UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

ORDER DENYING MOTION FOR PROTECTIVE ORDER AND GRANTING MOTION TO COMPEL DEPOSITIONS

I.

On April 30, 2002, Respondent MSC.Software Corporation ("MSC") filed a motion for a protective order to preclude Complaint Counsel from taking the depositions of six MSC senior executives. On May 2, 2002, MSC filed a second motion for a protective order to preclude Complaint Counsel from taking the deposition of the former CEO of Computerized Structural Analysis Research Corporation ("CSAR"). Complaint Counsel filed an opposition to both motions on May 3, 2002.

On May 1, 2002, Complaint Counsel filed a motion to compel MSC to produce for deposition six MSC senior executives and the former CEO of CSAR. MSC filed an opposition to this motion on May 3, 2002.

These motions and oppositions all address the same six MSC executives and one former executive of CSAR. For the reasons set forth below, MSC's two motions for protective orders are DENIED. Complaint Counsel's motion to compel is GRANTED.

II.

MSC argues that Complaint Counsel should be precluded from taking the depositions of these seven individuals because this discovery is unduly burdensome and cumulative. MSC asserts that Complaint Counsel has already taken the depositions of 14 MSC employees and has conducted investigational hearings of 5 of these 7 individuals during the investigatory stage of this litigation. MSC further asserts that two of the six executives are no longer on MSC's witness list and that MSC does not intend to call these two at trial. With respect to the founder and former CEO of CSAR, MSC asserts that forcing this individual to appear and MSC to defend its interests is unduly burdensome and cumulative. MSC argues that, with only one month remaining until the close of discovery, it should not be forced to expend its strained resources on

defending these depositions since, of Complaint Counsel's 24 listed witnesses, MSC has deposed only 2 and since Complaint Counsel has had ample opportunity to gather relevant information from MSC. MSC further asserts that because Complaint Counsel has received 280 boxes of documents from MSC, has talked to 46 third parties, and has taken the sworn testimony of 33 people, the depositions of these 7 individuals would be unduly cumulative.

In the alternative, MSC seeks an order limiting the depositions to the MSC executives that will be called at trial, that the depositions be held at the convenience of MSC, and that the depositions be limited to one seven hour day for each witness.

Complaint Counsel argues that each of the depositions it seeks to take will yield information that is relevant to the allegations of the complaint, the proposed relief, or to MSC's defenses. Complaint Counsel further argues that, although FTC counsel previously conducted investigational hearings of 5 of the 7 individuals, the proposed deponents have relevant information about documents Complaint Counsel has subsequently received and about recent developments in MSC's pricing decisions and alliances.

III.

Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, the proposed relief, or to the defenses of any respondent. 16 C.F.R. § 3.31(c)(1). Parties' requests for relevant discovery may be limited, however, if the discovery sought is unreasonably cumulative or duplicative, or if the burden and expense of the proposed discovery outweigh its likely benefit. 16 C.F.R. § 3.31(c)(1). In addition, an Administrative Law Judge may enter a protective order to protect a party from undue burden or expense. 16 C.F.R. § 3.31(d).

Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied. *Schering Plough Corp.*, 2001 FTC LEXIS 105, *3 (July 6, 2001); *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). A party seeking to quash a deposition in its entirety has a heavy burden of demonstrating good cause. *Bucher v. Richardson Hospital Authority*, 160 F.R.D. 88 (N.D. Tex. 1994). The fact that these deponents may be busy corporate executives does not protect them from being deposed. See *Arkwright Mutual Ins. Co. v. National Union Fire Ins. Co.*, 1993 U.S. Dist. LEXIS 1163, *6-7 (S.D.N.Y. Feb. 4, 1993); *CBS, Inc. v. Ahern*, 102 F.R.D. 820, 822 (S.D.N.Y. 1984).

MSC does not dispute that the proposed individuals have relevant information. Instead, MSC argues that the depositions are "not critical" or "not necessary." Complaint Counsel has demonstrated that the depositions would yield relevant information. The fact that Complaint Counsel has taken the depositions of 14 other MSC employees and now seeks to depose 6 more does not rise to the level of unduly cumulative, especially where 5 of the 7 proposed deponents are on MSC's witness list.

Simply because Complaint Counsel has investigational hearing transcripts of 5 of the 7 individuals taken during the Part II investigational stage is not a basis for precluding Complaint Counsel from taking the depositions of these individuals during the Part III litigation. *Hoechst Marion Roussel, Inc.*, 2000 WL 33596436 (F.T.C. Oct. 12, 2000) (*citing All-State Indus.*, 72 F.T.C. 1020, 1023-24, 1967 FTC LEXIS 159, *6-10 (Nov. 13, 1967) (The Commission, in explaining the different purposes of *pre*-complaint *investigation* versus *post* complaint *discovery* procedures pursuant to the rules for adjudicatory proceedings, held "complaint counsel may properly find, particularly after the issues are refined in a prehearing conference, that some additional documentation may be required to *round out, extend, or supply further details* for the particular transactions to be pursued.")). Contrary to MSC's characterization of the deposition of the former CEO of CSAR that Complaint Counsel seeks as a "second deposition," Complaint Counsel has not previously taken his deposition and is not prevented from doing so now on the grounds that FTC counsel previously conducted an investigational hearing of him. *Hoechst Marion Roussel, Inc.*, 2000 WL 33596436 (F.T.C. Oct. 12, 2000).

Further, simply because MSC does not intend to call 2 of the 6 MSC executives at trial is not a reason to preclude depositions. The inquiry is whether a proposed depositions are "reasonably expected to yield information within the scope of discovery under § 3.31(c)(1)." 16 C.F.R. § 3.33(a). Where the proposed deponent is also a proposed trial witness, the reasons for ordering such depositions are even more compelling.

IV.

Complaint Counsel has demonstrated that the depositions of these seven individuals are reasonably expected to yield information relevant to the allegations of the complaint. MSC, as the party moving for a protective order, has failed to carry its burden of demonstrating good cause why these individuals should not be deposed. Accordingly, MSC's motions for protective orders are DENIED. Complaint Counsel's motion to compel the depositions of these same seven individuals is GRANTED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: May 8, 2002