

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

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

Docket No. 9299

**COMPLAINT COUNSEL'S OPPOSITION
TO RESPONDENT'S MOTION SEEKING
EXTENSION OF THE DATE FOR FILING ITS PRETRIAL BRIEF,
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

There is no basis for any further extension of the date for Respondent MSC Software Corporation ("MSC") to file its Pretrial Brief and Proposed Findings of Fact and Conclusions of Law, as sought in its Motion of June 18.

The grounds for the requested extension appear to be (1) MSC counsel's demand that Complaint Counsel "immediately" provide a public version and an "MSC version" of Complaint Counsel's Pretrial Brief, Proposed Findings of Fact and Conclusions of Law; (2) the assertion that failure by Complaint Counsel to have done so has deprived MSC of its constitutional right to defend the case; and (3) the demand that MSC be permitted to postpone the filing of its own pretrial papers until seven days after it is provided with the demanded redacted versions of Complaint Counsel's papers. None of this reasoning remotely supports the requested extension.

The provision of the Commission's Rules that governs the filing of papers containing confidential information is Rule 3.45(e), 16 C.F.R. § 3.45(e). The Rule provides that a party who files a paper containing confidential or *in camera* information "shall file two versions of the document" (emphasis added) – one complete version containing the confidential information,

marked confidential on the first page of the document, and a second “expurgated version,” from which all confidential material has been removed, that is to be “filed with the Secretary within five (5) days after the filing of the complete version.” The rule explicitly states: “Any time period within which these rules allow a party to respond to a document shall run from the date the party is served with the complete version of the document.”

The text of the relevant Rule, therefore, contradicts multiple premises underlying the MSC Motion. The filing and service of a public version of a confidential document need not be done immediately (as MSC counsel demanded) but rather within five days of the filing of the complete version. The Rule contemplates filing and service of two versions of the document – not multiple redacted versions, specially tailored for the convenience of opposing counsel in dealing with clients. Most importantly for present purposes, the rule makes clear that a party is expected to respond in a timely fashion after receipt of the complete version of the document, and should not expect to postpone its response pending filing and service of the public version.¹

It is preposterous to suggest that Complaint Counsel’s compliance with Rule 3.45(e) compromises MSC’s “core Constitutional due process rights.” Motion at 2. The Amended Protective Order (Dec. 6, 2001) gives MSC’s counsel abundant ability to confer and consult with its client concerning the content of Complaint Counsel’s Pretrial Brief, Proposed Findings of Fact and Conclusions of Law, so long as MSC counsel do not compromise the particular

¹Under Rules 3.45(e) and 4.3(a), the public versions of Complaint Counsel’s papers filed on June 14 are due to be filed within five working days thereafter, or by June 21. Concurrent with this Opposition, Complaint Counsel are filing and serving a public version of their Pretrial Brief. A public version of Complaint Counsel’s Proposed Findings of Fact will be timely filed and served pursuant to Rule 3.45(e). Complaint Counsel’s Proposed Conclusions of Law have not been designated as confidential.

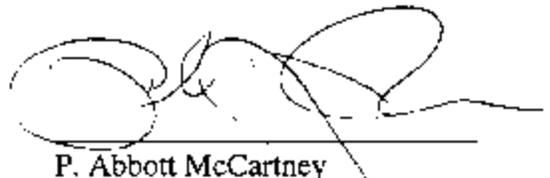
confidential factual information cited in the confidential versions of those documents. The lion's share of the confidential information contained in Complaint Counsel's papers is from MSC itself, and this is plainly not off-limits for discussion between MSC and its counsel. Indeed, the Motion makes no effort at all to suggest how as a practical matter MSC's counsel is being "hamstrung" in its consultations with its client.

Moreover, Paragraph 5 of the Amended Protective Order provides that MSC may seek permission for certain of its in-house personnel to obtain confidential documents and information, including confidential information of third parties, with notice to third parties and the approval of the Administrative Law Judge. Having never throughout this case even attempted to avail itself of this explicit provision of the Protective Order, MSC can hardly complain that it has been deprived of due process and the means for effective consultation between counsel and client.

Finally, MSC's reference (Motion at 2) to a portion of Your Honor's February 21 Order does not support the extension sought here. In that portion of the Order, Your Honor found that Complaint Counsel had incorrectly designated the entirety of our interrogatory answers as "Restricted Confidential," and ordered that a more selective review and designation be made. (Order at 6). No similar circumstance exists here, and the ruling cannot even remotely be read to suggest that Your Honor intended to override the provisions of Rule 3.45(c) and establish new procedural rules of the sort demanded here by MSC's counsel.

It is far too near the time of trial to permit MSC to postpone any longer the filing of its Pretrial Brief, Proposed Findings of Fact and Conclusions of Law. For the reasons set forth above, MSC's Motion for Extension should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'P. Abbott McCartney', written over a horizontal line.

P. Abbott McCartney
Peggy D. Bayer
Michael G. Cowie
Kent E. Cox
Andrew Heimert
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

Dated: June 20, 2002

CERTIFICATE OF SERVICE

This is to certify that on June 20, 2002, I caused a copy of Complaint Counsel's Opposition To Respondent's Motion Seeking Extension of the Date for Filing its Pretrial Brief, Proposed Findings of Fact and Conclusions of Law to be served:

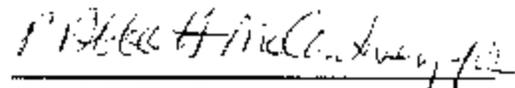
(a) via facsimile transmission, followed by hand-delivery of a copy to:

Tefft W. Smith, Esquire
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

and (b) by hand-delivery of a copy to:

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


Dennis J. Hargetts

