

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



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

**COMPLAINT COUNSEL'S EMERGENCY MOTION
TO COMPEL COMPLIANCE WITH
DISCOVERY ORDERS**

Complaint Counsel file this emergency motion seeking your Honor's intervention in order to effectuate the discovery orders dated January 17 and 18, 2002.

On Friday morning, January 18, 2002, Complaint Counsel received two separate discovery orders dated January 17 and 18, 2002. The first order directed the parties to schedule the long-delayed depositions of six MSC employees and executives, to occur by February 1, 2002. The second directed the parties to seek to resolve between them the remaining outstanding disputes pertaining to MSC's response to Complaint Counsel's Document Request, and granted leave to Complaint Counsel to renew our motion to compel if those issues were not resolved by January 25.

Recognizing that complying with these orders within the periods contemplated would necessitate prompt efforts by both sides, Complaint Counsel attempted to contact counsel for Respondent several times during the day of Friday, January 18, for purposes of scheduling the depositions and identifying the remaining disputed issues with respect to Complaint Counsel's Document Request. Rather than returning these calls, counsel for Respondent replied with an email at about 4 p.m. which reiterated the arguments made by Respondent in opposing the entry of the

discovery Orders, and which stated that Respondent would await Complaint Counsel's response to Respondent's discovery demands "before deciding what we will do in response to the ALJ's Order." (Ex. A, Letter of Karen A. Mills, Jan. 18, 2002). Complaint Counsel responded with a fax letter indicating that respondent's position of refusing to discuss scheduling of the depositions appeared to be in defiance of the Judge's Order. The letter asked Respondent to clarify if this was not its position.

On Saturday afternoon January 19, Respondent's counsel replied with a further email. (Ex. B, Email of Tefft W. Smith, Jan. 19, 2002). That email again reiterated Respondent's dissatisfaction with the discovery provided by Complaint Counsel and repeated that "we had not decided what to do in light of the ALJ's Order until we saw whether [Complaint Counsel] were going to provide meaningful answers" to Respondent's discovery demands. It also added, for the first time, a further condition – that "before we [Respondent] decide[s] what to do" in response to the ALJ's Order, Complaint Counsel must agree that the deponents would not be deposed again, even to address documents produced at some future date by Respondent in its much-delayed production pursuant to Complaint Counsel's Document Request. Respondent sought no such condition in its motion to quash the depositions, and there is no such condition in the Order.

Complaint Counsel by this emergency motion seek your Honor's intervention in order to clarify that Respondent is in violation of the recent discovery Orders by refusing to discuss scheduling of the depositions or the remaining outstanding disputes pertaining to Complaint Counsel's Discovery Request. While we are conscious of the burdens on this forum and are loathe to address your Honor unnecessarily on such discovery disputes, we are also aware that unless action is taken promptly the deadlines set in the Orders could be rendered a nullity. After today, there are only eight business days

within which to schedule and take the six remaining depositions by February 1. There are only three business days until January 25, the contemplated date for resolving the disputes concerning the Document Request.

Complaint Counsel therefore file this emergency motion seeking that your Honor clarify that Respondent, by refusing to discuss scheduling the depositions or the remaining outstanding disputes pertaining to Complaint Counsel's Discovery Request, is in violation of the discovery Orders dated January 17 and 18, 2002. Complaint Counsel request that Respondent be required to respond to this motion, orally or in writing, no later than the close of business today, January 22, 2002. Complaint Counsel make this motion without prejudice to our right to seek future sanctions as may be appropriate for Respondent's non-compliance with your Honor's orders.

Dated: January 22, 2002

Respectfully Submitted,

KAREN A. MILLS A.M.C.

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EXHIBIT A



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

Tefft W. Smith, Esq.
Kirkland & Ellis
655 15th 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.

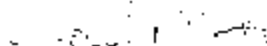
Tefft W. Smith
January 18, 2002

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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

EXHIBIT B

From: <tefft_smith@dc.kirkland.com>
To: FTC.SERIOUS("kmills@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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CERTIFICATE OF SERVICE

This is to certify that on January 22, 2002, I caused a copy of the Complaint Counsel's Emergency Motion to Compel Compliance with Discovery Orders to be served by hand upon the following persons:

The Honorable D. Michael Chappell
Federal Trade Commission
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Washington, D.C. 20580

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