UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONDENT MSC.SOFTWARE'S MOTION IN LIMINE TO PRECLUDE COMPLAINT COUNSEL'S EXPERT WITNESSES FROM TESTIFYING ABOUT OPINIONS NOT PREVIOUSLY DISCLOSED TO MSC

Complaint Counsel continues its pattern of "trial by ambush" -- a pattern of ignoring clearly-established disclosure obligations that should be rejected by Your Honor in order to ensure a fair trial and due process for MSC.[1]

Both Your Honor's Scheduling Order and the FTC Rules of Practice required Complaint Counsel to fully disclose the opinions of its expert witnesses months ago – on April 9. As to any alleged opinions rebutting MSC's expert witnesses, Complaint Counsel was required to provide supplemental expert reports no later than May 20, 2002. Despite these mandatory disclosure deadlines, Complaint Counsel and its expert witnesses admitted – at their depositions during the week of May 27 – that they intend to provide opinions at trial that are ***not*** contained in their expert reports. Worse still, Complaint Counsel's experts also refused to disclose what those undisclosed opinions might be.

[1] *Congressional Air, Ltd., v. Beech Aircraft Corp.*, 176 F.R.D. 513, 516 (D. Md. 1997) (undisclosed expert testimony constitutes "trial by ambush").

Complaint Counsel's approach to expert disclosure would make a mockery of Your Honor's Scheduling Order and the FTC's Rules. It also prejudices MSC's ability to receive a fair trial. Accordingly, MSC moves in limine for an order precluding Complaint Counsel from introducing expert opinions beyond those already disclosed to MSC in its expert reports. The entry of such an order simply enforces this Court's Scheduling Order and FTC Rule 3.31(b), which Complaint Counsel appear bent on ignoring.

LEGAL STANDARD

It is without dispute that expert witnesses are forbidden from testifying about matters not disclosed in their expert reports. To argue otherwise would be to espouse a "trial by ambush" approach that has been specifically rejected by both the FTC's Rules of Practice and Your Honor's Scheduling Order.

Rule 3.31(b)(3) of the FTC Rules of Practice requires Complaint Counsel's expert witnesses to disclose in writing "a complete statement of all opinions to be expressed and the basis and reasons therefore" as well as "the data or other information considered by the witness in forming the opinions."

> Except as otherwise stipulated or directed by the Administrative Law Judge, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. ***The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions***; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. ***These disclosures shall be made at the times and in the sequence directed by the Administrative Law Judge***.

FTC Rule of Practice 3.31(b)(3).

Consistent with Rule 3.31(b)(3), Your Honor issued a Scheduling Order on November 13, 2001 – as well as a Revised Scheduling Order on March 5, 2002 and a Second Revised Scheduling Order on May 3, 2002. Each of those Orders required Complaint Counsel to fully disclose the opinions of its expert witnesses to MSC. Indeed, those Scheduling Orders also contemplated the preclusion of Complaint Counsel's expert testimony to the extent it was not disclosed in Complaint Counsel's expert reports. *See, e.g.*, Scheduling Order's Deadline for Complaint Counsel's Rebuttal Reports (If new opinions disclosed in rebuttal report that are neither rebuttal nor contained in opening report, MSC "will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports")).

FACTUAL BACKGROUND

The original Scheduling Order in this case required Complaint Counsel to satisfy Rule 3.31's expert disclosure obligations on February 7, 2002. Complaint Counsel served an expert report from FTC employee Dr. John Hilke on February 7.

After the February scheduling conference, Your Honor issued an Amended Scheduling Order requiring Complaint Counsel to serve any supplemental expert reports no later than April 9, 2002. On the evening of April 9, Complaint Counsel served MSC with expert reports from four individuals – Dr. Hilke (a supplemental report), Dr. Pablo Spiller, Dr. Vipperla Venkayya, and Greg Smith.

Under the final Scheduling Order issued by Your Honor on May 3, any expert opinions by Complaint Counsel in rebuttal to matters set forth by MSC's experts were to be disclosed in writing by May 20, 2002. Complaint Counsel declined to provide any rebuttal expert opinions by the May 20 deadline imposed by the Scheduling Order.

