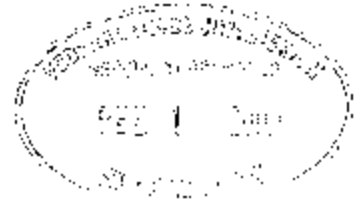


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF
MSC.SOFTWARE CORPORATION,
a corporation.

Docket No. 9299



To: The Honorable D. Michael Chappell
Administrative Law Judge

**CORRECTION TO PUBLIC VERSION OF RESPONDENT
MSC.SOFTWARE CORPORATION'S MEMORANDUM IN
SUPPORT OF ITS MOTION TO COMPEL COMPLAINT
COUNSEL TO RESPOND TO WRITTEN DISCOVERY**

Respondent MSC.Software Corporation hereby submits the following correction to its public version of Respondent MSC.Software Corporation's Memorandum in Support of its Motion to Compel Complaint Counsel to Respond to Written Discovery.

1. Exhibit "C" attached to the Memorandum contains the incorrect document. The correct document should be the January 7, 2002 letter from T. Smith to A. McCartney, instead of the January 7, 2002 letter from T. Smith to K. Cox that was attached. Attached is the correct exhibit.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tefft W. Smith".

Tefft W. Smith (Bar No. 458441)
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*Counsel for Respondent
MSC.Software Corporation*

Dated: February 1, 2002

CERTIFICATE OF SERVICE

This is to certify that on February 1, 2002, I caused a copy of the attached Correction to *public* version of Respondent MSC Software Corporation's Memorandum in Support of its Motion to Compel Complaint Counsel to Respond to Written Discovery to be served upon the following persons by hand:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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January 7, 2002

VIA FACSIMILE

P. Abbott McCartney, Esq.
Karen Mills, Esq.
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20005

Re: MSC Software, Docket No. 9299

Dear Abbott and Karen;

Complaint Counsel's Objections to MSC Software's First Set of Requests for the Production of Documents and Things – particularly when viewed in light of Complaint Counsel's deficient Initial Disclosures and Interrogatory Responses – raise troubling questions about Complaint Counsel's candor and willingness to comply with the FTC's commitment and delegation to provide MSC with a fair hearing consistent with its due process rights governing discovery.

As already outlined in our December 28, 2001 letter regarding the substantial deficiencies in Complaint Counsel's "responses" to MSC's First Set of Interrogatories, it is quite clear Complaint Counsel intends to conceal crucial information from MSC in an effort to hide deficiencies in its case, secrete exculpatory information away from public view, and preclude MSC from effectively preparing its defense.

MSC still does *not* have documents and information that should have been disclosed as part of Complaint Counsel's Initial Disclosures in *November*, even as Complaint Counsel pursues its aggressive, one-sided discovery. Also troubling is Complaint Counsel's *unilateral* decision to withhold verbatim statements (if any) made by those individuals who do not appear on Complaint Counsel's Preliminary Witness List and Complaint Counsel's acknowledgment that it is still holding non-privileged responsive documents. *See, e.g.*, Complaint Counsel's Response to Request No. 1.

Notably, no explanation has been offered for the delay in producing the verbatim statements that Complaint Counsel has chosen to dole out. Despite an express Commission requirement to turn over these statements as part of its Initial Disclosures, Complaint Counsel apparently *waited* until

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December 17, when it submitted its Preliminary Witness List to MSC, to *even begin* the process of providing the interviewees with a copy of the Protective Order (entered on November 27, 2001), thus further delaying the disclosures. *Even then*, Complaint Counsel waited until January 2, 2002, to provide copies of the statements. It is obvious that Complaint Counsel sifted through the information it gathered, cherry-picked the witnesses it would reveal, and gradually produced their transcripts. Even now, MSC still does not know the identity of those with whom Complaint Counsel communicated other than those appearing on the Preliminary Witness List.

MSC's response to each of Complaint Counsel's General and Specific Objections is provided below.

General Objections

General Objection No. 1: The objection is not well founded. MSC has *not* asked Complaint Counsel to segregate and resubmit materials previously provided – nor does it expect Complaint Counsel to do so. At issue is Complaint Counsel's decision to unilaterally limit production of materials to those which *it* believes are *relevant*. Complaint Counsel's obligations to produce documents is *not* limited to only those documents which were obtained from third parties during the investigatory phase and which are "*relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Respondent.*" Relevance – whether to the complaint's allegations, the proposed relief, and MSC's defenses – is *not* the measure of what Complaint Counsel must produce. Rather, Complaint Counsel is obligated to provide each document responsive to the request. Complaint Counsel may not *unilaterally* limit the scope of documents it provides.

