

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



\_\_\_\_\_  
IN THE MATTER OF )  
MSC.SOFTWARE CORPORATION, )  
a corporation. )  
\_\_\_\_\_ )

Docket No. 9299

**MSC.SOFTWARE CORPORATION'S RESPONSE TO COMPLAINT  
COUNSEL'S EMERGENCY MOTION**

With this latest Motion, Complaint Counsel continues its unfortunate pattern of disregarding its meet-and-confer obligations, forcing your Honor to get involved in minor disputes, and wasting this Court's and the parties' time. Time that could be more productively spent clarifying and narrowing the issues that need to be litigated. MSC has been – and remains – committed to complying with the Orders of the Administrative Law Judge. Complaint Counsel's inflammatory assertions to the contrary are improper, and frankly, unprofessional.

On Monday, January 14, 2002, Counsel for MSC offered to meet with Complaint Counsel to talk about all of the outstanding discovery issues and to work with Complaint Counsel to restore civility to our dealings. As of today, Complaint Counsel has not responded to this offer. Complaint Counsel's refusal is both disappointing and instructive of its approach to this case.

On January 18, 2002, after your Honor ruled, Counsel for MSC received a flurry of calls from Complaint Counsel demanding that we provide dates for depositions instantaneously and insisting that the witnesses appear in the same order as originally scheduled, regardless of the witnesses' schedules. Counsel for MSC responded that same day by e-mail stating that we had issues to discuss with Complaint Counsel. (See 1/18/02 E-mail from T. Smith to P. McCartney & K. Mills, attached as

Exhibit A -- omitted from Complaint Counsel's Motion). Specifically, we needed to know Complaint Counsel's position on discovery before deciding whether to move for reconsideration of your Honor's Order and whether and when to file a motion to compel Complaint Counsel to respond to MSC's interrogatories. We never said, nor meant to imply, that we would not schedule the remaining depositions or that we were disregarding the Order. In fact, after receiving your Honor's Order, Counsel for MSC contacted the remaining witnesses to obtain dates that they would be available for their depositions.

As evidenced by Complaint Counsel's letter on January 18, Complaint Counsel was determined to involve your Honor without ever talking to us. (See 1/18/02 Letter from K. Mills to T. Smith, attached as Exhibit B). In that letter, Complaint Counsel stated that it interpreted MSC's desire to discuss unresolved discovery issues to mean that we were defying your Honor's order and said it would seek your intervention. We responded to Complaint Counsel by e-mail again asking them to advise us how Complaint Counsel wanted to proceed and reminded them of our offer of a face-to-face meeting. (See 1/18/02 E-mail from T. Smith to P. McCartney & K. Mills, attached as Exhibit C). Complaint Counsel's response to our e-mail was not to schedule a meet-and-confer session, but to file yet another Motion.

Frankly, we were shocked to learn this morning that Complaint Counsel filed this Emergency Motion without responding to our e-mail. Indeed, Complaint Counsel never let MSC know that it was refusing to discuss this matter prior to filing its Motion. We should not be before this Court today. We should have the meeting we requested, and the parties should be working out these issues without your intervention. Complaint Counsel simply must stop making unreasonable demands, jumping to false conclusions, refusing to talk, and running to this Court.

We respectfully request that Complaint Counsel's Motion be denied.

Respectfully submitted,



Tefft W. Smith (Bar No. 458441)  
Marimichael O. Skubel (Bar No. 294934)  
Michael S. Becker (Bar No. 447432)  
Bradford E. Biegon (Bar No. 453766)  
Larissa Paule-Carres (Bar No. 467907)  
KIRKLAND & ELLIS  
655 15<sup>th</sup> Street, N.W.  
12<sup>th</sup> Floor  
Washington, DC 20005  
(202) 879-5000 Telephone  
(202) 879-5200 Facsimile

*Counsel for Respondents  
MSC Software Corporation*

Dated: January 22, 2002

**CERTIFICATE OF SERVICE**

This is to certify that on January 22, 2002, I caused a copy of the attached MSC Software Corporation's Response to Complaint Counsel's Emergency Motion to be served upon the following persons by hand:

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

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

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

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



David Shotlander

KIRKLAND & ELLIS  
655 15<sup>th</sup> Street, NW  
Washington, D.C. 20005  
(202) 879-5000 (tel.)  
(202) 879-5200 (fax)

*Counsel for Respondents,*  
**MSC Software Corporation**





**Tefft Smith**

01/18/2002 03:01 PM

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To: Pmcartney@ftc.gov, kmills@ftc.gov

cc:

Subject: Communications

Abbott/Karen

On Monday, I offered to meet with Complaint Counsel face-to-face to talk about overall discovery issues in the interests of advancing the ball and trying to find a way to restore civility to the relationship given the necessarily intense demands of any trial preparation schedule. While I was met with smiles and "thanks for the offer," I have heard nothing since.

Suddenly, there have been a flurry of calls from Karen to Marimichael and me, relating to the ALJ's Order this afternoon. We intend to await Complaint Counsel's promised reconsideration

of the positions taken in response to MSC's Interrogatories and Document Requests and possible supplementation, due today, before deciding what we will do in response to the ALJ's Order. As you know, we held off filing our motions to compel in the hope that Complaint Counsel would decide to provide meaningful discovery responses.

