

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

Docket No. 9299

**THIRD PARTY HARRY SCHAEFFER'S MOTION TO QUASH
SUBPOENA SERVED BY MSC SOFTWARE CORPORATION**

Third Party Dr. Harry Schaeffer moves pursuant to Rule 3.34(c) of the Federal Trade Commission's Rules of practice (the "Rules") to quash the Subpoena *Ad Testificandum* issued by MSC. Software Corporation ("MSC") scheduled for May 28, 2002. Relief is appropriate due to the incredibly short notice given (just 6 days, only 3 of which are not weekend or holiday days), and the virtual impossibility of compliance under the terms provided. Counsel for Dr. Schaeffer and MSC have met and conferred in accordance with Rule 3.22 in an attempt to resolve this matter and have been unable to do so.

I. INTRODUCTION

Yesterday, on May, 21 2002, Dr. Schaeffer and I received a Subpoena *Ad Testificandum* issued by MSC. [Exh. A to Porter Affidavit]. The subpoena requires that he allow his deposition to be taken in Washington D.C. on May, 28 2002, only six days from the date he received the subpoena. Due to the short notice, and the impending three day

weekend, and the fact that Dr. Schaeffer is out of state all this week, there is simply no way that Dr. Schaeffer and his attorney can prepare for and attend the deposition. [Porter Affidavit, ¶¶ 3-5].

In an effort to resolve the problems arising from this short notice, Counsel for Dr. Schaeffer immediately sent a letter the same day (May 21, 2002) explaining the problems, and suggesting that MSC set the deposition for a later date, as well as arrange for it to be taken in Los Angeles, where Dr. Schaeffer and his Counsel reside. [Exh. B to Porter Affidavit]. Counsel for MSC responded with a letter agreeing to take the deposition in Los Angeles, but refusing to set it for a reasonable, later date, citing problems with a discovery cut off apparently set by the court. [Exh. C to Porter Affidavit].

Moreover, in that letter, Counsel for MSC attempted to shift to Dr. Schaeffer the burden of resolving MSC's timing problem relating to a discovery cutoff, suggesting that if *Dr. Schaeffer* would negotiate with Complaint Counsel (apparently for the benefit of MSC) and get them to agree to an extension of the discovery cut-off, or obtain a similar order from this Court, only then would MSC agree to schedule the deposition at a later date. [Exh. C to Porter Affidavit]. Again, Dr. Schaeffer is not a party to these proceedings and under any set of circumstances, he should not be expected to suffer as a result of the problems associated with MSC's discovery schedule, nor expend his resources to resolve them.

And to the extent MSC desires additional time to complete its discovery in a way that does not unduly prejudice and inconvenience third parties, MSC should request that

relief directly either from Complaint Counsel or the Court.

II. RELIEF REQUESTED

Dr. Schaeffer seeks an order that will quash the Subpoena Ad Testificandum issued by MSC.

Alternatively, Dr. Schaeffer Requests that if his deposition is to be taken, MSC should be required to give reasonable notice (at least ten days), preferably on a mutually convenient date in Los Angeles.

III. ARGUMENT

A. MSC has clearly given insufficient notice of the requested deposition and Dr. Schaeffer cannot reasonably be available on the requested date.

By subpoenaing Dr. Schaeffer with only six days notice, MSC has put Dr. Schaeffer and his counsel in an impossible position. The limited days Dr. Schaeffer and his counsel have to prepare include two weekend days and a Federal holiday. Not counting the day of receipt, this leaves Dr. Schaeffer and his counsel *only three days to prepare*. However, Dr. Schaeffer is out of town for this entire week and unable to meet with counsel on any of those few days. [Porter Affidavit ¶ 3].

It is simply impossible for Dr. Schaeffer to comply with this subpoena given the ridiculously short notice provided by MSC. Furthermore, it is not reasonable to expect him to do so. Dr. Schaeffer cannot be expected to appear for deposition in this or any case without a fair opportunity to prepare and plan for it, and he would be prejudiced if forced to do so. [Porter Dec., ¶¶3-5].

