

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



_____))
In the Matter of))
MSC.SOFTWARE CORPORATION,) Docket No. 9299
a corporation.))
_____)

**SECOND SUPPLEMENT TO COMPLAINT COUNSEL'S
MOTION TO COMPEL COMPLIANCE WITH
SUBPOENAS AD TESTIFICANDUM AND DUCES TECUM**

Since Monday, when Complaint Counsel filed our first Supplement to the pending Motion to Compel, there have been further developments which demonstrate the need for an order compelling Respondent's current and former employees to appear for depositions. On Tuesday afternoon January 8, 2002, by telephone message and confirming letter from its counsel (Ex. A, Letter of Marimichael O. Skubel), Respondent canceled more of the previously-scheduled depositions of present and former MSC employees and executives. This brings to a total of six the number of cancelled depositions, and leaves only one of the remaining scheduled depositions that Respondent has not cancelled.¹ The cancellations follow Complaint Counsel's January 3 deposition of David Beer, another current employee of Respondent.

Respondent has also belatedly provided Complaint Counsel with its preliminary witness list (Ex.B). Each of the witnesses whose depositions have been cancelled by Respondent (Messrs. Brown, Loewers, Hart, Curry, Cully and Jones) is listed as a prospective trial witness by the Respondent.

¹The one outstanding scheduled deposition that has not been cancelled is that of Mr. Riordan, which is set for Monday January 14. Complaint Counsel intend to proceed with this deposition.

In the letter confirming the most recent cancellations, Respondent's counsel states that "we are not in a position to schedule the remaining depositions of current and former MSC employees" because of dissatisfaction with the discovery provided by Complaint Counsel. Respondent expressly conditions the taking of the depositions on the provision of further discovery by Complaint Counsel.² Complaint Counsel are conferring with Respondent's counsel regarding these discovery issues (Ex. C, letter of Kent Cox, Jan. 9, 2002), but have reached impasse on the production of witnesses for deposition because of Respondent's insistence that Complaint Counsel's right to conduct discovery is contingent on Respondent's satisfaction with the discovery Complaint Counsel provides. (Ex. D, Letter of Karen A. Mills, Jan. 9, 2002).

As noted in the previous supplement to our pending motion, Respondent's conditioning of discovery in this fashion is directly contrary to Rule 3.31 of the Commission's Rules of Practice, which expressly states that "the fact that a party is conducting discovery shall not operate to delay any other party's discovery." 16 C.F.R. § 3.31(a). At the time it adopted this rule, the Commission made clear that it intended the rule to be a means for promptly and fairly moving forward discovery in a litigated case. "The Commission believes that simultaneous discovery prevents an unprepared party from hindering the overall progress of the case, while it allows a prepared party to move forward expeditiously." 61 Fed. Reg. 50640 (1996). Respondent's lack of preparedness, therefore, is not reason to permit it to block Complaint Counsel from preparing our case consistent with the terms of the Scheduling Order.

Although irrelevant to the right to proceed with the scheduled depositions, we note that in

²"Once Complaint Counsel has met its discovery obligations, so that MSC can properly prepare and defend its witnesses, the remaining depositions may proceed." Ex. A, Letter of Marimichael O. Skubel (Jan. 8, 2002).

fact Respondent has been provided by Complaint Counsel with abundant materials for preparation of its defense generally and these depositions in particular. These include:

- Copies of all third-party materials received in response to Commission investigative subpoenas, or voluntarily in lieu of process, in the investigation of this case.
- Complaint Counsel's witness list, which specifies information on more than forty third party witnesses who Complaint Counsel may call at trial, the bulk of whom are employees of MSC customers.
- All verbatim statements of witnesses identified on Complaint Counsel's preliminary witness list.
- All materials received to date in response to outstanding Part 3 subpoenas to third parties.

In addition, of course, Respondent has access to its own business records and the recollection of its employees. With respect to its preparation for the scheduled depositions, Complaint Counsel has for weeks been asking that Respondent, in its own file search for documents responsive to Complaint Counsel's outstanding document request, give priority to files maintained by the witnesses to be deposed and the files for particular MSC customers that were to be inquired about at the depositions. Given this, there is no plausible reason why Respondent cannot be prepared for its own employees to be asked about their own activities on behalf of the company.

