

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

PUBLIC VERSION



Docket No. 9299

**RESPONDENT MSC.SOFTWARE CORPORATION'S
SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS
MOTION TO COMPEL (BASED UPON COMPLAINT COUNSEL'S
BELATED "REVISED" AMENDED INTERROGATORY ANSWERS)**

This is not a game. This is government litigation firing a headshot at a relatively small corporation for two *de minimus* (one \$6 million, the other \$11 million) acquisitions, demanding not just divestiture of the acquired assets but the expropriation of MSC's flag ship property: MSC.Nastran. (See Complaint "Notice of Contemplated Relief," at 8-9).

Yet, Complaint Counsel -- after admitting on January 7 that its initial interrogatory responses due December 12, 2001, were deficient and promising "to supplement" "on or around January 18th" -- waited until 10:40 Friday night January 25 to email "Complaint Counsel's Revised Responses and Objections to Respondent MSC.Software Corp.'s First Set of Interrogatories" ("Revised Responses"), attached as Exhibit A, only *after* Complaint Counsel had already received and reviewed MSC's Motion to Compel, filed that afternoon.¹

¹ Notably, although Complaint Counsel also promised "supplemental" responses to MSC's document requests -- again initially due on December 21, and also subject to MSC's January 25 Motion to Compel, Complaint Counsel still has made *no* effort at curing any of the deficiencies identified in MSC's letter of January 7, 2002.

This is game playing, plain and simple. The Revised Responses underscore Complaint Counsel's intent to hide the critical issues of market definition and competitive effects behind a wall of vague generalities punctuated by qualifiers like "such as" and "including."

In addition, Complaint Counsel continues the game of preventing MSC from being able to consult with counsel to prepare its defense. Despite containing *no* specific confidential information, *each page* of the Revised Responses -- as had been the "initial" Responses -- are improperly designated "ATTORNEY EYES ONLY." As such, under the protective order, MSC counsel *cannot* even discuss these "responses" with its client, thereby effectively foreclosing any ability to prepare a defense in consultation with MSC personnel. As demanded in MSC's December 28, 2001, letter, Complaint Counsel must put its contentions on the public record and allow MSC to test them with its client.

As detailed below, Complaint Counsel's Revised Responses -- which it took them a month and a half to produce -- remain deficient for all the reasons set forth in MSC's January 25 Motion to Compel and in MSC's December 28, 2001, letter incorporated by reference therein.

First, Complaint Counsel continues to dodge its responsibility to describe the "metes and bounds" of the relevant product market. (See Revised Responses at Nos. 2, 3, & 4 (attached as Exhibit A)). Complaint Counsel continues to combine qualifiers and generalities in its "responses" to interrogatories seeking the boundaries of the relevant product market -- "advanced versions of Nastran" -- alleged in the complaint.

Complaint Counsel's "revised" articulation of the relevant product market -- "a high level of advanced functionality and a wide range of features and at higher prices" -- uses more words, but still fails to provide the precision mandated in an FTC adjudicatory proceeding. Thus, in *R.R. Donnelly*,

Complaint Counsel identified the relevant product market *not* simply as “gravure printing with higher volumes than other printing runs,” but specifically as “high volume publication gravure printing,” which is approximated by four-color gravure printing jobs with at least five million copies, at least sixteen pages, and fewer than four four-color versions (or the equivalent in one-color versions).” *In re R. R. Donnelly & Sons Co.*, No. 9243, 1995 WL 461663 (F.T.C. July 21, 1995).

In order for MSC to conduct discovery, work with experts, and prepare its defense, Complaint Counsel must likewise specify here what “linear structural solution” jobs MSC.Nastran (and UAI and CSAR) are alleged to be uniquely situated to perform. But Complaint Counsel continues to refuse to identify *which* of the “numerous grounds including features, capabilities, types of analyses performed, price level, ease of use, speed, size, complexity of problem that can be analyzed, . . . ability to perform system-type analysis, availability of implementing software, computer platform and operating system[s] in which the solver operates and record reliability” *differentiate* MSC.Nastran from the other “advanced linear structural solvers” offered by ANSYS, HKS, Dassault and others in its ability “to solve large problems with a large number of degrees of freedom.” (See Revised Responses at No. 3 (attached as Exhibit A)).

