

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



_____)
In the Matter of)
)
MSC SOFTWARE CORPORATION,)
a corporation.)
_____)

PUBLIC VERSION
Docket No. 9299

To: The Honorable D. Michael Chappell
Administrative Law Judge

**RESPONSE OF COMPLAINT COUNSEL TO
MSC'S "EMERGENCY" MOTION REGARDING THE
CASHMAN DEPOSITION AND MSC'S UNOPPOSED
MOTION TO AMEND THE REVISED SCHEDULING ORDER**

Complaint Counsel hesitate to burden Your Honor with a further filing at a time when there are significant demands placed by both this and other cases. However, the extent of vituperation reflected in the two recent filings made by Respondent MSC compel us to make this response so that the comments offered by MSC's trial counsel do not remain unanswered. We therefore ask Your Honor's indulgence in considering this response.

The Cashman Deposition. Complaint Counsel have consented to past postponements of Mr. Cashman's deposition date in order to facilitate discussions between MSC and ANSYS concerning the terms of a possible divestiture that might address the anticompetitive effects of the acquisitions under challenge and permit a settlement of the Commission's case. Last Friday, pursuant to separate requests from MSC (through an outside counsel who is not a member of the trial team) and ANSYS, FTC staff met separately with counsel and executives for MSC and ANSYS to discuss issues pertaining to a possible settlement. MSC and ANSYS were each aware that FTC staff was meeting with the other. Complaint Counsel, aware of the upcoming

deposition of Mr. Cashman set for Monday morning and of the discussions between MSC and ANSYS set for later in the day on Friday, informed ANSYS counsel that we were inclined to consent to a further postponement of the deposition date if that would facilitate the settlement discussions. Complaint Counsel was not involved in the communications between MSC and ANSYS later in the day that led to the current dispute. However, we do note that the description of events reflected in the ANSYS response to the MSC "emergency" motion is consistent with Complaint Counsel's understanding of the situation based on conversations since last Friday.

Complaint Counsel dispute most emphatically the assertions, made by MSC in its motion, that Complaint Counsel was "complicit" in any "partnership" with ANSYS or anyone else to "frame" MSC. Throughout the investigation and prosecution of this case, Complaint Counsel have acted independently based on the public interest in the integrity of the competitive process. It was the Commission itself, not Complaint Counsel, that voted unanimously to issue the complaint against MSC, based on its finding that there was reason to believe that MSC's acquisitions violated the FTC Act. Your Honor will soon have occasion to assess the evidence against MSC and reach your own conclusion, based on the record to be developed at trial. We are confident that the evidence, from a broad range of industry participants and from MSC's own files and executives, will more than sustain the charges voted by the Commission. Nobody has "framed" MSC – on the contrary, MSC has placed itself in its current situation entirely by its own actions aimed at cutting off competition from UAI and CSAR by buying those companies. Consistent with the public interest, Complaint Counsel have and will continue to talk and meet with MSC, ANSYS and other persons if it appears that doing so will assist in accomplishing a divestiture that redresses the anticompetitive effects of the MSC acquisitions.

MSC's Motion To Amend the Revised Scheduling Order. When Complaint Counsel informed MSC's counsel that it would not oppose its request for postponement of various scheduling order dates, as set forth in MSC's motion of June 11, we did not anticipate that the motion would contain an attack on the bona fides of Complaint Counsel in connection with the submission of Complaint Counsel's exhibit list and exhibits. We are, therefore, placed in the unfortunate position of providing this response to a motion, the substance of which we do not oppose.

Preparation and submission of Complaint Counsel's exhibit list and exhibits, due under the Second Revised Scheduling Order on June 4, was complicated by the heavy back-loading of MSC's production of responsive material in this case, and by its delaying the availability of company officials for deposition, despite Complaint Counsel's prompt issuance of a document request and subpoenas ad testificandum and duces tecum soon after the complaint issued in 2001. MSC refused to submit its top executives for deposition until ordered to do so by Your Honor, and even then refused to make available three of its executives or former executives (Messrs. Swami, Perna, Morgan) within the time ordered, that is, prior to the May 28 close of discovery. Respondent also insisted that MSC's expert witnesses would not be made available for deposition by Complaint Counsel until MSC's depositions of Complaint Counsel's experts were completed. The result of this undoubtedly strategic gaming of the schedule by MSC placed significant burdens on Complaint Counsel in the period immediately prior to the exhibit due date. Complaint Counsel nonetheless provided MSC with a witness list, exhibit list, and the bulk of the exhibits on June 4. In the period since, Complaint Counsel have been checking and correcting the exhibit list and exhibits and providing updates and corrections as soon as we have them. We will continue to do so.

MSC's attack on Complaint Counsel's exhibit list efforts is astonishing, considering that MSC itself apparently still has not completed its document production under the request for documents that has been outstanding since last November. This was the subject of Complaint Counsel's most recent, third motion to compel, which is pending and to which MSC has not yet deigned to reply. Subsequent events have revealed that the situation is far more serious even than that Complaint Counsel knew at the time it filed that motion.

