

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

Docket No. 9299

**ANSYS, INC.'S RESPONSE TO MSC'S EMERGENCY MOTION TO REMEDY
JIM CASHMAN'S REFUSAL TO APPEAR FOR HIS DEPOSITION**

The only emergency aspect of MSC's motion is MSC's apparently emergency need to attempt to pre-argue the merits of its case before this tribunal.

As a threshold matter, the bulk of MSC's motion is a collection of spin-doctoring, name calling, feigned indignation and fanciful allegations of some kind of a conspiratory "Partnership" between ANSYS and Complaint Counsel, manufactured out of blatant mischaracterizations of documents and deposition testimony, all of which has no conceivable relevance to the issue at hand: whether this Monday, June 10 was an appropriate date on which to take Mr. Cashman's deposition in light of Mr. Cashman's need to participate in crafting an offer to MSC (which MSC itself requested on Friday, June 7 that ANSYS deliver to MSC on Monday, June 10) in an effort to settle this litigation. While MSC's tactics are not at all surprising in light of MSC's counsel's conduct at the depositions themselves,¹ ANSYS does not see the need to dignify these statements with a response, except to the limited extent necessary to

¹ A fair reading of the entire deposition transcripts reveals MSC's counsel's repeated attempts to distort documents and to force words into the mouths of third party witnesses in an effort to obtain precisely the type of misleading sound bytes that it cites in its motion. MSC's need to rely on these tactics speaks volumes about the merits of its defenses.

set the record straight as it pertains to the only issue at hand: the appropriate date for Mr. Cashman's deposition.

The reality of the situation is as follows: Mr. Cashman is ANSYS's President and Chief Executive Officer. He has no special knowledge of facts relevant to this case and he is not on the FTC's witness list. Unnecessary depositions of Chief Executive Officers are unfortunately used frequently by overly aggressive counsel as a means to harass those whom they perceive are opposing them in litigation. ANSYS employees with first hand on knowledge of fact relevant to MSC's defenses (such as they are) have already been deposed. Additionally, ANSYS has produced in excess of 16,600 pages of documents in response the MSC's document subpoena. As such, ANSYS can hardly be accused of refusing to cooperate with discovery.

On the other hand, ANSYS has been involved in ongoing negotiations between MSC, Complaint Counsel and ANSYS and SAS (ANSYS's business partner) in an effort to reach mutually acceptable terms and conditions under which ANSYS would acquire the assets that Complaint Counsel seeks to have divested. Obviously, as ANSYS's President and CEO, Mr. Cashman's involvement in those negotiations, including his participation in crafting and evaluating offers, is critical. In connection with those negotiations, MSC has already recognized that Mr. Cashman cannot simultaneously participate in settlement negotiations and give deposition testimony. Unfortunately, MSC is represented in those negotiations by different management personnel and different outside counsel than are conducting this litigation. As outlined below, MSC's current motion appears to be the result of a lack of coordination among those teams.

ANSYS and MSC initially met on May 23 to discuss a possible settlement. In connection with those discussions, MSC agreed to postpone Mr. Cashman's deposition, then scheduled for May 23, to June 10 in order to permit the parties to explore the terms of a potential settlement transaction. ANSYS then urged a further meeting on June 6 or 7. MSC responded that it was only available on June 7. ANSYS informed MSC that because negotiations were

taking place on the eve of Mr. Cashman's deposition, that it may become necessary to discuss postponement of Mr. Cashman's depositions so that he could participate in negotiations. MSC clearly understood the situation.

On June 7, MSC and ANSYS met independently with Complaint Counsel because MSC refused to meet jointly with Complaint Counsel and ANSYS.² As a result of these meetings, MSC's negotiating team requested that ANSYS submit an offer on Monday, June 10. MSC insisted that time was of the essence. On the afternoon of June 7, ANSYS believed it had obtained from MSC a clear indication of the relative priorities between proceeding expeditiously with the settlement negotiations, as the negotiating team requested, and proceeding with the deposition, as MSC's litigation counsel insisted. ANSYS could only presume that MSC was acting genuinely and in good faith in requesting a settlement offer on Monday, June 10.

Based on MSC's request that it receive an offer from ANSYS on Monday, June 10 and the negotiating teams' mutual recognition that time was of the essence, counsel for ANSYS advised MSC's representatives that Mr. Cashman could not simultaneously give deposition testimony and participate in crafting an offer. MSC's representatives expressed understanding of why Mr. Cashman's deposition should not go forward on Monday, but stated that they lacked authority to agree to a postponement. MSC's representatives, however, stated their understanding that Mr. Perna and Mr. Cashman were expected to discuss the subject personally by telephone later that day, and they further agreed to seek authorization to postpone Mr. Cashman's deposition.

When ANSYS had not heard back by late Friday afternoon, ANSYS's counsel, Thomas Donovan, called MSC's counsel, Colin Kass. Mr. Donovan explained the above-described situation to Mr. Kass and offered to make Mr. Cashman available for deposition on

² MSC's allegations of a conspiratory "Partnership" between ANSYS and Complaint counsel are even more bizarre in light of MSC's refusal to participate in joint discussion to which it was invited. Obviously, as a party to the litigation, Complaint Counsel's input into the terms of any transaction in potential settlement of the case against MSC is critical.