By way of contrast, the discovery provided by Respondent since the filing of the Complaint has been meager, to say the least. It has permitted only one of the scheduled depositions of MSC personnel to go forward, and scheduled only one more, despite subpoenas outstanding since late November. Since Monday, when we noted in our first Supplement to the Motion to Compel that no documents had been produced in response to the outstanding document request, Respondent has provided its first document submission. But the submission

so far has consisted of only roughly half a box of materials, containing MSC press releases, analysts' reports about MSC, four North American price books, and a collection of pricing analysis presentations.

The threadbare character of MSC's discovery responses, both in the current litigation and the earlier investigation, is illustrated by last week's deposition of MSC's employee David Beer. As noted in our earlier Supplement, in order to examine Mr. Beer concerning his activities as a sales representative for MSC, Complaint Counsel were forced to use MSC-prepared documents which came from the files of MSC customers. Complaint Counsel would have preferred to examine Mr. Beer using copies of the same documents from MSC's files, but was unable to do so because they have never been produced to Complaint Counsel by MSC, either in the investigative stage of the case or in response to the document request that has been outstanding since before Thanksgiving.

Needless to say, Respondent's cancellation of these depositions overturns its commitment, made to Complaint Counsel and this Court in its response to the pending Motion to Compel, that Respondent would proceed with the scheduled depositions.³ Because Respondent refuses to even discuss dates for rescheduling these depositions so long as Respondent remains unsatisfied with Complaint Counsel's responses to Respondent's discovery, it appears that only an order of this court can compel Respondent's current and former executives and employees to appear. Complaint Counsel therefore request that the Court grant our Motion to Compel

³E.g., MSC Software Corporation's Motion to Quash Subpoenas (Dec. 5, 2001) at 4 n.2; MSC Software Corporation's Opposition to Complaint Counsel's Motion to Compel (Dec. 27, 2001) at 4 ("[t]here is no need to compel the attendance of these deponents given the history of MSC's willingness to negotiate with Complaint Counsel and the lack of any indication that these deponents will fail to appear at their depositions.")

Compliance with the Subpoenas *Ad Testificandum* and *Duces Tecum* for the reasons set forth above and in the papers previously filed. Since Respondent's refusal to produce witnesses has already caused many of the scheduled deposition dates to pass, Complaint Counsel propose that this court issue an Order compelling Respondent to agree to a revised deposition schedule to be completed on or before January 25, 2002.

Respectfully Submitted,



P. Abbott McCartney
Peggy D. Bayer
Kent E. Cox
Karen A. Mills
Patrick J. Roach
Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580
(202) 326-2695
Facsimile (202) 326-3496

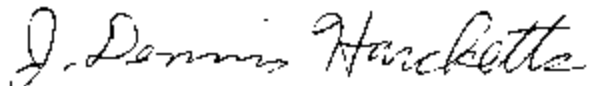
CERTIFICATE OF SERVICE

This is to certify that on January 10, 2002, I caused a copy of the Supplement to Complaint Counsel's Motion to Compel Compliance With Subpoenas *Ad Testificandum* and *Duces Tecum* to be served by hand upon the following persons:

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

Marimichael O. Skubel, Esquire
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5034
Fax (202) 879-5200

Counsel for MSC Software Corporation



J. Dennis Hacketts
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580
(202) 326-2783
Facsimile (202) 326-3496

Exhibit A

KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

655 Fifteenth Street, N.W.
Washington, D.C. 20005

202 879-5000

Facsimile
202 879-5200

Marimichael O Skubel
To Call Writer Directly:
(202) 879-5034
Marimichael_skubel@dc.kirkland.com

January 8, 2002

Via Facsimile

Karen Mills, Esq.
Federal Trade Commission
Bureau of Competition
601 Pennsylvania Avenue, N.W.
Washington, DC 20580

Subject: MSC Software Inc., Docket No. 9299

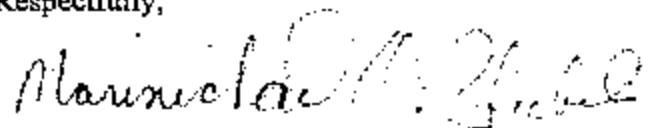
Dear Karen:

This letter confirms that Mr. Riordan will be available for his deposition on January 14, 2002. Please tell us whether you intend to go forward with this deposition.