Respondent still has not complied with Your Honor's May 22 order compelling Respondent to complete its document production by May 28, the closing date for fact discovery in the case, has not committed to when it will do so, and refuses to certify at any time whether its response is complete. To put the matter in perspective, it is now clear that *the substantial bulk of Respondent's overall document production in the case has been produced on or after the May 28, 2002 deadline* that is, Respondent has delivered by far more documents to Complaint Counsel on or after May 28, 2002, than it delivered during the entire six-month period leading up to Your Honor's deadline. Specifically, in the period since the issuance of the document request and prior to the May 28 deadline, MSC provided Complaint Counsel with approximately 320 boxes of responsive materials in hard copy form. On May 28, MSC produced 15 boxes of hard-copy documents, along with the equivalent of an additional 180 boxes of imaged documents on 49 CD's. In the period after the May 28 deadline, MSC so far has dumped 53 boxes of hard copy documents on Complaint Counsel (34 boxes on May 30, 10 boxes on May 31, 9 boxes on June 11), and a further set of CD's containing the equivalent of roughly 180 additional boxes of imaged documents.

Lest there be any illusion that MSC has completed its document production, MSC's counsel, by a telephone call on June 11, 2002, informed Complaint Counsel that it will be

delivering additional boxes of hard-copy material later this week. In a further call at 4:35 p.m. on June 12, MSC informed Complaint Counsel that it also will be producing an additional 27 CD's of imaged documents, the equivalent of approximately another 100 boxes. MSC has announced that it refuses to certify at any time whether its response is complete.

The CD's of imaged documents, as we note in our pending motion, are not in a form that makes them practically usable. Respondent, however, already has the load files and concordance it needs to make the CDs usable, even though it refused to provide them to Complaint Counsel. MSC counsel has informed Complaint Counsel that it expects to have the documents in a usable, searchable form for its own use on the software it has available to it, by June 13, 2002, which will be in time for Respondent to generate its own exhibit list.

Lest there be any illusion that these late-arriving materials are not relevant to the case, we attach as Exhibit 1 to this response a copy of one of the documents received on June 11. It is an exchange of email messages between an MSC executive and a representative of the customer in December 1999, after MSC completed its acquisitions of UAI and CSAR. The representative makes reference to its efforts to negotiate new contracts with MSC in the aftermath of the then-recent acquisitions by MSC of UAI and CSAR, and complains about significant price increases:

The document is responsive not only to the document request outstanding since last November, but also to the subpoenas issued during the pre-complaint, investigative phase of the case. Yet it only surfaced from MSC a week and a half after the close of discovery and the deadline set by Your Honor's May 22 Order.

In short, if there is anyone who has "transform[ed] this Court's Scheduling order deadline

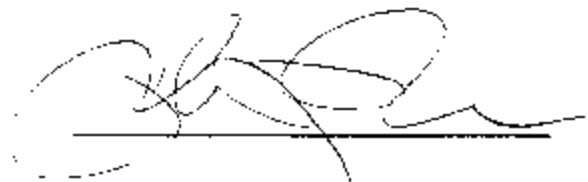
into a non-event" (MSC Scheduling Motion at 1), it is MSC, not Complaint Counsel. Complaint Counsel do not oppose the amendments requested by MSC to the Second Revised Scheduling Order. However, we have and will continue to reserve our right to correct and supplement our exhibit list as needed to ensure accuracy and deal with the results of MSC's longstanding efforts to sandbag Complaint Counsel. We also reserve our right to seek sanctions for violation of the May 22, 2002 Order that Respondent complete its document production by May 28, 2002.

* * *

We appreciate Your Honor's indulgence in considering these responses to the two motions recently filed by MSC.

June 13, 2002

Respectfully submitted,

A handwritten signature in black ink, appearing to read "P. Abbott McCartney", is written over a solid horizontal line. The signature is fluid and cursive.

P. Abbott McCartney
Peggy D. Bayer
Michael Cowie
Kent E. Cox
Karen A. Mills
Nancy Park
Patrick J. Roach
Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580
(202) 326-2695
Facsimile (202) 326-3496

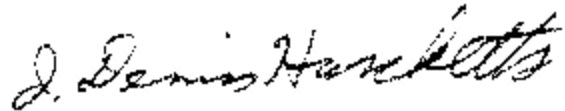
CERTIFICATE OF SERVICE

This is to certify that on June 13, 2002, I caused a copy of Complaint Counsel's Motion to Compel Compliance with Complaint Counsel's First Request for Production of Documents and Things to be served via hand-delivery upon the following persons:

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

Marimichael O. Skubel, Esquire
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5034
Fax (202) 879-5200

Counsel for MSC Software Corporation



J. Dennis Harckets
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580
(202) 326-2783
Facsimile (202) 326-3496

Exhibit 1

[Redacted]