

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 OPPOSITION TO COMPLAINT
COUNSEL'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENAS AD
TESTIFICANDUM AND DUCES TECUM**

Respondent MSC.Software Corporation ("MSC") hereby responds to Complaint Counsel's Motion to Compel Compliance with Subpoenas *Ad Testificandum* and *Duces Tecum* served upon Messrs. Thomas C. Curry, George N. Riordan, Robert E. Louwers, Thomas Cutly, Bruce Hart, Edward Jones, Todd Brown, and David Beer. As stated in its opening brief, MSC is not denying Complaint Counsel the opportunity to take the depositions of the above-named persons. To the contrary, counsel for MSC contacted Complaint Counsel in an effort to reschedule the deposition dates to accommodate all persons involved. Frankly, MSC found Complaint Counsel's approach of scheduling the dates without consulting the deponents odd. When faced with resistance from Complaint Counsel -- Complaint Counsel refused to consider dates in January and asserted that MSC would have to move to quash if it would not agree to December depositions -- MSC submitted that the arbitrary December dates noticed for these depositions should not stand and moved to quash the deposition dates selected by Complaint Counsel. Because the parties and the deponents have agreed to January

deposition dates—albeit, only after MSC’s filing of its Motion to Quash—both MSC’s Motion to Quash and Complaint Counsel’s Motion to Compel are moot. The issuance of an order compelling the appearance of these deponents is unnecessary, and thus Complaint Counsel’s Motion to Compel Compliance with Subpoenas *Ad Testificandum* and *Duces Tecum* should be denied.

STATEMENT OF FACTS

On December 5, 2001, MSC filed a Motion to Quash the series of subpoenas *ad testificandum* to MSC sales personnel, former employees, and a member of the Board of Directors served by Complaint Counsel. These subpoenas, issued on November 26, 2001, noticed eight depositions to occur between December 5, 2001 and December 18, 2001. Complaint Counsel selected these dates with no input from the deponents as to their availability. Immediately, counsel for MSC contacted Complaint Counsel in an effort to negotiate the deposition dates. However, Complaint Counsel was adamant that the dates stand and that the depositions must occur in December. At no point was the possibility of January deposition dates entertained by Complaint Counsel until after MSC filed its Motion to Quash. Subsequently, after much discussion, dates were established for all eight depositions to occur in the upcoming weeks of January, 2002.

On a parallel track, MSC has on several occasions communicated to Complaint Counsel that only one of the noticed deponents possessed documents responsive to Complaint Counsel’s subpoenas *duces tecum*. Those documents, which belonged to Mr. Thomas Curry, were produced to Complaint Counsel on December 10, 2001, pursuant to an agreement extending the production date from December 3 to

December 10. Counsel for MSC is in the process of obtaining verifications from the remaining deponents that state that there are no responsive documents relevant to the request. As these verifications are received, counsel for MSC is forwarding them immediately to Complaint Counsel. The verifications, however, are a mere formality, for, as stated above, there are no documents forthcoming. There will not be a massive document dump from these deponents on the eve of their depositions. Complaint Counsel knows this.

ARGUMENT

I. A Motion To Compel Compliance With Subpoenas *Ad Testificandum* Is Premature As MSC Has Not Violated Any Agreements Regarding Deposition Dates

In attempting to justify the bases for its Motion to Compel, Complaint Counsel first attempts to paint MSC in a negative light by deceptively relaying that on November 26, 2001, MSC refused to accept service on behalf of Messrs. Curry, Riordan, or Jones, while then confirming that it would accept service for those deponents on November 29, 2001. This statement is misleading in that it suggests that MSC was stalling or misinforming Complaint Counsel, when in fact, MSC simply had not yet determined whether its counsel would represent these non-MSC deponents. As soon as the issue of representation had been determined, a mere three days following issuance of the subpoenas, counsel for MSC began to negotiate on behalf of these non-MSC deponents.

Complaint Counsel next states that “[e]xperience has demonstrated that these persons have tended to back away from agreements about their availability to

appear.” This is hyperbole designed only to impugn the integrity of the deponents, Respondent, and counsel for MSC. While counsel for MSC, in an effort to negotiate and work with Complaint Counsel in the rescheduling of these depositions (a cooperative effort which should have occurred prior to service of the subpoenas), preliminarily suggested December dates for only one deponent, MSC’s counsel never represented that those were firm dates acceptable or convenient for all persons involved. Furthermore, MSC’s counsel never even preliminarily suggested December dates for any deponent other than George Riordan— not “some subpoenaed persons,” as Complaint Counsel suggests. The tentative dates in December were quickly withdrawn and there was no prejudice to Complaint Counsel.

One switched date in the course of negotiating eight deposition dates is far from a demonstration “that these persons have tended to back away from agreements about their availability to appear.” Therefore, there is absolutely no basis for the issuance of a motion to compel. There is no need to compel the attendance of these deponents given the history of MSC’s willingness to negotiate with Complaint Counsel and the lack of any indication that these deponents will fail to appear at their depositions. Consequently, Complaint Counsel’s Motion to Compel Compliance with Subpoenas *Ad Testificandum* and *Duces Tecum* should be denied.

II. A Motion To Compel Compliance With Subpoenas *Duces Tecum* Is Moot As MSC Has Produced All Documents In The Possession Of Deponents Which Are Responsive To Complaint Counsel's Request

Complaint Counsel accuses MSC of being “unwilling to state when responsive documents would be produced, or to certify that no further responsive

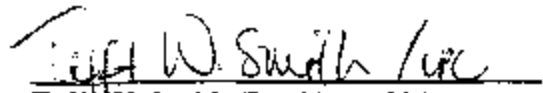
documents exist." In truth, counsel for MSC has relayed to Complaint Counsel on multiple occasions that, with the exception of Thomas Curry, whose responsive documents were produced to Complaint Counsel on December 10, 2001, none of the subpoenaed deponents have documents responsive to the subpoenaed requests. The formality of submitting the verification is in the process of being completed, but Complaint Counsel has not been prejudiced by the lack of such verification. Consequently, Complaint Counsel's Motion to Compel Compliance with Subpoenas *Ad Testificandum* and *Duces Tecum* should be denied.

CONCLUSION

Complaint Counsel's bald assertions of MSC's delinquency and untrustworthiness tell an unfair version of the facts and omit MSC's cooperation and willingness to negotiate discovery issues relevant to this litigation. MSC has demonstrated its good faith by making the deponents available, primarily in the District of Columbia, a location more convenient for Complaint Counsel, on the January dates agreed upon by all parties. For these reasons, MSC respectfully requests that the Court deny Complaint Counsel's Motion to Compel Compliance with Subpoenas *Ad Testificandum* and *Duces Tecum*.

December 27, 2001

Respectfully submitted,



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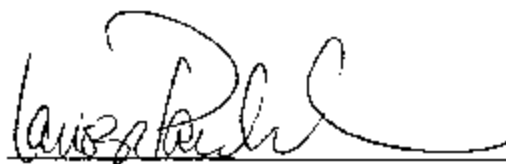
Counsel for Respondents,
MSC Software Corporation

CERTIFICATE OF SERVICE

This is to certify that on December 27, 2001, I caused a copy of the attached MSC Software Corporation's Opposition to Complaint Counsel's Motion to Compel Compliance with Subpoenas *Ad Testificandum* and *Duces Tecum* to be served upon the following persons by hand:

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