For example, the Objection improperly states Complaint Counsel's intention to provide *only* those "verbatim statements" of individuals listed on its Preliminary Witness List. However, Complaint Counsel may *not* choose what it will provide and what it will *not* provide, while hiding evidence behind an impermissibly broad assertion of alleged privileges. Each of MSC's requests is narrowly-drawn and reasonably calculated to lead to the discovery of admissible evidence. Indeed, Complaint Counsel did *not* even object that responding to MSC's requests would be *unduly* burdensome or were *not* reasonably calculated to lead to the discovery of admissible evidence. Thus, Complaint Counsel may *not* simply opt to cut-off MSC's right to fair discovery.

The Objection also states that Complaint Counsel has "provided to Respondent *nearly all* non-privileged documents." This statement implies that Complaint Counsel is holding on to documents produced by third parties that are *not* privileged and others over which Complaint

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Counsel is asserting some privilege. Please identify what documents have been withheld, why they are being withheld, and when they will be produced.

As to any third party document over which Complaint Counsel asserts a privilege, please identify Complaint Counsel's basis for asserting a privilege over a document provided to it by a third party. Regardless of the reasons why Complaint Counsel continues to withhold documents, it is deeply troubling that Complaint Counsel continues to conceal documents - *three months after* Complaint Counsel's Initial Disclosures were due.

General Objection No. 2: This objection is not well founded. Complaint Counsel has had since November 27, 2001, to provide any person with whom it communicated a copy of the Protective Order in this case. Complaint Counsel's decision to wait until it served MSC with its Preliminary Witness List before giving individuals the opportunity to object to the Protective Order is *unconscionable*. *First*, the delay is inexplicable given the tight schedule governing this case. *Second*, the decision to refuse to provide verbatim statements from those with whom Complaint Counsel secretly communicated is likewise unjustified and inconsistent with Complaint Counsel's obligation to produce exculpatory evidence.

General Objection No. 3: This objection is not well founded. Complaint Counsel has failed to meet its burden of establishing the basis for an assertion of privilege regarding the identity of third parties with whom Complaint Counsel has communicated. The informant's privilege is a qualified one and Complaint Counsel has offered no basis - either in its Objections to MSC's Document Requests or in its earlier Objections to MSC's Interrogatories - for invoking the privilege. Complaint Counsel's objection is particularly inapt with regard to the identities of anyone that Complaint Counsel communicated with who offered exculpatory evidence or support for MSC's acquisition's of UAI and CSAR. Please provide the requested documents and state whether you have withheld any documents on this grounds.

In its Objection to MSC's Interrogatory No. 1, which sought the identity of "each person with whom you have communicated regarding MSC's acquisitions," Complaint Counsel stated that "[r]espondent will be able to ascertain from the face of the documents or other identifying characteristics the persons that Complaint Counsel have communicated with." *If* Complaint Counsel has actually provided MSC with *all* documents received from third parties (as stated in Kent Cox's letter), and MSC can identify *every* third party with whom Complaint Counsel communicated from those documents, then Complaint Counsel has waived its informant's privilege and Complaint

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Counsel must now withdraw any objection to both MSC's First Set of Interrogatories and MSC's First Set of Document Requests based on the informant's privilege.

If Complaint Counsel has withheld documents on this ground, please state the bases for the claimed privilege and all facts relied upon in support of that claim(s), including the document date, author(s), recipient(s), subject matter, its present location, and the request to which the document is responsive and explain whether the privileged material can be redacted (and if not, why not) as required by Instruction No. 15.

General Objection No. 4: To the extent that this objection asserts work product privilege with regard to documents prepared by, or in conjunction with, third parties, it is not well founded. Please state whether materials have been withheld from MSC based on this privilege and provide a statement of the claim of privilege, immunity, exemption, or the bases for the claimed privilege and all facts relied upon in support of that claim(s), including the document date, author(s), recipient(s), subject matter, its present location, and the request to which the document is responsive and explain whether the privileged material can be redacted (and if not, why not) as required by Instruction No. 15.

General Objection No. 5: To the extent that this objection asserts the attorney-client communication privilege with regard to documents prepared by, or in conjunction with, third parties, it is not well founded. Please state whether materials have been withheld from MSC based on this privilege and provide a statement of the claim of privilege, immunity, exemption, or the bases for the claimed privilege and all facts relied upon in support of that claim(s), including the document date, author(s), recipient(s), subject matter, its present location, and the request to which the document is responsive and explain whether the privileged material can be redacted (and if not, why not) as required by Instruction No. 15.