Despite these clear deadlines for disclosing all of its expert opinions, Complaint Counsel's experts appear poised to sandbag MSC by offering yet-undisclosed expert testimony at trial. In their depositions last week, Complaint Counsel's experts admitted that they intended to offer testimony on areas not covered by their expert reports – while at the same time, refusing to disclose those new opinions in their depositions.

Dr. Hilke's Market Definition Opinions. In both of his expert reports, Dr. Hilke set forth only two possible product market definitions – "advanced Nastran" and "advanced linear structural FEA solvers." Nowhere in his expert reports did Dr. Hilke set forth any other relevant product markets or any narrower sub-markets within either of his two product markets, including specifically any narrower market based on price discrimination. Indeed, in his deposition, Dr. Hilke stated that he did not anticipate trying to define "smaller product markets" based on "price discrimination", that he had not "attempted to analyze what degrees of price discrimination might be going on within NASTRAN" and that he had not "to date done the analysis which would be needed to demonstrate" the existence of a narrower market based on price discrimination. (Hilke Dep. at 89-90 & 97.)[2] Nor has Dr. Hilke ever provided a "rebuttal" report since receiving MSC's expert report from its economist (Dr. Kearl) almost three months ago on March 1st and a supplement last month on May 6.

Nevertheless, during his deposition, Dr. Hilke made clear that he "might" offer testimony at trial proposing narrower product markets based on price discrimination as well as additional markets during Complaint Counsel's case-in-chief or in rebuttal.

[2] Copies of deposition testimony cited are attached as Exhibits A (Hilke Dep.), Exhibit B (Spiller Dep.) and Exhibit C (Venkayya Dep.).

Q. So you cannot sitting here today definitively tell me how many product markets you will define at trial; yes or no?

A. I only anticipate at this point speaking about the advanced NASTRAN product market and the broader product market that I discussed, ***but I wouldn't preclude***, based on what I've seen so far of Dr. Kearl's position of commenting on that, and that in that context ***I might end up discussing the potential for separate product markets within the advanced NASTRAN product market.*** I think that's accurate.

* * *

Q. So you would envision defining narrower product markets than advanced NASTRAN or your alternative product market?

A. Only in this rebuttal sense.

* * *

Q. And you would plan to respond in rebuttal testimony that you might give?

A. There are two possibilities, at least. One is that I would learn of Dr. Kearl's or someone else's intention to raise those types of issues during his deposition and ***I might therefore respond to that anticipated argument during my initial testimony.***
But the more likely circumstance is that if such argument arose that it would be dealt with through rebuttal.
(Hilke Dep. at 94, 96 & 114.)

As he admits in his deposition, Dr. Hilke "***might*** end up discussing the potential for separate product markets" based on price discrimination that were never addressed or disclosed in his expert reports. Moreover, Dr. Hilke's attempt to style his new opinions as "rebuttal" (even where he intends to offer them in his initial testimony during Complaint Counsel's case-in-chief) is ***inconsistent*** with Complaint Counsel's failure to file a rebuttal expert report from Dr. Hilke or anyone else. If Dr. Hilke wished to provide new product market definitions in light of MSC expert Dr. Kearl's opinions, he was obligated to disclose those opinions in a rebuttal expert report by May 20.

Dr. Spiller's "Incomplete" and "Partial" Liability Opinions. In its identification of trial experts and in Dr. Spiller's expert report, Complaint Counsel described Dr. Spiller's work in this case as that of an economic expert who will speak to "remedies" issues, and there is no mention that Dr. Spiller will address liability issues.

For instance, in its identification of trial experts, other than a generic reference to "economic theory" and an analysis of the complaint, Complaint Counsel describes Dr. Spiller's testimony as "***the appropriate remedy to restore lost competition***." (Complaint Counsel's Supplemental Identification of Trial Experts at 2, attached as Exhibit D.) In contrast, Complaint Counsel's liability economic expert – Dr. Hilke – is described as providing testimony on the "relevant market and the anticompetitive effect" of the acquisitions, *i.e.*, liability issues. (*Id.* at 1.)