B. It is not Dr. Schaeffer's Responsibility to Clean up MSC's Discovery Problems.

In MSC's letter of May 21, 2002, (Exh. B) Counsel for MSC writes, "If you would like to hold the deposition after May 28th, you will either have to convince Complaint Counsel or obtain an order from the FTC administrative Law Judge permitting the deposition to be held at a later date." We take issue with MSC's apparent belief that it can use the subpoena power of this Court to shift to third parties the burdens associated with its own last-minute discovery. Accordingly, we respectfully decline the invitation to resolve the problems resulting from MSC's failure to conduct its discovery at an earlier date. Dr. Schaeffer is not a party to this action (though his name and position in the relevant industry has been known by MSC since before the case was even filed), and the fact that MSC is running up against a discovery deadline for failing to take the deposition sooner simply should not be Dr. Schaeffer's problem. It is not our responsibility to cure scheduling problems created by MSC's late served subpoena, and the unnecessary expense and inconvenience we've already experienced in being forced to bring this motion is prejudice enough.


IV. Conclusion

Dr. Schaeffer has clearly received inordinately short notice of his deposition. He

and his counsel are unable to prepare for and are not available to attend the deposition on the indicated date. The subpoena should be quashed.

DATED: May 22, 2002

Respectfully submitted,
HILL, FARRER & BURRILL LLP

By: 

PAUL M. PORTER
CA Bar No. 155852

300 South Grand Avenue
37th Floor
Los Angeles, California 90071
Telephone: (213)-620-0460
Facsimile: (213)624-0460

Attorneys for Dr. Harry Schaeffer

:\D\MAIL\HILL\MAIL\429427.j

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

**AFFIDAVIT OF PAUL M. PORTER IN SUPPORT OF THIRD-PARTY
HARRY SCHAEFFER'S MOTION TO QUASH SUBPOENA AD
TESTIFICANDUM SERVED BY MSC.SOFTWARE CORPORATION**

State of California)
) ss
Los Angeles County)

PAUL M. PORTER, being duly sworn, deposes and says:

1. My name is Paul M. Porter. I am an attorney at law licensed before the Supreme Court of California and the United States District Court for the Central and Southern Districts of California. I am the attorney for Dr. Harry Schaeffer and Schaeffer Automated Simulations LLC.

2. On May 21, 2002 I received a copy of the Subpoena *Ad Testificandum* issued by MSC.Software ("MSC) Corporation. A true and correct copy is attached as "Exhibit A."

3. Dr. Schaeffer is out of the state all this week. Given that fact, and due

to other commitments both he and I have on May 28, 2002, we are unable to prepare for and attend a deposition on May 28, 2002, even if it is held in Los Angeles. In addition, the short notice provided would require both Dr. Schaeffer and I to forego the upcoming holiday weekend to try to prepare for the deposition, all for no other reason than that MSC apparently waited until the eleventh hour before completing its discovery.

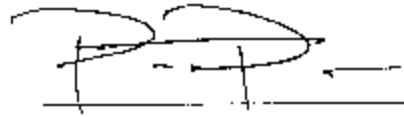
4. I am generally familiar with the issues involved in the above-referenced litigation. Dr. Schaeffer and Schaeffer Automated Simulations LLC are well known names within the industry that is at issue in the litigation, and counsel for MSC has advised me that Dr. Schaeffer's name appears on the witness list that was provided some time ago in that case by the Federal Trade Commission.

5. Given Dr. Schaeffer's current absence from the State, and his need to first return to California, dig through the pile of business that has amassed as a result of his absence, and then spend his weekend trying to both recover from his travels and prepare for the deposition, and then spend Tuesday in a deposition rather than attending to his business, it is clear to me that we Dr. Schaeffer would be prejudiced if forced to attend a deposition in the above-captioned case without more time to prepare and plan.

4. On May 21, 2002 I sent a letter, via facsimile, to Counsel for MSC explaining these problems and requesting that Dr. Schaeffer's deposition be scheduled for a later date. A true and correct copy is attached hereto as "Exhibit B."

5. May 21, 2002 Counsel for MSC responded by facsimile. A true and correct copy is attached hereto as "Exhibit C."

FURTHER, affiant sayeth not.



A stylized handwritten signature in black ink, consisting of a large 'P' followed by a horizontal line and a vertical line, all connected by a single stroke.

