD and NASA to demonstrate DOD's and NASA's experiences as users of FEA solvers. Complaint Counsel, and not MSC, has made the opinions, choices and positions held by the DOD sites and NASA centers a central issue in this case.

Complaint Counsel represents that it has turned over to MSC documents obtained from DOD and NASA. MSC does not know if Complaint Counsel has turned over all of the documents it obtained from DOD and NASA or the scope of Complaint Counsel's search for documents. Fairness dictates that MSC should not be required to rely on the documents collected by and filtered by Complaint Counsel for MSC's defense in this litigation.

According to MSC, Dr. Hilke, Complaint Counsel's economic expert, relies on testimony and documents from DOD witnesses to establish his positions on relevant product market, MSC's pricing both before and after the acquisitions, and whether CSA/Nastran was a viable substitute to MSC.Nastran, and relies on documents from NASA witnesses to establish his positions on competition in the FEA solver market and the viability of UAI and CSAR as substitutes. Also, according to MSC, Dr. Venkayya, Complaint Counsel's technical expert, relied in part on NASA Goddard's solver requirements in developing a list of features a code must contain to be seriously considered as a viable substitute for Nastran. Thus, compelling circumstances in support of issuance of these subpoenas exist due to Complaint Counsel's experts' reliance on documents from these agencies and Complaint Counsel's identification of these individuals as potential trial witnesses.

MSC represented at the April 25, 2002 status conference that it has contacted various government agencies seeking voluntary compliance and that the agencies are prohibited from voluntarily complying with the requests from MSC. Accordingly, MSC has demonstrated that the information or material sought cannot reasonably be obtained by other means.

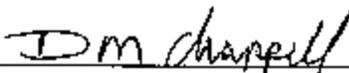
IV.

MSC has made the specific showing required by Commission Rule 3.36(b) in support of its motion for issuance of subpoenas *duces tecum* and subpoenas *ad testificandum* that it seeks to serve on DOD and NASA. Accordingly, MSC's motions for issuance of subpoenas are GRANTED.

DOD and NASA are not required to produce privileged documents or information.

Pursuant to Rule 3.34, in the event that either DOD or NASA seek to limit or quash the subpoenas, they shall have the earlier of ten days after service of the subpoena or the time for compliance therewith to file any such motion. 16 C.F.R. § 3.34(c). MSC shall serve a copy of this order on DOD and NASA at the time it serves the subpoenas. 16 C.F.R. § 3.36(c).

ORDERED:

  
\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

Date: May 9, 2002