Dr. Spiller's expert report makes it even more clear that he disclosed only opinions on remedies issues, opinions that were based on certain assumptions of lost competition in the marketplace: "I was asked by complaint counsel to issue my opinion on what remedies should be applied *if* the FTC's alleged violations of the antitrust statutes have indeed taken place. ***While I have not conducted a complete evaluation of competitive conditions bearing on antitrust liability***, an economic assessment of the appropriate remedy requires an understanding of the competition lost by virtue of MSC's acquisitions." (Spiller Report ¶ 12.) Based upon the limited opinions (addressing remedies alone) set forth in his expert report and the lack of any rebuttal reports from Complaint Counsel, MSC came prepared to ask Dr. Spiller about his opinions on remedies at his deposition, and the assumptions upon which he was relying in terms of lost competition.

However, at his deposition Dr. Spiller stated that his "assessment has been that the acquisitions indeed substantially reduce competition" and that he "***probably***" would offer this opinion at trial. (Spiller Dep. at 20.) Through this previously-undisclosed opinion, Dr. Spiller now attempts to opine directly on the ultimate liability issue of whether the acquisitions substantially reduced competition, *i.e.*, whether they were illegal. Indeed, Dr. Spiller states that he will express his new liability opinions even though he has ***not yet*** "conducted a complete evaluation of competitive conditions bearing on antitrust liability." (Spiller Dep. at 18.) Dr. Spiller also intends to offer his liability opinions even though he will not be expressing an opinion on efficiencies, a necessary part of any analysis of whether the acquisitions would substantially reduce competition. (Spiller Dep. at 10.)

Similarly, Dr. Spiller apparently intends to offer these liability opinions even though: (1) he has ***not completed*** his analysis of market definition; (2) these market definition and other liability issues that were ***not disclosed*** in his expert report; and (3) he was ***unprepared to testify*** about that analysis at his deposition last week.

> Q. Are you expressing an opinion in this matter on the proper market definition to analyze this industry?
> A. ***I do a partial, a partial analysis of that, yes.***
> Q. What do you mean by "a partial analysis"?
> A. Well, ***not complete.***
> Q. So you're telling me your expert report contains an incomplete discussion of the proper market definition in this industry? . . .
> A. The report, as the report states, is ***in process***, and further analysis may imply that I may add more to it, including the market definition.
> (Spiller Dep. at 8-9.)
> Q. Are you offering an opinion in this report on the proper market definition?
> A. Partially, but not -- again, my analysis on that has ***not been complete***.
> (Spiller Dep. at 17-18.)

Dr. Spiller admitted in his deposition that he was aware of this Court's requirement that all of his opinions be disclosed to MSC in his expert report in April 2002. Nevertheless, Dr. Spiller was quite candid that he intended to provide opinion testimony that was not contained in that report in violation of the Scheduling Order and FTC Rules of Practice.

> Q. Is it your understanding that in your expert report you were supposed to express your opinions on this matter in this proceeding?
> A. Yeah.
>
> Q. ***And have you expressed all opinions that you have on this matter in your expert report?***
> A. ***No.***
> (Spiller Dep. at 16.)

Dr. Spiller – who was retained in February 2002 -- has had plenty of time to reach any and all opinions Complaint Counsel wished to put forward in this case. Yet in his mandatory expert report disclosure in April, Dr. Spiller addressed only remedies issues and provided no opinions or analysis of liability issues such as market definition and efficiencies. Neither did Dr. Spiller file any rebuttal expert report addressing these issues by the Court's May 20 rebuttal deadline. Even today, Dr. Spiller remains unprepared to disclose these "partial" and "incomplete" opinions in his deposition. Dr. Spiller and Complaint Counsel should not be allowed to ignore the disclosure requirements of Your Honor's Scheduling Order and the FTC's Rules of Procedure -- Dr. Spiller's testimony at trial should be limited to offering opinions on remedies and the assumptions underlying these opinions, consistent with the scope of his expert report.

Dr. Venkayya's "Possible" New Opinions. While not as clear in his intention of offering yet-undisclosed opinions at trial as Drs. Hilke and Spiller, Complaint Counsel's technical expert Dr. Venkayya also took the position that he might bring new opinions to trial

that were not disclosed in his expert report. Dr. Venkayya apparently is in possession of various materials that – while he didn't think were important enough to review in preparing his expert report and deposition testimony – he ***"might"*** rely on at trial to support a "new opinion."