We await your promised materials and the opportunity to review them. In the interim, if you have something else you want to say, please put it in writing.

Respectfully,

Tefft





UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Tefft W. Smith, Esq.  
Kirkland & Ellis  
655 15<sup>th</sup> Street, N.W.  
Washington, DC 20005

January 18, 2002  
Via Fax

Re: FTC Docket No. 9299

Dear Mr. Smith,

We are concerned about your apparent unwillingness to proceed with the scheduling of depositions pursuant to Judge Chappell's Order of January 17, 2002.

In order to schedule the depositions and complete them pursuant to Judge Chappell's Order compelling Respondents' deponents to appear for deposition, we contacted Marimichael Skubel and you several times by telephone today, soon after we received the Order. Rather than return our phone calls and discuss the scheduling of depositions, you chose to respond with a 4:05 p.m. e-mail that stated:

We intend to await Complaint Counsel's promised reconsideration of the positions taken in response to MSC's Interrogatories and Document Requests and possible supplementation, due today, before deciding what we will do in response to the ALJ's Order. As you know, we held off filing our motions to compel in the hope that Complaint Counsel would decide to provide meaningful discovery responses. We await your promised materials and the opportunity to review them. In the interim, if you have something else you want to say, please put it in writing.

From your refusal to return our telephone calls or answer the telephone messages we left you, and your e-mail, we take it that you are continuing to maintain the position you took in your January 14, 2002, filing with the court, which is that you refuse to discuss scheduling of depositions so long as you are dissatisfied with the discovery you have received from Complaint Counsel. If we misunderstand your position, please clarify for us in writing what it is.

We regard your refusal to discuss scheduling of depositions as defiance of Judge Chappell's Order. We intend to seek Judge Chappell's assistance Tuesday morning to secure your cooperation with compliance with his Order, if you have not contacted us before then to schedule the depositions.

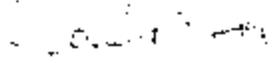
Tefft W. Smith  
January 18, 2002

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In the telephone messages we left with Marimichael today, we also said that we would like to meet with you as soon as possible, preferably today, to discuss your compliance with Complaint Counsel's First Request for Production of Documents and Things. Judge Chappell's separate Order dated January 18, 2002, authorizes complaint Counsel to file a renewed motion to compel if we have not resolved disputed issues by January 25, 2002, and we intend to do so if we are not able to resolve the disputed issues by then. Again, your dissatisfaction with discovery you have received from Complaint Counsel does not justify your refusal to comply with Complaint Counsel's discovery.

As we explained to you we are working on supplemental responses to your interrogatories. We told you that we would provide our supplementation on or around January 18, 2002, and we do expect to send you supplementary responses early next week.

Very truly yours,

  
Karen A. Mills



**From:** <tefft\_smith@dc.kirkland.com>  
**To:** FTC.SERIOUS("knills@ftc.gov", "pmccartney@ftc.gov")  
**Date:** 1/19/02 2:14PM  
**Subject:** Dkt. 9299

Karen/Abbott

Your letter late Friday underscores the issues between us. While you continue to demand and insist that we do things and talk to you about what we are going to do, you refuse to do anything in response or to be willing to talk about your discovery obligations. And, you knowingly misrepresent what we do say and do.

First, we/I did respond to your phone calls by my email Friday asking that you advise us of where you stood on your prior promises -- orally to me -- of a "reconsideration" of your position on MSC Interrogatories and Document requests by "January 18th" (you did equivocate in writing that it would be "on or around"). You have obviously decided -- in your own words -- to "renege" on that promise which, as we advised you by our letter of January 14th, was the basis for our decision not to file motions to compel. We will accordingly immediately proceed to file same.

Second, my email asked you to advise me -- in writing -- specifically how you wanted to proceed. It is Complaint Counsel, not MSC -- as evidenced by your lack of any response to my offer last Monday for an face-to-face meeting -- that refuses to have a verbal exchange on discovery issues.

Third, we said we had not decided what we would do in light of the ALJ's Order until we saw whether you were going to provide meaningful answers to MSC's basic contention Interrogatories and supplement your document production with the materials that you are admittedly withholding, notably without providing any privilege log. Please specify when "early next week" we will receive anything and specifically what we will receive.

Lastly, before we decide what to do, we need to know -- in writing -- whether you agree that if these witnesses are produced now, that Complaint Counsel will not seek to redepose them after MSC's production of additional documents which production you knew, at the time you noticed these depositions, would not occur until after the depositions were completed. Notably, at George Riordan's deposition, Abbott purported to reserve the right to recall Mr. Riordan based on "the additional documents we're waiting for" from MSC (1/14/02 Dep. Tr. 215, 217). Indeed, Abbott objected "to the deposition proceeding without having received responses to our [document ] subpoenas[.]" (Tr. 7).

Complaint counsel cannot have it both ways. We await your written response.

Respectfully,

Tefft Smith

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