

Respondent produced a huge volume of documents after Complaint Counsel's experts supplied their reports and even after Respondent had deposed them. Respondent turned over the equivalent of 516 boxes of documents *on or after* the May 28, 2002, discovery deadline. This quantity is greater than all the documents that Respondent had previously supplied during the Part III proceeding. MSC also supplied a number of boxes immediately prior to the close of discovery while both parties were in the midst of taking depositions, including expert depositions. Complaint Counsel's experts should be free to consider this late-arriving evidence, and include even the testimony introduced at trial itself, as a basis for their expert opinions.

BACKGROUND

Pursuant to the Court's Amended Scheduling Order, Complaint Counsel provided on April 9, 2002, reports from four expert witnesses it intends to call at trial: Dr. John Hilke (economic expert), Dr. Pablo T. Spiller (economic expert on remedies), Dr. Vipperla B. Venkayya (technical expert), and Mr. Gregory Smith (accounting expert). Dr. Hilke's report was a supplemental report; he submitted a prior report on February 7, 2002.

Respondent supplied reports from three expert witnesses on March 1, 2002: Dr. James R. Kearl (economic expert), Dr. Jerry A. Hausman (economic expert), and Dr. Nils Juhlin (technical expert). On May 6, 2002, MSC submitted supplemental reports from Dr. Kearl and Dr. Juhlin and a report from an additional expert, Dr. Kenneth J. Versprille. In May, Respondent indicated that it would not call Dr. Hausman. On the eve of Complaint Counsel's deposition of Dr. Juhlin, MSC announced that it was also pulling him as a trial witness.

Respondent took the deposition of Dr. Hilke on May 27, 28, and 29, Dr. Spiller on May 29 and 30, Dr. Venkayya on May 30 and 31, and Mr. Smith on May 31. Complaint Counsel took the deposition of Dr. Kearl on June 6 and 7 and Dr. Versprille on June 6.

The Court's March 5, 2002, Revised Scheduling Order imposed a May 28, 2002, deadline on discovery. On May 22, 2002, the Court further ordered Respondent to complete its document production in response to Complaint Counsel's document request not later than May 28. Respondent turned over a massive quantity of documents in the final weeks of discovery and after the May 28, 2002, discovery cut off: the equivalent of 516 boxes of documents *on or after* the May 28 deadline.² Indeed, Respondent supplied more documents after the discovery cut off than before the deadline.

On May 8, the Court ordered Respondent to make six MSC executives and the former CEO of CSAR available for depositions not later than May 28, 2002. Respondent, however, refused to schedule any of these depositions until the two weeks immediately prior to the discovery cut-off. Moreover, Respondent refused to schedule the deposition of its CEO, Frank Perna, and the former CEO of UAI, Jeff Morgan, and the former CEO of CSAR, Dr. Narayanaswami, until after the Court's May 28, 2002, deadline.

² This consisted of 56 boxes of responsive documents and 127 unusable CDs containing the equivalent of an estimated 460 additional boxes. The CDs contained no bibliographic information or load files that would enable Complaint Counsel to make use of the CDs.

THE LAW

Section 3.31(b)(3) of the Commission's Rules of Practice provide that the parties shall exchange for each expert witness "a written report prepared and signed by the witness." Section 3.31(c)(4)(i) further provides for depositions of experts after receipt of the reports: "A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under §3.31(b)(3), the deposition shall not be conducted until after the report is provided." These provisions are intended to provide both sides with the pretrial disclosure of their respective expert's opinions and the facts and documents on which they rely for their respective opinions. Expert are afforded, however, the opportunity to provide opinions based upon information that was not available at the time of their reports and deposition testimony. *See Miller v. Pfizer Inc.*, 196 F. Supp. 1062, 1091 (D. Kan. 2002).

ARGUMENT

Dr. John Hilke

Consistent with his report, attached as Exhibit A, and his deposition, Complaint Counsel's economic expert, Dr. John Hilke, will testify that the appropriate product market in which to analyze Respondent's acquisitions of UAI and CSAR is a market comprised of MSC Nastran, UAI Nastran, and CSAR Nastran. This market may appropriately be described as the market for advanced versions of Nastran. He will further testify that even if other solvers may be included in the product market such as the ANSYS solver and Dassault's standalone Elfini solver, MSC's acquisitions of UAI and CSAR remain anticompetitive and unlawful.