> Q. Do you intend to review the documents in your possession right now that you haven't already reviewed?
> A. I can't tell.
> Q. You're not sure what you're going to do?
> A. Not sure.
> Q. You might review them, you might not.
> A. Yes, that's correct.
> Q. Okay. If you perchance happen to finally review these documents, do you intend to modify your opinions based on that review?
> A. I don't know.
> Q. You might?
> A. If I find something that I would be willing to modify. I don't know now.
> Q. ***So, if there's something in those documents that isn't already in your expert report, you might come up with a new opinion?***
> A. ***Possibly.***
> (Venkayya Dep. at 293-294.)

For materials already in his possession, Dr. Venkayya has no excuse for not including those materials in his expert report, or at least being able to disclose them during his deposition. To allow Dr. Venkayya to keep any alleged bases for his opinions secret until he takes the stand at trial would turn the FTC's expert disclosure obligations on their head.

LEGAL ARGUMENT

As made clear by Rule 3.31(b)(3), Complaint Counsel's experts may not testify about opinions not disclosed in their expert reports. The exclusion of such testimony is enforced by FTC Rule 3.38(b)(3) which empowers Your Honor to order that Complaint Counsel "may not introduce into evidence or otherwise rely, in support of any claim or defense" where it has failed to comply with Your Honor's Scheduling Order requiring full disclosure of its expert opinions months ago.

The obvious purpose of the expert disclosure requirement is "to impose an additional duty to disclose information concerning expert testimony sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses." *In the Matter of Kreta Shipping*, 181 F.R.D. 273, 275 (S.D.N.Y. 1998); *see also In the Matter of Thompson Medical Co., Inc.*, 101 F.T.C. 385 (FTC 1983) (purpose behind rule is to give opposing counsel an opportunity to prepare for effective cross examination).

Consistent with the FTC Rules requiring advance disclosure of expert opinions, Courts routinely prohibit expert testimony not previously disclosed in a witness' expert report. In *Nutrasweet Co. v. X-L Engineering C.*, the Seventh Circuit prohibited testimony not included in an expert report, finding that "***the sanction of exclusion is automatic and mandatory*** unless the party to be sanctioned can show that its violation was either justified or harmless." 227 F.3d 776, 785-86 (7th Cir. 2000). The failure of Complaint Counsel's experts to disclose their opinions in a timely fashion and their efforts to modify those opinions that they did disclose are neither justified nor harmless – indeed, to allow such a "trial by ambush" would eliminate the protections for a fair trial put in place by Your Honor's Scheduling Order.

Other courts have rejected attempts similar to Complaint Counsel's to have their experts bring new opinions to trial. *See, e.g., Gem Realty Trust v. First Nat'l Bank*, 1995 WL 136874, at *2 (D.N.H. MAr. 27, 1995) ("If plaintiff wanted to offer expert opinion testimony as to any other matters, it had a duty to disclose such opinions, and the bases and reasons therefore, ***prior*** to the close of discovery in this case"); *Asia Strategic Inv. Alliances Ltd. v. General Elec. Capital Servs., Inc.*, 173 F.R.D. 305, 307 (D. Ks. 1997) ("Aside [from] the question of untimeliness, plaintiff has not shown that its later reports and affidavits adequately comply with

the disclosure requirements ... therefore, the court finds plaintiff ***may not use*** at trial the additional expert testimony.") (emphasis added).

CONCLUSION

Complaint Counsel has had more than two-and-a-half years to formulate its theories in this case. Any expert opinions it wished to rely upon could have easily been and were required to be disclosed to MSC in its expert reports on April 9. Any effort by Complaint Counsel to have its experts show up at trial with new or altered opinions amounts to nothing more than the sort of "trial by ambush" that has been rejected by Your Honor, FTC Rules, and the courts who have addressed this issue. *Congressional Air, Ltd., v. Beech Aircraft Corp.*, 176 F.R.D. 513, 516 (D. Md. 1997) (undisclosed expert testimony constitutes "trial by ambush").

Accordingly, MSC respectfully asks for the entry of an order precluding Complaint Counsel from putting on expert testimony on opinions and materials not contained in their expert reports.