At this time, we are not in a position to schedule the remaining depositions of current and former MSC employees. As we explain in our January 7th letters to you, Kent Cox, Abbott McCartney and in MSC's *Opposition to Complaint Counsel's Motion to Compel Compliance with Complaint Counsel's First Request for Documents and Things*, Complaint Counsel's non-responses and evasions to MSC's Interrogatories and Complaint Counsel's failure to turn over responsive documents have necessarily forced MSC to cancel the remaining depositions. Complaint Counsel's refusal to provide meaningful discovery precludes MSC from obtaining the due process protection that is critical to a fair hearing. Once Complaint Counsel has met its discovery obligations, so that MSC can properly prepare and defend its witnesses, the remaining depositions may proceed.

We remain ready to work to resolve these issues expeditiously and have specifically sought to – and again offer – to meet face-to-face to discuss the issues presented by your non-responses to the Interrogatories, incomplete response to the Document Request, and your failure to comply with your Initial Disclosure obligations.

Respectfully,



Marimichael O. Skubel

Exhibit B

A. INDUSTRY WITNESSES

MSC Software Corporation

Frank Perna
c/o Tefft W. Smith, Esq.
Kirkland & Ellis
655 Fifteenth Street, NW
Washington, D.C. 20005
(202) 879-5000

Mr. Perna is Chairman and Chief Executive Officer of MSC. MSC expects that Mr. Perna will testify as to at least (a.) the nature and scope of MSC's business, (b.) the highly-competitive nature of the industry, (c.) the general nature and performance of MSC's products, and (d.) the reasons why MSC acquired Universal Analytics, Inc. ("UAI") and Computerized Structural Analysis and Research, Inc. ("CSAR").

Ronny H. Dyer
c/o Tefft W. Smith, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Mr. Dyer is a Senior Director at MSC. MSC expects Mr. Dyer to testify as to at least (a.) the highly-competitive nature of the industry, (b.) the general nature and performance of MSC's products, (c.) the nature and substance of MSC's contract negotiations for the licensing of MSC.NASTRAN and other MSC products in the periods before and after the MSC's acquisitions of UAI and CSAR, and (d.) as of 1999, the ineffectiveness of UAI and CSAR as competitors in the industry.

Michael J. Morgan
c/o Tefft W. Smith, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Mr. Morgan is a Vice President at MSC and former President of UAI. MSC expects Mr. Morgan to testify as to at least (a.) the highly-competitive nature of the industry, (b.) the general nature and performance of MSC's and UAI's products, (c.) as of 1999, the ineffectiveness of UAI as a competitor in the industry, and (d.) the future prospects for UAI had MSC not acquired UAI.

Kenneth D. Blakely
c/o Tefft W. Smith, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Mr. Blakely is a Senior Vice President at MSC. MSC expects that Mr. Blakely will testify as to at least (a.) the highly-competitive nature of the industry, (b.) the reasons why these pressures remain unaffected by MSC's acquisitions of UAI and CSAR, and (c.) as of 1999, the ineffectiveness of UAI and CSAR as competitors in the industry.

David Beer
c/o Tefft W. Smith, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Mr. Beer is a Senior Account Manager at MSC. MSC expects Mr. Beer will testify as to at least (a.) the highly-competitive nature of the industry, (b.) the nature and substance of

MSC's contract negotiations for the licensing of MSC.NASTRAN and other MSC products, and (c.) as of 1999, the ineffectiveness of UAI and CSAR as competitors in the industry.

Todd Brown
c/o Tefft W. Smith, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Mr. Brown is a Senior Sales Representative at MSC. MSC expects Mr. Brown will testify as to at least (a.) the highly-competitive nature of the industry, (b.) the nature and substance of MSC's contract negotiations for the licensing of MSC.NASTRAN and other MSC products, and (c.) as of 1999, the ineffectiveness of UAI and CSAR as competitors in the industry.

Robert Louwers
c/o Tefft W. Smith, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Mr. Louwers is an Account Manager at MSC. MSC expects Mr. Louwers will testify as to at least (a.) the highly-competitive nature of the industry, (b.) the nature and substance of MSC's contract negotiations for the licensing of MSC.NASTRAN and other MSC products, and (c.) as of 1999, the ineffectiveness of UAI and CSAR as competitors in the industry.