June 21, should negotiations prove unsuccessful. Mr. Kass did not even suggest any prejudice from such a delay. Mr. Kass returned Mr. Donovan's call later Friday afternoon (approximately 4:00 PM) and stated that he could not agree to a postponement, not because of prejudice but because he was unable to obtain authorization from MSC management. Further discussions with the negotiating team revealed that only Frank Perna, MSC's CEO, could make such a decision, and apparently, Mr. Perna was unavailable due to his flight schedule. At the same time ANSYS learned that Mr. Perna's scheduling problems had forced a cancellation of his conference with Mr. Cashman, which Mr. Perna had solicited for Friday afternoon and which MSC's negotiating team had suggested would provide a final forum for sorting out MSC's priorities. With only minutes remaining in the last business day before Mr. Cashman's deposition, Mr. Donovan was faced with the choice of making Mr. Cashman available for his deposition or making him available to craft an offer to MSC. Because Mr. Donovan understood: (1) that MSC wanted an offer on Monday and (2) that the only reason "official" authorization for a postponement had not been obtained was because Mr. Perna could not be reached, Mr. Donovan made the then uncontroversial decision to reschedule the deposition for June 21. Accordingly, MSC's machinations about prejudice and bad faith are entirely hollow.

Finally, a few comments about the relief that MSC seeks are appropriate.

First, Mr. Cashman has pre-existing business commitments with ANSYS customers on June 14 and he cannot be available that day.

Second, there is no legitimate reason to force Mr. Cashman to endure two days of deposition testimony, much less that he be forced to endure the second day on a Saturday. As stated above, Mr. Cashman has no special knowledge of facts relevant to this case. The seven hour limitation provided for in Federal Rule of Civil Procedure 30(d)(2) is an entirely appropriate guide in this case, particularly where it is widely understood that depositions of high level corporate executives with little hands on involvement in relevant circumstances are a common harassment tactic.

Third, MSC's request that Mr. Cashman be ordered to answer questions regarding ANSYS's negotiating strategy with respect to the potential purchase of the UAI and CSAR assets is illogical and untenable. Indeed, MSC has already conceded this point by agreed to treat discovery into this area as outside its subpoena to ANSYS.³ MSC's about face now can only be viewed as a further harassment tactic. If the negotiations between ANSYS and MSC are to have any chance of success (now or in the future following a trial), MSC obviously cannot be permitted to use questioning under oath to inquire into ANSYS's negotiating strategy. Alternatively, if MSC's pursuit of negotiations with ANSYS is simply a delay tactic (or is otherwise not in good faith), MSC should simply say that it has no interest in such negotiations. However, simultaneously pursuing negotiations and discovery into ANSYS's negotiating strategy is indefensible.

For all of the foregoing reasons, ANSYS respectfully that MSC's Emergency Motion to Remedy Jim Cashman's Refusal to Appear for his Deposition be denied.

³ See Exhibit A, attached hereto. Notably, MSC has not served a supplemental subpoena directed at this information.

Respectfully submitted,
KIRKPATRICK & LOCKHART LLP



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Dated: June 11, 2002

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March 13, 2002

VIA FACSIMILE

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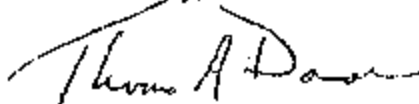
RE: In Re: MSC Software Corporation
FTC Docket No. 9299 ("Case No. 9299")

Dear Colin:

This letter confirms our conversation yesterday afternoon during which we agreed to treat as not responsive to MSC's subpoena dated February 21, 2002 documents that would reveal ANSYS' negotiating strategy with MSC regarding the possible purchase of the UAI and CSAR assets from MSC. We understand that MSC reserves its rights to request such documents through a supplemental subpoena and that ANSYS reserves its rights to move to quash or limit such a subpoena and/or object to the production of such documents under applicable FTC Rules of Practice.

Please advise us if any of the above is inconsistent with our conversation.

Sincerely,


Thomas A. Donovan

TAD:drt



PI-823360 v1 0216480-0206

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

Docket No. 9299

ORDER

AND NOW, this ___ day of _____, 2002, upon consideration of
**ANSYS, INC.'S RESPONSE TO MSC'S EMERGENCY MOTION TO REMEDY JIM
CASHMAN'S REFUSAL TO APPEAR FOR HIS DEPOSITION** it is hereby ORDERED
that said motion is DENIED.

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE AND ELECTRONIC FILING

The undersigned certifies that a true and correct copy of the foregoing ANSYS, INC.'S RESPONSE TO MSC'S EMERGENCY MOTION TO REMEDY JIM CASHMAN'S REFUSAL TO APPEAR FOR HIS DEPOSITION was served this 11th day of June, 2002, upon the following persons by hand:

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

Karen Mills, Esquire
Federal Trade Commission
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and by Facsimile and First Class Mail upon:

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and that a true and correct electronic copy of the same, minus exhibits, was transmitted to the Secretary of the Commission.