Respectfully submitted,

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Counsel for Respondents,
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Dated: June 17, 2002

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FEDERAL TRADE COMMISSION

MATTER NO. D09299

TITLE MSC.SOFTWARE CORPORATION

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DATE MAY 27, 2002

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TESTIMONY OF JOHN C. HILKE, Ph.D.
VOLUME 1

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discrimination, but the question I have: Are you going to be expressing an opinion that a relevant market exists narrower than the advanced NASTRAN market or the alternative product market that you discuss in your report?

MR. McCARTNEY: Objection. Asked and answered.

THE WITNESS: I believe that's the question I was attempting to respond to.

BY MR. BECKER:

Q. Well, was the answer yes or no?

A. The answer was, just as I expressed in my report, I may present the view that incumbent firms may find it profitable to undertake that kind of discrimination. That would be consistent with there being a narrower product market.

Q. I'm not asking whether you think that incumbent firms may be profitable -- strike that.

I'm not asking you whether you think incumbent firms may find it profitable to price-discriminate.

I'm asking whether you are going to express an opinion that there is a relevant product market narrower than the advanced NASTRAN market or the alternative product market you discuss in your report.

MR. McCARTNEY: Objection. Asked and answered.

THE WITNESS: I thought that's what I was expressing, but maybe we need to take a step back.

In defining product markets it is possible that a product market will exist and be exploited prospectively even if it's not necessarily being utilized at present, and I haven't attempted to analyze what degrees of price discrimination might be going on within the NASTRAN -- within the advanced NASTRAN product market at the time of the acquisitions.

So I'm -- I may very well say something about prospectively that markets may be utilized, essentially effectuated, through price discrimination, for instance, on the basis of the industry, but I haven't to date done the analysis which would be needed to demonstrate that that was already occurring in any detail.

Q. Is it your understanding that one of the steps in doing antitrust analysis is to define relevant markets?

A. It certainly can be. Sure.

Q. Is that one of the steps you took in this matter?

A. I've attempted to do that, yes.

Q. Are you offering an opinion on any relevant

product market in that circumstance?

A. Without knowing the specifics I can't tell you, but that would certainly be the concept that would be being used, yes.

Q. So you would envision defining narrower product markets than advanced NASTRAN or your alternative product market?

A. Only in this rebuttal sense.

MR. McCARTNEY: Well, objection. Asked and answered and misstates his prior testimony.

MR. BECKER: I've premarked RX 730, which is a copy of the DOJ-FTC merger guidelines.

MR. McCARTNEY: I would just note that off the record the court reporter will be initialing the exhibits, and I note that Exhibit 713 and 765 have yet to be initialed.

(Respondent's Exhibit Number 730 was marked for identification.)

BY MR. BECKER:

Q. Would you turn to page I 519.

A. I 519. Okay.

Q. Are you familiar with section 1.12 of the merger guidelines?

A. In a general sense, yes.

Q. Are you planning to define a narrower product

issues during his deposition and I might therefore respond to that anticipated argument during my initial testimony.

But the more likely circumstance is that if such argument arose that it would be dealt with through rebuttal.

Q. So you cannot tell me sitting here today when you give testimony in the case in chief for complaint counsel at trial whether you'll be defining two relevant product markets or whether you'll be defining more than two relevant product markets; is that right?

MR. McCARTNEY: Objection. Asked and answered and ambiguous and it misstates the prior testimony.

THE WITNESS: Do you want me to answer?

BY MR. BECKER:

Q. Yes.

A. Basically my expectation is that I will be dealing with the two, with the advanced NASTRAN product market and the alternative broader product market as this, whatever you want to call it, the core of what I'm saying, but I might very well repeat the materials which I have in my statement about the possibility that price discrimination might be a more -- a profitable way for MSC to price within those markets.

And depending upon what I hear from Dr. Kearl's deposition, I may or may not go further than that. But as I state, my expectation, my strong expectation, is that the core of what I testify would be about the two product markets, advanced NASTRAN product market and the alternative broader product market, which I've presented in my statement.

Q. If you do decide to pursue testimony discussing price discrimination, do you plan to define a product market narrower than the two product markets you discuss in your testimony using the techniques of section 1.12 of the merger guidelines?

MR. McCARTNEY: Objection. Misstates his prior testimony.