Paul M. Porter, Esq.

Sworn to and subscribed before me on this ___ day of May, 2002.

Carol Yuson-Mitchell

[Notary Public]





SUBPOENA AD TESTIFICANDUM

Issued Pursuant to Rule 3.34(a)(1), 16 C.F.R. § 3.34(a)(1) (1997)

1. TO
 Harry G. Schaeffer
 2400 N. Lincoln Ave.
 Altadena, CA 91001

Harry G. Schaeffer
 c/o Paul M. Porter
 Hill, Farrer & Burrill LLP
 One California Plaza, 37th Floor,
 300 South Grand Avenue
 Los Angeles, California 90071

2. FROM
 UNITED STATES OF AMERICA
 FEDERAL TRADE COMMISSION

This subpoena requires you to appear and give testimony, at the date and time specified in Item 5, at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

3. PLACE OF HEARING
 Kirkland & Ellis
 655 15th Street, NW
 Washington, DC 20005
 (or mutually agreed upon location)

4. YOUR APPEARANCE WILL BE BEFORE
 Colin R. Kass

5. DATE AND TIME OF HEARING OR DEPOSITION
 May 28, 2002, at 8:30 a.m.

6. SUBJECT OF PROCEEDING
 In the matter of MSC Software Corporation, Docket No. 9299

7. ADMINISTRATIVE LAW JUDGE
 The Honorable D. Michael Chappell
 Federal Trade Commission
 Washington, D.C. 20580

8. COUNSEL REQUESTING SUBPOENA
 Colin R. Kass
 Counsel to Respondent MSC Software Corporation
 655 15th Street, NW
 Washington, DC 20005
 (202) 879-5000

DATE ISSUED
 MAY 17 2002

SECRETARY'S SIGNATURE

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

CERTIFICATE OF SERVICE

This is to certify that on May 20, 2002, I caused a copy of the attached Subpoena Ad Testificandum Issued on Behalf of Respondent *MSC Software Corporation* to Harry Schaeffer of Schaeffer Automated Simulation to be sent by facsimile and Federal Express, upon the following person for service:

Harry G. Schaeffer
Schaeffer Automated Simulation
2400 N. Lincoln Ave.
Altadena, CA 91001

Harry G. Schaeffer
c/o Paul M. Porter
Hill, Farrer & Burrill LLP
One California Plaza, 37th Floor,
300 South Grand Avenue
Los Angeles, California 90071

This is to further certify that on May 20, 2002, I caused a copy of the attached Subpoena Ad Testificandum Issued on Behalf of Respondent *MSC Software Corporation* to Harry Schaeffer of Schaeffer Automated Simulation to be served by hand delivery, upon the following persons:

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

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

P. Abbott McCartney
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, DC 20580



Colin R. Kass
Kirkland & Ellis
655 15th Street, N.W.
Washington, DC 20005
Phone: (202) 879-5172
Facsimile: (202) 879-5200

HILL, FARRER & BURRILL LLP
 A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

ATTORNEYS AT LAW • ESTABLISHED IN 1923

ONE CALIFORNIA PLAZA, 27TH FLOOR
 300 SOUTH GRAND AVENUE, LOS ANGELES, CALIFORNIA 90071-3147
 TELEPHONE: (213) 620-9440
 FACSIMILE: (213) 624-4840
 WWW.HFBLLP.COM

A.J. HILL (1894-1973)
 WM. M. FARRER (1894-1973)
 STANLEY B. BURRILL (1901-1997)

Docket Dial: (213) 621-0800
 E-MAIL: ACFAX@HFBLLP.COM

May 21, 2002

VIA FACSIMILE AND U. S. MAIL

Colin Kass, Esq.
 Kirkland & Ellis
 655 Fifteenth Street, N.W.
 Washington D.C. 20005

Re: In the Matter of MSC Software Corporation
Docket No. 9299 (E.T.C.)