General Objection No. 6: To the extent that this objection asserts a deliberative process privilege with regard to documents prepared by, or in conjunction with third parties, it is not well founded. Please state whether materials have been withheld from MSC based on this privilege and provide a statement of the claim of privilege, immunity, exemption, or the bases for the claimed privilege and all facts relied upon in support of that claim(s), including the document date, author(s), recipient(s), subject matter, its present location, and the request to which the document is responsive and explain whether the privileged material can be redacted (and if not, why not) as required by Instruction No. 15.

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General Objection No. 7: This objection appears to be duplicative in scope to General Objection No. 3. If Complaint Counsel has a separate basis for making this objection, please state so. In any event, Complaint Counsel has failed to establish that it is entitled to assert this qualified privilege and, therefore, the objection is not well founded. Please state whether materials have been withheld from MSC based on this privilege and provide a statement of the claim of privilege, immunity, exemption, or the bases for the claimed privilege and all facts relied upon in support of that claim(s), including the document date, author(s), recipient(s), subject matter, its present location, and the request to which the document is responsive and explain whether the privileged material can be redacted (and if not, why not) as required by Instruction No. 15.

General Objection No. 8: Please state whether materials have been withheld from MSC based on this privilege and provide a statement of the claim of privilege, immunity, exemption, or the bases for the claimed privilege and all facts relied upon in support of that claim(s), including the document date, author(s), recipient(s), subject matter, its present location, and the request to which the document is responsive and explain whether the privileged material can be redacted (and if not, why not) as required by Instruction No. 15.

General Objection No. 9: Complaint Counsel's objection to Instruction No. 15 is not well founded. Complaint Counsel has broadly asserted a number of privileges – many of which appear specious – as grounds for withholding material necessary to MSC's defense. Complaint Counsel's refusal to provide a privilege log deprives MSC of any opportunity to assess the breadth of Complaint Counsel's assertions of privilege – let alone assess the legitimacy of Complaint Counsel's assertion of its privileges. In particular, Complaint Counsel's admission that it has submitted "nearly all" responsive documents which are "non-privileged" raises serious concerns regarding the degree to which Complaint Counsel has deliberately withheld documents from production. This concern is heightened by the general inadequacy of Complaint Counsel's earlier Interrogatory "responses."

General Objection No. 11: Please clarify whether – and if not, when – documents held by the management and staff of the Bureau of Competition and the Bureau of Economics responsive to these Requests have been – or will be – produced.

General Objection No. 12: This objection is not well founded. To the extent Complaint Counsel has documents responsive to MSC's requests, they must be produced (unless *properly* privileged), regardless of their source, public or private. MSC will move to preclude use at trial of *any* document's in Complaint Counsel's possession, custody, or control which has not been

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produced and which is responsive to MSC's requests, whether the origin of that document(s) is public or private. If any such documents exist, produce them immediately.

General Objection No. 14: To the extent that Complaint Counsel receives addition material and elects to assert a privilege over that material, MSC expects Complaint Counsel to update its privilege log.

General Objection No. 15: This objection is *not* well founded. Complaint Counsel is obligated to state its objections now so that they may be resolved by the parties or the Judge, if necessary. Complaint Counsel is not at liberty to think up excuses for not providing discovery as it goes along. Complaint Counsel had adequate time to formulate its boilerplate objections. This is a further demonstration of Complaint Counsel's deliberate effort to deny MSC its right to due process and a fair proceeding.

Specific Objections

Although Complaint Counsel enumerates "specific objections" to MSC's requests, they are generally boilerplate in nature and repeated uniformly throughout. Therefore, MSC will address these "objections" as a group.

In response to Request Nos. 1-2 and 4-18, Complaint Counsel "objects" that it has "provided nearly all non-privileged documents responsive to this Request." This objection is deficient insofar as it fails to explain why these documents have not been previously produced. Nor is it clear that Complaint Counsel will produce *all* non-privileged documents responsive to MSC's requests. Complaint Counsel may *not* selectively pick and choose which documents to produce or wait until it is most convenient to Complaint Counsel – or most disadvantageous to MSC – to produce these documents.

Complaint Counsel's delay is particularly egregious in light of Complaint Counsel's aggressive insistence upon taking the depositions of MSC employees even before these documents have been produced. Complaint Counsel insisted upon forging ahead with depositions even as it delayed production of critical verbatim statements. Complaint Counsel waited until January 2, 2002, the *day before* MSC's first employee was to be deposed, to produce *any* verbatim statements (which is avowedly an incomplete collection). The dates of these depositions had been negotiated well in advance and MSC anticipated – indeed MSC had been promised by Complaint Counsel – that by the time of these depositions Complaint Counsel would have fulfilled its obligation to turn over

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documents. Regrettably, MSC has necessarily been impeded in its ability to prepare for these depositions and has been compelled, in the interest of fairness, to cancel a number of these depositions.