THE WITNESS: The best I can express this is that I don't have anticipation of trying to define in any detail what smaller product markets might arise in the context in which MSC decided to use price discrimination in its pricing decisions.

I have done my report on the basis that the core concepts here for product market are advanced NASTRAN and the alternative broader market. But as I say, I would reserve the right to say something either on direct or on cross -- well, obviously I can say anything I want on cross I guess -- if Dr. Kearl or

of narrower markets in the context of the couple of examples that I gave, but I don't anticipate that being a focus of my testimony.

BY MR. BECKER:

Q. So you cannot sitting here today definitively tell me how many product markets you will define at trial; yes or no?

MR. McCARTNEY: Objection. Asked and answered and -- asked and answered.

THE WITNESS: I only anticipate at this point speaking about the advanced NASTRAN product market and the broader product market that I discussed, but I wouldn't preclude, based on what I've seen so far of Dr. Keane's position of commenting on that, and that in that context I might end up discussing the potential for separate product markets within the advanced NASTRAN product market. I think that's accurate.

BY MR. BECKER:

Q. Let's go to your initial report, which is RX 700, and go to page 6, footnote 4 at the bottom of the page.

A. Okay. I see that.

Q. The first question is: I couldn't find this footnote in your supplemental report. Do you still

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DATE MAY 29, 2002

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TESTIMONY OF PABLO T. SPILLER, Ph.D.

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It's duplicative. He's answered substantially the same question.

THE WITNESS: Should I answer the same way?

BY MR. BECKER:

Q. You may answer the question.

A. I do want to express an opinion here on what extent there was competition lost by virtue of the acquisitions and I do express an opinion on that. I don't comment on the legal implications I think in the paper.

Q. Okay. I'm not interested in whether you're commenting on the legal implications per se. What I want to know is: Are you -- let's put it this way.

Are you expressing an opinion in this matter that the acquisitions harmed competition?

A. Yeah.

Q. Are you expressing an opinion in this matter on the proper market definition to analyze this industry?

A. I do a partial, a partial analysis of that, yes.

Q. What do you mean by "a partial analysis"?

A. Well, not complete.

Q. So you're telling me your expert report contains an incomplete discussion of the proper market

definition in this industry?

A. The --

MR. COWIE: Objection to form.

THE WITNESS: The report, as the report states, is in process, and further analysis may imply that I may add more to it, including the market definition.

BY MR. BECKER:

Q. Are you expressing an opinion in this matter on matters of entry?

A. Yeah.

Q. Are you expressing an opinion in this matter on matters of competitive effects?

A. What do you mean by "competitive effects"?

Q. Well, what do you understand the phrase "competitive effects" to mean?

A. There are multiple ways. You have to tell me what you want and I'll answer that.

Q. Give me your understanding of the general meaning of "competitive effects."

A. Well, "competitive effects" is to what extent mergers facilitate collusion.

Is that what you had in mind?

Q. Do you understand the concepts of unilateral effects and coordinated effects as they're used in the

merger guidelines?

A. Sure.

Q. Are you expressing an opinion in this matter whether the acquisitions will lead to adverse -- strike that.

Are you expressing an opinion in this matter that the acquisitions will cause harm to competition through unilateral effects?

A. Yes. Implicitly. Not directly, but implicitly I'm saying that.

Q. Are you expressing an opinion in this matter that the acquisitions will cause harm to competition through coordinated effects?

A. I don't deal with that.

Q. Are you expressing an opinion in this matter as to issues of efficiencies?

A. I don't deal with that.

Q. Are you expressing opinions in this matter as to issues of the failing firm doctrine?

A. I couldn't hear you.

Q. Are you expressing opinions in this matter as to the issue of the failing firm doctrine?

A. Not right now. Not yet.

Q. Do you plan to file another expert report?

A. I'm not sure.

and --

MR. COWIE: Well, it's a confusing question.

MR. BECKER: State your objection and leave it at that.

THE WITNESS: I think I would prefer if you don't make so compounded a question because I don't really, can't understand what you are asking for.

So if you can simplify the question without a preamble, I could maybe give you a better answer.

BY MR. BECKER:

Q. Well, it had no preamble. I will repeat the question.

Is it your understanding that in your expert report you were supposed to express your opinions on this matter in this proceeding?