Bruce Hart
c/o Tefft W. Smith, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

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Mr. Hart is a Director at MSC. MSC expects Mr. Hart will testify as to at least (a.) the highly-competitive nature of the industry, (b.) the nature and substance of MSC's contract negotiations for the licensing of MSC.NASTRAN and other MSC products, and (c.) as of 1999, the ineffectiveness of UAI and CSAR as competitors in the industry.

George Riordan
c/o Tefft W. Smith, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Mr. Riordan is a Member of MSC's Board of Directors. MSC expects that Mr. Riordan will testify as to at least (a) any presentation to MSC's Board of Directors regarding the acquisitions of UAI and CSAR, (b.) the highly-competitive nature of the industry, and (c.) the nature and scope of MSC's business.

Thomas Cully
c/o Tefft W. Smith, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Mr. Cully is a Senior Account Manager at MSC. MSC expects Mr. Cully will testify as to at least (a.) the highly-competitive nature of the industry, (b.) the nature and substance of MSC's contract negotiations for the licensing of MSC.NASTRAN and other MSC products, and (c.) as of 1999, the ineffectiveness of UAI and CSAR as competitors in the industry.

Thomas Curry
c/o Tefft W. Smith, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Mr. Curry is a former President and Chief Executive Officer of MSC. MSC expects that Mr. Curry will testify as to at least (a.) the nature and scope of MSC's business, (b.) the highly-competitive nature of the industry, (c.) the general nature and performance of MSC's products, and (d.) as of 1999, the ineffectiveness of UAI and CSAR as competitors in the industry.

Edward Jones
c/o Tefft W. Smith, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Mr. Jones is a former Senior Account Manager at MSC. MSC expects Mr. Jones will testify as to at least (a.) the highly-competitive nature of the industry, (b.) the nature and substance of MSC's contract negotiations for the licensing of MSC.NASTRAN and other MSC products, and (c.) as of 1999, the ineffectiveness of UAI and CSAR as competitors in the industry.

OTHERS

Ramakrishna Swarni Narayanswami
c/o Tefft W. Smith, Esq.
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5000

Mr. Narayanswami is the former Chairman and Chief Executive Officer of CSAR. MSC expects Mr. Narayanswami to testify as to at least (a.) the highly-competitive nature of the

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industry, (b.) the general nature and performance of CSAR's products, (c.) as of 1999, the ineffectiveness of CSAR as a competitor in the industry, and (d.) the future prospects for CSAR had MSC not acquired CSAR.

P. Abbott McCartney, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, N.W
Washington, D.C. 20005

Mr. Abbott is an attorney with the FTC. MSC expects Mr. Abbott to testify as to at least (a.) communications between the FTC and MSC's competitors regarding those competitors' objections to MSC's acquisitions of UAI and CSAR, (b.) the motivations for those competitors' complaints, and (c.) how the proposed relief that Complaint Counsel seeks would benefit those competitors.

Kent Cox, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, N.W
Washington, D.C. 20005

Mr. Cox is an attorney with the FTC. MSC expects Mr. Cox to testify as to at least (a.) communications between the FTC and MSC's competitors regarding those competitors' objections to MSC's acquisitions of UAI and CSAR, (b.) the motivations for those competitors' complaints, and (c.) how the proposed relief that Complaint Counsel seeks would benefit those competitors.

Rendall Davis, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, N.W
Washington, D.C. 20005

Mr. Davis is an attorney with the FTC. MSC expects Mr. Davis to testify as to at least (a.) communications between the FTC and MSC's competitors regarding those competitors' objections to MSC's acquisitions of UAI and CSAR, (b.) the motivations for those competitors' complaints, and (c.) how the proposed relief that Complaint Counsel seeks would benefit those competitors.

Peggy D. Bayer, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, N.W
Washington, D.C. 20005

Ms. Bayer is an attorney with the FTC. MSC expects Ms. Bayer to testify as to at least (a.) communications between the FTC and MSC's competitors regarding those competitors' objections to MSC's acquisitions of UAI and CSAR, (b.) the motivations for those competitors' complaints, and (c.) how the proposed relief that Complaint Counsel seeks would benefit those competitors.