Thus, if Complaint Counsel’s Revised Responses allege that the market is limited to “the level and speed of performance and the size of model that can be analyzed,” it must provide sufficient detail about what those level, speed, and size constraints are. Just as Complaint Counsel was required to define “large printing jobs” in *R.R. Donnelly* as “at least five million copies, at least sixteen pages, and fewer than four four-color versions (or the equivalent in one-color versions),” so must Complaint Counsel now state *what* “linear structural solution” jobs MSC.Nastran (and UAI and CSAR) are alleged to be uniquely situated to perform. For example, what number of degrees of freedom

constitute a large problem? And, does Complaint Counsel contend -- as they did in *R.R. Donnelly* -- that MSC can price discriminate to those customers (*i.e.* charge a higher price)?

Second, Complaint Counsel may not continue to use qualifying language to avoid disclosing information. Throughout its responses, Complaint Counsel sprinkles the terms: “including,” “such as,” “for example,” “many users,” “among others,” and “as well as other factors.” Complaint Counsel’s efforts to hide behind these qualifiers -- and avoid providing whatever factual information it possesses supporting the allegations in its complaint -- must be rejected.

Third, if Complaint Counsel has no information to support a particular allegation, it must say so. To be sure, MSC has believed since this investigation began that Complaint Counsel has *no* evidence for many of the allegations in its complaint. Accordingly, MSC served interrogatories requiring Complaint Counsel to identify the specific factual information it had to support those allegations.

Complaint Counsel’s “responses,” rather than allowing any narrowing of the issues for discovery and trial in this case, resort to a mix of generalities about “users” (without identifying any of them) and self-serving statements about “MSC’s documents” and “third party documents” (without ever identifying any specific document).

For example, in Interrogatory No. 15, MSC seeks “each instance in which any person paid a higher price for any relevant product sold or licensed by MSC” or any other anticompetitive conduct resulting from the acquisitions at issue. In response, Complaint Counsel simply states: “Complaint Counsel *need not show at trial* that Respondent has actually exercised enhanced market power,” and “Respondent *may have* exercised such enhanced market power.”

If Complaint Counsel has *no* concrete examples of anticompetitive effects at this time, Complaint Counsel must say so. *See, e.g., Princeton Mgmt. Corp. v. Assimakopoulos*, No. 91 Civ. 5192, 1992 WL 84552, at *1 (S.D.N.Y. Apr. 10, 1992) (“If defendant does *not* know the answer to any portion of the questions asked, she must so state under oath in response to the specific interrogatory. . . .”); *Harlem River Consumers Co-op., Inc. v. Associated Grocers*, 64 F.R.D. 459, 465 (S.D.N.Y. 1974) (responding party’s “duty is to state the facts it will rely on and if it does not have any further information to say so”) (emphasis added).

Fourth, Complaint Counsel continues to refuse to provide complete information about who it gathered information from during its investigation. Complaint Counsel’s Revised Response to Interrogatory No. 1 still falls well short of its obligations. While Complaint Counsel now provides a list of the companies for which Complaint Counsel provided documents to MSC, Complaint Counsel still refuses to provide three key pieces of information: (i) what persons or departments were involved; (ii) the source of the verified statements that Complaint Counsel continues to withhold from MSC; and (iii) the persons and companies contacted that the FTC did not seek documents from, but who nevertheless provided the FTC with information during the investigation.