Dear Mr. Cass:

I received today your subpoena for the deposition of Dr. Harry Schaeffer at your office in Washington D.C. on Tuesday, May 28, 2002. Unfortunately, neither Dr. Schaeffer nor I are available to attend the deposition in Washington D.C. on such short notice, much less to travel on a holiday weekend. And beyond our unavailability, it would be impossible for Dr. Schaeffer and I to get together to prepare for the May 28 deposition. Specifically, it is Tuesday today, and Dr. Schaeffer is out of state all of the rest of the week. Monday is a holiday, and you've set the deposition in Washington D.C. the day after that. Though we recognize your right to conduct discovery, we hope you recognize our right to be provided with sufficient time to plan and prepare for the deposition. The minimal notice you provided is simply inadequate.

In addition, we also expect that if there is going to be a deposition of Dr. Schaeffer, that deposition will be conducted in Los Angeles where Dr. Schaeffer and I reside. The inconvenience and lost time involved in Dr. Schaeffer and I traveling to Washington D.C. for a deposition in your case would be significant, as would the monetary expense of that trip, the attorneys fees, etc. For convenience, you may use my office in Los Angeles for the rescheduled deposition if you like.

As I've advised, we will attend a deposition on a mutually convenient date in Los Angeles if we are provided sufficient notice. In this regard, we are willing to work with you toward scheduling a date

Colin Kass, Esq.
May 21, 2002
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for the deposition that would provide us with ample opportunity to plan and prepare for it. Please contact me with your available dates for the deposition.

I trust that we will be able to find a mutually convenient date for the deposition, and toward that end I look forward to hearing from you.

Very truly yours,



PAUL M. PORTER
OF
HILL, FARRER & BURRILL LLP

cc: Alfred M. Clark, III, Esq.
Dr. Harry G. Schaeffer

KIRKLAND & ELLIS

Fax Transmittal

655 Fifteenth Street, N.W.
Washington, D.C. 20005-5793
Phone: (202) 879-5000
Fax: (202) 879-5200

Please notify us immediately if any pages are not received

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**IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR,
PLEASE NOTIFY US IMMEDIATELY AT:
(202) 879-5000.**

To:	Paul Porter, Esq.	From:	Hedy J. Aponte
Company:	Hill, Farrer & Surrill, LLP	Fax #:	(202) 879-5200
Fax #:	(213) 624-4840	Direct #:	(202) 879-5982
Direct #:	(213) 621-0820	Date:	May 21, 2002
Pages:	6 (including this cover sheet)		

Message:

KIRKLAND & ELLIS
PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

665 Fifteenth Street, N.W.
Washington, D.C. 20005-5763

Colin R. Kass
To Call Writer Directly:
(202) 879-5172
colin_kass@dc.kirkland.com

(202) 879-5000

*facsimile:
(202) 879-5200

May 21, 2002

VIA FACSIMILE

Paul Porter, Esq.
Hill, Farrer & Burrill LLP
One California Plaza, 37th Floor
300 South Grand Avenue
Los Angeles, CA 90071

Dear Paul:

I write in response to your letter of earlier today, which I am enclosing for Complaint Counsel's benefit. As I indicated in my voicemail to you yesterday, I issued the subpoena because you indicated last Thursday that you would not be making Mr. Schaeffer available, despite your earlier representations that you would make him available. During that discussion on Thursday, you indicated that Mr. Schaeffer's current position was that he would only make himself available if subpoenaed for a deposition. At that point, I asked you to provide possible dates to hold that deposition. Hearing nothing, I issued the subpoena for the last day of the fact discovery period.

Your letter indicates that May 28th is not acceptable, and that you would like to schedule the deposition at a later point. MSC is not opposed to holding the deposition after the close of the discovery period, but Complaint Counsel has insisted on a showing of good cause to hold depositions after May 28th.¹ If you would like to hold the deposition after May 28th, you will either have to convince Complaint Counsel or obtain an order from the FTC Administrative Law Judge permitting the deposition to be held at a later date.

As for the location of the deposition, while the deposition is noticed for the Washington Offices of Kirkland & Ellis or "at a place to be agreed upon," as I indicated to you in yesterday's voicemail, MSC would be happy to hold the deposition in Los Angeles. Accordingly, once the issue of the date is resolved – be it May 28th, which we will assume for the present and insist upon absent

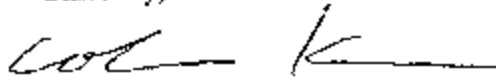
¹ If you decide to pursue discussions with, and are successful in convincing, Complaint Counsel to agree to post-pone the deposition until after May 28th, MSC suggests June 3rd or 4th as acceptable alternative dates.