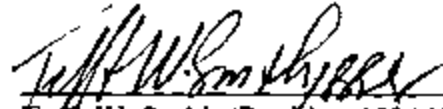
B. WITNESSES DESIGNATED BY COMPLAINT COUNSEL

Respondent MSC may call as a witness in this action any or all of the witnesses or deponents designated by Respondent in either its Preliminary Witness List, Final Witness List, or both.

C. DOCUMENT WITNESSES

Respondent MSC may call as a witness individuals useful and necessary to establish the admissibility of documents produced by such third parties.

Dated: January 7, 2002



Terri W. Smith (Bar No. 458441)

Marimichael O. Skubel (Bar No. 294934)

Michael S. Becker (Bar No. 447432)

Bradford E. Biegon (Bar No. 453766)

Larissa Paule-Carres (Bar No. 467907)

KIRKLAND & ELLIS

655 15th Street, N.W.

Washington, D.C. 20005

(202) 879-5000 (tel.)


(202) 879-5200 (fax)

Counsel for Respondents,
MSC Software Corporation

CERTIFICATE OF SERVICE

This is to certify that on January 7, 2002, I caused a copy of the attached RESPONDENT MSC.SOFTWARE CORPORATION'S PRELIMINARY WITNESS LIST to be served upon the following persons by hand:

Richard B. Dagen, Esquire
Karen Mills, Esquire
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, DC 20580



David S. Shotlander

KIRKLAND & ELLIS
655 15th Street, NW
Washington, D.C. 20005
(202) 879-5000 (tel.)
(202) 879-5200 (fax)

Counsel for Respondents,
MSC.Software Corporation

Exhibit C



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Kent Cox
Attorney
Bureau of Competition

Direct Dial
(202) 326-2058

Via Fax & First Class Mail
January 9, 2002

Tefft W. Smith, Esquire
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Re: Docket No. 9299

Dear Tefft:

We are in receipt of your letter dated January 7, 2002, concerning Complaint Counsel's offer to supplement our responses to MSC's First Set of Interrogatories. Abbott McCartney has asked me to convey that he would be happy to confer with you tomorrow at 3:00 p.m. or Friday at 3:00 p.m. to discuss any issues that you feel remain with regard to MSC's First Set of Interrogatories. Abbott will give you a call to set it up.

Sincerely,

A handwritten signature in black ink, appearing to read "Kent Cox".

Kent Cox
Complaint Counsel

Exhibit D



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Marimichael O. Skubel, Esq.
Kirkland & Ellis
655 15th Street, N.W.
Washington, DC 20005

January 9, 2002

Re: FTC Docket No. 9299

VIA FAX

Dear Ms. Skubel,

We have received your letter of January 8, 2002, cancelling all but one of the scheduled depositions of MSC personnel. This is a modification of the position you took this past weekend, when you asked only for postponement of the three depositions scheduled for this week.

In your most recent letter, you refuse to cooperate with Complaint Counsel's discovery because you are not satisfied with Complaint Counsel's compliance with Respondent's discovery. Refusal to cooperate with Complaint Counsel's discovery on this basis is not permitted by the Rules. The Rules of Practice state that, "[u]nless the Administrative Law Judge orders otherwise, the frequency or sequence of [discovery] is not limited. The parties shall, to the greatest extent practicable, conduct discovery simultaneously; the fact that a party is conducting discovery shall not operate to delay any other party's discovery." 16 C.F.R. § 3.31(a). The Rule is clear. The fact that MSC is conducting discovery cannot be allowed to delay Complaint Counsel's discovery.

My two telephone conversations with you yesterday reveal that we have reached an impasse on this issue, as you continue to insist that Complaint Counsel's right to conduct discovery is contingent upon Respondent's satisfaction with the discovery it obtains from Complaint Counsel. Complaint Counsel intend to supplement the Motion to Compel, to ask that all of the persons scheduled to be deposed appear for deposition on or before January 25, 2002. As to the one deposition you are not now cancelling, we do intend to proceed to take the deposition of Mr. Riordan on January 14, 2002, at 9:30 a.m., as previously scheduled.

Very truly yours,

Karen A. Mills