A. Yeah.

Q. And is it your understanding in this expert report you were supposed to provide the bases for your opinions in this proceeding?

A. The bases for my opinions are here.

Q. And have you expressed all opinions that you have on this matter in your expert report?

A. No.

Q. For the opinions you are expressing in your expert report, how do you -- strike that.

For the opinions you are expressing in your expert report, how do you intend to offer opinions when you have not done a complete evaluation of competitive conditions?

A. Well, at one point in time when the complete evaluation would be done if needed.

Q. And why wouldn't it be needed?

A. Why won't it be needed? Because the information that I gain doesn't change substantially my prior knowledge and as a consequence there is no need to further develop the issues.

But if I do find more information that is important for my opinions or that substantially or partially change them, I will provide more information on that.

Q. You state there are opinions on liability in your expert report.

Where would I find these opinions on liability?

A. Well, you have the opinions on the issue of competition and the fact that there has been competition lost. And you'll find that in the first part.

Q. Are you offering an opinion in this report on the proper market definition?

A. Partially, but not -- again, my analysis on that has not been complete.

Q. Are you offering an opinion in this report on issues of entry?

A. Yeah.

Q. Are you offering an opinion in this report on issues of unilateral competitive effects?

A. Implicitly.

Q. Have you, subsequent to issuing this report, conducted a complete evaluation of competitive conditions bearing on antitrust liability?

A. No. Not yet.

Q. Have you done any work subsequent to your expert report?

A. Yeah.

Q. What have you done?

A. I've read more material.

Q. Have you reviewed the expert reports of Dr. Kearl?

A. Absolutely.

Q. Are you planning to rely on the testimony of Dr. Hilke regarding issues of antitrust liability in this case?

MR. COWIE: I object to the form of the question.

Q. Who first contacted you about working on this matter?

A. I think it was Abbott -- no. Actually it was not. It was the -- a lawyer in the BC. I can't remember the name. I think it was one of the division chiefs. I'm not sure.

Q. How was the matter described to you?

A. Well, it was described in a very general form.

Q. And give me a description of the general form that was given to you.

A. Well, I can't really remember exactly the phone conversation, but it was would I be interested in participating in a case involving some acquisitions and that have already taken place.

Q. At what point did you make an assessment that you believe the acquisitions were anticompetitive?

A. I'm not sure about that. That requires me to figure out the exact point in my analysis.

Q. Have you made an assessment that the acquisitions are anticompetitive?

A. Well, my assessment has been that the acquisitions indeed substantially reduce competition.

Q. And that's the opinion you're planning to offer in this matter?

A. Probably.

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it, because I have seen that Power Train study, also.

Q. Okay. Dr. Venkayya, can you listen to my question, please?

A. Yeah.

Q. Here's my question. This document, you said you might have it in your possession, but you haven't had a chance to review it yet, correct?

A. Well, I don't know exactly if I have it.

Q. Okay. Are there documents in your possession that you haven't had a chance to review yet?

A. If it's a very recent one, yes.

Q. Okay. Is it your position that you're going to review those documents in the future?

MR. COX: I object to that question, because MSC has not yet certified compliance with the subpoena.

BY MR. LOCASCIO:

Q. Okay, go ahead, Dr. Venkayya.

A. Well, I don't know what the case is going to be in the future.

Q. Dr. Venkayya, please listen to my question and answer it.

A. Okay.

Q. Do you intend to review the documents in your possession right now that you haven't already reviewed?

A. I can't tell.

Q. You're not sure what you're going to do?
A. Not sure.
Q. You might review them, you might not.
A. Yes, that's correct.
Q. Okay. If you perchance happen to finally review these documents, do you intend to modify your opinions based on that review?
A. I don't know.
Q. You might?
A. If I find something that I would be willing to modify. I don't know now.
Q. So, if there's something in those documents that isn't already in your expert report, you might come up with a new opinion?
A. Possibly.
MR. COX: And does your question, Gregg, include the documents that MSC has not yet produced in response to our subpoena?
MR. LOCASCIO: Thank you, Dr. Venkayya.
Kent, when it's my deposition, you can ask me questions, okay, and this isn't.
BY MR. LOCASCIO:
Q. Dr. Venkayya, Exhibit 037 --
A. This is the same one?
Q. Yes, Solving Large Linear Problems with ABAQUS.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S SUPPLEMENTAL IDENTIFICATION OF TRIAL EXPERTS