Respondent targets for exclusion possible opinions from Dr. Hilke that might define markets based upon price discrimination. *See* Respondent's Motion in Limine at 4-5. While Dr. Hilke's report and his deposition testimony did not define markets based upon price discrimination, Dr. Hilke offered opinions that Respondent is able to and has charged varying prices to different customers. He also offered opinions that Respondent's increased market power gained through the acquisitions – its monopoly power – may be exercised by raising prices by differing degrees above competitive levels. *See, e.g.*, Dr. Hilke's Supplemental Expert Report at ¶¶ 38, 116, 220, 226, 275. Thus, there is no basis for limiting Dr. Hilke's opinions at trial regarding the past existence of and the future prospect for price discrimination by Respondent.

Dr. Pablo Spiller:

Respondent targets for exclusion opinions that Dr. Spiller does not intend to offer at trial. *See* Respondent's Motion in Limine at 6-8. Dr. Spiller is an economic expert who will address the appropriate remedy needed to restore the competition lost through Respondent's acquisitions of UAI and CSAR. Dr. Spiller prepared a detailed 39-page report on the remedy issue. *See* Exhibit B. Complaint Counsel is not calling Dr. Spiller to assist in defining the market or other issues regarding this challenge to MSC's acquisitions. If Respondent believes that Dr. Spiller has offered opinions at trial going beyond his report or opinions that are not otherwise justified by the lateness of Respondent's responses to Complaint Counsel's discovery, then Respondent can move at that time to exclude the opinions.

Dr. Vipperla B. Venkayya:

Complaint Counsel will call Dr. Vipperla Venkayya to address technical issues at trial. While Respondent seeks to limit his testimony in its motion, Respondent fails to identify any opinions that go beyond those expressed in his 59-paged detailed report. *See* Exhibit C. While Complaint Counsel does not plan to offer any new opinions from Dr. Venkayya, Respondent is overreaching when it seeks a blanket pretrial order limiting Dr. Venkayya to those opinions set forth in his expert reports. If Respondent believes that Dr. Venkayya offers opinions at trial beyond his report and that are not otherwise justified by Respondent's newly produced evidence, it can move at that time to limit the opinions.

Recently Produced Facts and Late Discovery:

Respondent's motion should be further denied to the extent that it seeks to limit Complaint Counsel's experts from relying upon and testifying about the substantial volume of new evidence produced by Respondent. Respondent produced the massive quantities of documents on or after the close of discovery, as well as a number of boxes during the final weeks of discovery when both parties were fully occupied taking depositions. Additionally, Respondent refused to make its senior executives and the former CEO of CSAR available until the two weeks before the close of discovery, including scheduling three depositions after the May 28, 2002, close of discovery and Your Honor's May 28, 2002, deadline for the depositions. Complaint Counsel's experts must remain open to review and rely upon such new evidence.

Courts have recognized that an expert can provide opinions on materials not known at the time of the expert's report. *See Miller v. Pfizer Inc.*, 196 F. Supp. 1062, 1091 (D. Kan. 2002) (testimony will be limited to reports except "with regard to scientific developments that occurred after the time that the record was put together in this case and information that the Court's experts either might have taken into account or that Dr. Healy might have taken into account that was not available to him at the time of the original expert reports.") In this matter, MSC's failure to turn over documents and schedule depositions within the period for discovery provide ample reason for allowing experts to review and rely upon such new evidence in offering their opinions.

* * * * *

The Court should deny Respondent's motion seeking a blanket pretrial order limiting Complaint Counsel's expert witnesses to the opinions contained in their expert reports. Respondent's vague notions of opinions not yet offered is an insufficient basis to limit opinions prior to trial. Any limitation, if warranted, must await trial where the parties can directly address actual opinions offered by the respective expert witnesses in the factual context of the case. The Court may also then weigh the effect

of Respondent's failures to comply in a timely fashion with the Court's discovery orders on the experts' ability to prepare their respective reports.



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Dated: July 1, 2002

EXHIBIT A

EXHIBIT B

EXHIBIT C

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

**ORDER DENYING RESPONDENT
MSC.SOFTWARE'S MOTION IN LIMINE TO LIMIT
OPINIONS OF COMPLAINT COUNSEL'S EXPERT WITNESSES**

IT IS HEREBY ORDERED that Respondent's June 17, 2002, Motion in Limine to Limit Opinions of Complaint Counsel's Expert Witnesses is DENIED.

Dated: _____

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that on July 1, 2002, I caused a copy of Complaint Counsel's Opposition to Respondent MSC.Software's Motion in Limine to Limit Certain Opinions of Complaint Counsel's Expert Witnesses to be served on the following persons:

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