

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

Docket No. 9299

**MSC'S MOTION FOR LEAVE TO FILE DECLARATION OF COLIN R. KASS IN
RESPONSE TO THIRD-PARTY HARRY SCHAEFFER'S SUPPLEMENTAL
AFFIDAVITS AND IN FURTHER SUPPORT OF MSC'S OPPOSITION TO HARRY
SCHAEFFER'S MOTION TO QUASH DEPOSITION SUBPOENA**

MSC requests leave to file the attached Declaration of Colin R. Kass. This Declaration responds to the Supplemental Affidavits of Paul M. Porter, Esq. and Alfred M. Clark, Esq. This Court should permit MSC to file this Declaration because the affidavits of Messrs. Porter and Clark raise new issues that they failed to address in Dr. Schaeffer's Motion to Quash MSC's Deposition Subpocna and misrepresent relevant facts.

Respectfully submitted,

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Counsel for Respondent
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Dated: April 15, 2002

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF)	NON-PUBLIC VERSION
MSC.SOFTWARE CORPORATION,)	Docket No. 9299
a corporation.)	

DECLARATION OF COLIN R. KASS

I, Colin R. Kass, hereby declare as follows:

1. I submit this affidavit in response to two near identical affidavits of Paul Porter and Alfred Clark, attorneys for Harry Schaeffer.

2. Put simply, Messrs. Porter and Clark misrepresent the facts of our negotiations concerning the possibility of interviewing Dr. Schaeffer. The correct chronology of events is as MSC explained in its Opposition to Harry Schaeffer's Motion to Quash Deposition Subpoena.

3. I have reviewed my contemporaneous notes of my conversations with Messrs. Porter or Clark. Those notes reflect that Mr. Porter was willing to "give [me] a couple of hours with Schaeffer." I later spoke with both Messrs. Porter and Clark and told them that MSC wanted to take Dr. Schaeffer up on his offer, and requested dates, which they agreed to provide. Both of these conversations occurred prior to the May 16th conversation referenced in MSC's Opposition.

4. As explained in MSC's Opposition, on May 16th, I called Mr. Porter to follow-up to find out if they had obtained dates for the interview. They then told me they were not going to make Dr. Schaeffer available and that, the only way MSC would obtain access to Dr. Schaeffer, would be through a deposition. I immediately requested deposition dates, and Mr. Porter agreed to look into possible dates.

5. In their near identical affidavits (which apparently Paul Porter did not read, since the search and replace function they used failed to replace "Paul Porter's" name in his affidavit), Messrs. Porter and Clark assert that they did not, in fact, renege on any agreement. But this is a new-founded "defense." In my March 21st letter to Paul Porter, I stated as follows:

"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

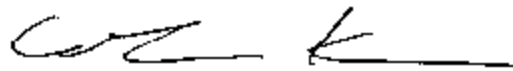
Mr. Schaeffer's current position was that he would only make himself available if subpoenaed for a deposition. At that point, I asked you to provide possible dates to hold that deposition. Hearing nothing, I issued the subpoena for the last day of the fact discovery period."

(See Exhibit 12 to MSC's Opposition). Neither Messrs. Porter or Clark contradicted this recitation of the facts, either in any letter or in its Motion to Quash, which they filed the next day.

6. Moreover, the affidavits of Messrs. Porter and Clark leave the impression that MSC was unwilling to hold the depositions after the close of discovery or to work with Complaint Counsel to try to obtain a post-discovery deposition. That is not the case. As I explained to Mr. Porter, Complaint Counsel was being incredibly difficult in allowing post-discovery depositions. The one they allowed, the deposition of Mr. Cashman, was due to Mr. Cashman's letter to Complaint Counsel that demonstrated good cause to Complaint Counsel's satisfaction. Thus, it was my view that Complaint Counsel would only agree to a post-discovery deposition in response to a showing of good cause by Dr. Schaeffer, which they had not proffered at the time.

7. When I called Mr. Porter on May 22nd to follow-up on my May 21st letter, he informed me that he was faxing me their Motion to Quash. I asked why they were doing so, and he explained that he did not want to get in the middle of a discussion with Complaint Counsel about when to hold the deposition requested by MSC. I then offered to call Complaint Counsel to see if the entire issue could be obviated by Complaint Counsel's agreement to hold the deposition post-close of discovery. (As explained in MSC's opposition, Complaint Counsel refused). This May 22nd discussion with Paul Porter, however, was the first time that Dr. Schaeffer's counsel requested that I coordinate with Complaint Counsel to obtain dates post-close of discovery. Had he raised the issue earlier, I would have told him I was willing to ask Complaint Counsel for an accommodation, if he could *first* establish "good cause," as required by this Court and as insisted upon by Complaint Counsel.

I declare under penalty of perjury that the above is true and accurate.



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Counsel for Respondent
MSC Software Corporation

Dated: May 23, 2002

CERTIFICATE OF SERVICE

This is to certify that on May 24, 2002, I caused a copy of MSC's Motion For Leave to File Declaration of Colin R. Kass in Response to Third-Party Harry Schaeffer's Supplemental Affidavits And in Further Support of MSC's Opposition to Harry Schaeffer's Motion to Quash Deposition Subpoena to be served upon the following persons by hand delivery:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Av Avenue, N.W.
Washington, DC 20580

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

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

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

and that I caused MSC's Motion For Leave to File Declaration of Colin R. Kass in Response to Third-Party Harry Schaeffer's Supplemental Affidavits And in Further Support of MSC's Opposition to Harry Schaeffer's Motion to Quash Deposition Subpoena to be served upon the following person by facsimile and overnight mail:

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



David S. Shotlander
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