In accordance with the March 5, 2002, Revised Scheduling Order, Complaint Counsel hereby identify the expert witnesses that we plan to call in our case in chief. We provide herewith a curriculum vitae for each expert witness, which identifies the expert's publications and any cases where the expert has testified or been deposed. Complaint Counsel also provide herewith all available transcripts of any such testimony by the expert. Complaint Counsel reserve the right to expand or contract the scope of any expert's testimony from that set forth below, elect not to call any expert witnesses listed herein, or identify additional expert witnesses as appropriate as the issues in the case are clarified in the course of pre-trial and trial processes.

I. John C. Hilke, Ph.D.

Dr. Hilke, an economist with the Division of Economic Policy Analysis in the FTC's Bureau of Economics, is expected to provide testimony on matters of economic theory and analysis pertaining to the allegations in the complaint, including the relevant market and the anticompetitive effect of Respondent's acquisitions. In addition, Dr. Hilke is expected to address the various claims raised or likely to be raised by Respondent.

2. Pablo Spiller, Ph.D.

Dr. Spiller is a special assistant to the Director of the FTC's Bureau of Economics and the Joe Shooing Professor of International Business and Professor of Business and Public Policy, and Chair, Bureau & Public Policy Group, Walter A. Haas School of Business, University of California, Berkeley, California. Dr. Spiller is expected to provide testimony concerning matters of economic theory and analysis pertaining to the allegations in the complaint, including the appropriate remedy to restore lost competition. In addition, Dr. Spiller may address various claims raised or likely to be raised by Respondent.

3. Dr. Vipperla B. Venkayya, Ph.D.

Dr. Venkayya is an expert in modeling and simulation of complex dynamics problems related to aeronautics and space structures. Dr. Venkayya retired in January 2002 from his position as a senior scientist at the Air Force Research Laboratory, Wright-Patterson Air force Base, in Ohio, where he was involved in modeling and simulation of complex structural dynamics problems using NASTRAN and other software systems. Dr. Venkayya is expected to give testimony concerning the art and science of engineering, the use and methods of finite element analysis, the features, functionalities, and differences among computer-aided engineering software products, and switching between different engineering software products.

4. Mr. Gregory Smith, CPA

Mr. Smith is a Certified Public Accountant and principal with Penta Advisory Services, a unit of Navigant Consulting, Inc. He is expected to provide testimony concerning the financial valuation of UAI and CSAR, including methodologies for valuing businesses, MSC's purchase price and valuation of UAI and CSAR, other firms' interest in acquiring or partnering with UAI and CSAR, and the efforts of UAI and CSAR to elicit alternative acquisition or partnering opportunities.

P. Abbott McCartney

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Dated: March 19, 2002

CERTIFICATE OF SERVICE

This is to certify that on March 19, 2002, I caused a copy of the attached Complaint Counsel's Supplemental Identification of Trial Experts to be served via facsimile transmission upon the following person with hand-delivery the following day:

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KIRKLAND & ELLIS
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Counsel for MSC.Software Corporation

P. Abbott McCartney

P. Abbott McCartney

CERTIFICATE OF SERVICE

This is to certify that on June 17, 2002, I caused a copy of the Respondent MSC.Software's Motion in Limine To Preclude Complaint Counsel's Expert Witnesses Form Testifying About Opinions Not Previously Disclosed to MSC 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.
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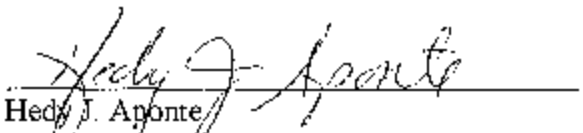

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

[PROPOSED] ORDER

IT IS HEREBY ORDERED that Respondent MSC. Software Corporation's Motion in Limine to Preclude Complaint Counsel's Expert Witnesses from Testifying About Opinions Not Previously Disclosed to MSC is GRANTED.

Specifically, it is hereby ORDERED that Complaint Counsel is precluded from introducing expert opinions beyond those already disclosed to MSC in its expert reports.

June ____, 2002