KIRKLAND & ELLIS

Paul Porter, Esq.
May 21, 2002
Page 2

some agreement from Complaint Counsel, or some other date – we will plan on holding the deposition in your offices.

Sincerely,

A handwritten signature in black ink, appearing to read "Colin R. Kass". The signature is written in a cursive style with a long horizontal stroke at the end.

Colin R. Kass

cc: Peggy D. Bayer, Esq.

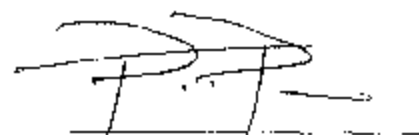
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

STATEMENT OF PAUL M. PORTER, ESQ. PURSUANT TO SECTION 3.22(F) OF THE CODE OF FEDERAL REGULATIONS

I am a partner at the law firm of Hill, Farrer & Burrill LLP, 300 South Grand Ave, 37th Floor, Los Angeles, California 90071. I submit this statement pursuant to Rule 3.22(f) of the Federal Trade Commission's Rules of practice, 16 C.F.R. Section 3.22(f), in connection with Dr. Harry Schaeffer's Motion to Quash the subpoena issued by MSC. On Monday May 21, I met and conferred with counsel for MSC via voicemail and facsimile in a good faith effort to resolve by agreement the issues raised by the accompanying Motion to Quash, yet was unable to reach agreement. Specifically I corresponded with Colin R. Kass of the law firm of Kirkland & Ellis, all as explained in my affidavit concurrently filed with the Motion to Quash.

Dated: May 22, 2002



Paul M. Porter, Esq.

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

[Proposed] ORDER

AND NOW, this ___ day of _____, 2002, upon consideration of Third Party Dr. Harry Schaeffer's Motion to Quash Subpoena *Ad Testificandum* Served by MSC. Software Corporation, it is hereby ORDERED, that said motion is GRANTED.

D. Michael Chappell

Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that on May 22, 2002, I caused copies of the attached **THIRD PARTY HARRY SCHAEFFER'S MOTION TO QUASH SUBPOENA SERVED BY MSC.SOFTWARE CORPORATION, STATEMENT OF PAUL M. PORTER, ESQ. PURSUANT TO SECTION 3.22(F) OF THE CODE OF FEDERAL REGULATIONS, AFFIDAVIT OF PAUL M. PORTER IN SUPPORT OF THIRD-PARTY HARRY SCHAEFFER'S MOTION TO QUASH SUBPOENA AD TESTIFICANDUM SERVED BY MSC.SOFTWARE CORPORATION** and [Proposed] **ORDER** to be served via facsimile and/or Federal Express, upon the following:

Federal Express Only

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

Federal Express Only

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

Federal Express and Fax

P. Abbott McCartney, Esq.
Peggy D. Bayer, Esq.
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, DC 20580
Fax: (202) 326-3496

Federal Express and Fax

Colin R. Kass, Esq.
Kirkland & Ellis
655 15th Street, N.W.
Washington, DC 20005
Fax: (202) 879-5200

Federal Express Only

Hon. Michael D. Chappell
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

This is to further certify that copies of the attached **THIRD PARTY HARRY SCHAEFFER'S MOTION TO QUASH SUBPOENA SERVED BY MSC.SOFTWARE CORPORATION, STATEMENT OF PAUL M. PORTER, ESQ. PURSUANT TO SECTION 3.22(F) OF THE CODE OF FEDERAL REGULATIONS, AFFIDAVIT OF PAUL M. PORTER IN SUPPORT OF THIRD-PARTY HARRY SCHAEFFER'S MOTION TO QUASH SUBPOENA AD TESTIFICANDUM SERVED BY MSC.SOFTWARE CORPORATION** and [Proposed] **ORDER** were served via e-mail to Secretary@ftc.gov. I hereby certify that paper copies of the attached documents are being filed with the Secretary of the Federal Trade Commission, and that the attached electronic copies are true and correct copies thereof.

Executed on May 22, 2002, at Los Angeles, California.


Shirley Williams