In a glaring example of gamesmanship, Complaint Counsel identifies ANSYS products as being outside the “advanced Nastran” relevant product market, and as a potential acquirer of UAI and CSAR, yet ANSYS is *not* identified in response to Interrogatory No. 1. While Complaint Counsel’s response would have everyone believe that ANSYS has not been involved in Complaint

Counsel's or the FTC's investigation in any way, the fact of the matter is that Complaint Counsel is simply gaming its response to withhold key information.²

Fifth, Complaint Counsel cannot continue to rely on documents without specifically identifying them. Complaint Counsel continues to avoid responding by relying *improperly* on vague and general references to documents. For example, in response to Interrogatory No. 2, Complaint Counsel makes reference to as "Respondent's employees and documents show" with *no* specific citations or document identification. As discussed in MSC's opening brief, both Rule 3.35(c) and the applicable case law are crystal-clear on this point. Complaint Counsel must identify the documents at issue with specificity. *See, e.g.,* 16 C.F.R. 3.35(c) ("[t]he specification *shall* include *sufficient detail* to permit the interrogating party *to identify* readily the *individual documents* from which the answer may be ascertained") (emphasis added).

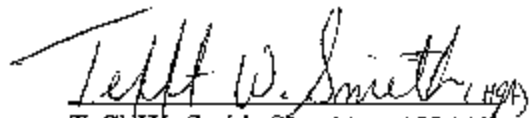
Sixth, Complaint Counsel's "Revised Responses" fail to identify exculpatory evidence or provide a privilege log. Complaint Counsel's Revised Responses do nothing to change the fact that its objection to providing exculpatory evidence in its possession is misplaced and contrary to controlling case law. (See MSC's Motion to Compel Mem.). Similarly, Complaint Counsel -- directly in the face of FTC Rule 3.38A -- continues to refuse to provide a privilege log so that MSC and Your Honor can better assess the mass of documents that are being withheld on alleged "privilege" grounds. *See* 16 C.F.R. § 3.38A (stating that "[a]ny person withholding material ... shall, if so directed in the ... request for production, submit ... a schedule of the items withheld").

² Not surprisingly, ANSYS admitted that it competes with MSC.Nastran across the board for new customers. (See Jan. 25, 2002 MSC's Mem. In Opp'n. to ANSYS Mot. for a Protective Order).

Therefore, despite -- and, indeed, because of -- Complaint Counsel's "revised interrogatory responses," MSC continues to seek the relief identified in its brief in support of its Motion to Compel.

Moreover the fact that Complaint Counsel did *not* simply add information to its December Responses -- but affirmatively abandoned many of its earlier "responses," substituting new ones -- is an acknowledgment of the inadequacy of the Interrogatory Responses Complaint Counsel has rested on for the past two months. The now-abandoned Interrogatory Responses -- combined with Complaint Counsel's refusal to provide proper responses -- has delayed and prejudiced MSC's ability to develop its defense. As a result of this and other delays, MSC will be seeking an extension of the trial schedule.

Respectfully submitted,



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Dated: January 31, 2002

CERTIFICATE OF SERVICE

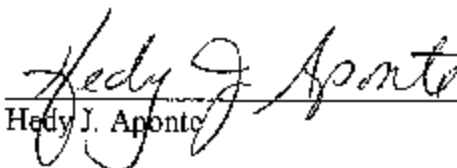
This is to certify that on January 31, 2002, I caused a copy of the attached "**Public Version**" of Respondent MSC Software Corporation's Supplemental Memorandum in Support of its Motion to Compel (Based Upon Complaint Counsel's Belated "Revised" Amended Interrogatory Answers) to be served upon the following persons by hand:

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COMPLAINT COUNSEL'S REVISED RESPONSES AND OBJECTIONS
TO RESPONDENT MSC.SOFTWARE CORPORATION'S
FIRST SET OF INTERROGATORIES

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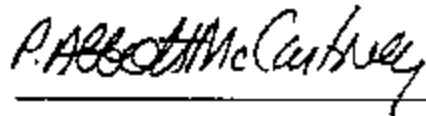
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FTC Docket No. 9299

CERTIFICATE OF SERVICE

This is to certify that on January 25, 2002, I caused a copy of Complaint Counsel's Revised Responses and Objections to Respondent MSC Software Corporation's First Set of Interrogatories to be served via facsimile transmission and followed by hand-delivery of a copy to the following person:

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