Significantly, Complaint Counsel does *not* raise this "objection" in response to Request No. 3 which seeks "[a]ll transcripts (including electronic versions), video recordings, and audio recordings of investigatory depositions, interviews, statements, notes relating to any discussions held during such depositions or interviews statements taken or obtained by the FTC pursuant to its investigation of MSC's acquisitions."

Complaint Counsel's omission of this "objection" to this request is telling. Complaint Counsel obviously cannot claim that it has produced nearly all non-privileged responsive documents because Complaint Counsel is holding onto transcripts and other recordings of interviews and conversations that it refuses to turn over. This is an illegitimate effort to conceal information which Complaint Counsel must feel is injurious to its case (given the forty individuals named in Complaint Counsel's Preliminary Witness List, it is hard to believe that it is holding anything *adverse* to MSC in reserve). This also is the only request in which Complaint Counsel does *not* state that it will turn over additional responsive documents on the return date.

Litigation commenced and prosecuted by agents of the Federal Government is *not* a game for the benefit of the "home team." It is supposed to be a search for the truth and justice. *See Berger v. United States*, 295 U.S. 78, 88 (1935) ("[The Government] is the representative *not* of an ordinary party . . . but of a sovereignty . . . whose interest . . . is not that it shall win cases, but that justice shall be done"). MSC is protected by due process guarantees that mandate it be given a fair and adequate opportunity to defend itself. *Cf. Chambers v. Mississippi*, 410 U.S. 284 (1973) (due process right to introduce certain evidence); *Epstein v. MCA, Inc.*, 54 F.3d 1422 (9th Cir. 1995) ("The Federal Rules of Civil Procedure creates a "broad right of discovery" because "wide access to relevant facts serves the integrity and fairness of the judicial process by promoting the search for the truth.").

In response to Request Nos. 2-5 and 7-18, Complaint Counsel "objects" that "Complaint Counsel will provide all verbatim statements by persons appearing on Complaint Counsel's witness list after those persons have been afforded an adequate opportunity to seek an appropriate protective order." This objection is deficient and demonstrates again Complaint Counsel's attempt to thwart MSC's discovery and efforts to seek a fair hearing. By this objection, Complaint Counsel declares its intent to litigate from the shadows and hide from MSC's and the public's sight information that

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would show the lack of merit to Complaint Counsel's case. Complaint Counsel has arrogated to itself the right to decide which discovery it will provide and what it will hide. Complaint Counsel may not *unilaterally* limit its production of verbatim statements – and other responsive information – to those witnesses it has chosen to call at trial because Complaint Counsel believes that those witnesses will be most damaging to MSC. If Complaint Counsel has other verbatim statements – as this objection strongly suggests – produce them immediately.

This "objection" raises an additional point. The assertion that third parties must have time to seek an appropriate protective order suggests that Complaint Counsel has controlled the timing of notification to such third parties in a way that maximizes the delay in disclosing this important information to MSC. Had third parties been given notice of Complaint Counsel's intent to disclose their identity in *November*, when the Protective Order was first entered, the time for third parties to object would have long since passed. Instead, Complaint Counsel appears to have waited strategically to delay the production of such statements until January. MSC notes that these actions are consistent with Complaint Counsel's originally proposed schedule – a schedule *rejected* by Judge Chappell. Thus, Complaint Counsel has taken by fiat what it could *not* gain by argument.

Moreover, the fact that Complaint Counsel sent the notification to only those whom it intended to call at trial, suggests that other previously "interviewed" witnesses were not given an opportunity to agree or object to the disclosure of their identities to MSC. This suggests that Complaint Counsel's selective *exclusion* of verbatim statements has nothing to do with protecting these so-called "informants," but has more to do with impairing MSC's ability to obtain a fair hearing.

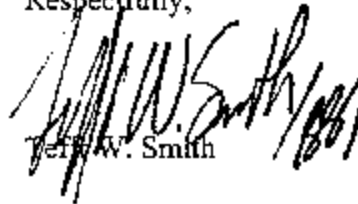
Complaint Counsel also "objects" in response to every Request – *except for No. 3* – that it will produce additional responsive documents on the return date. Inasmuch as these documents should have been produced as part of Complaint Counsel's Initial Disclosures, these documents must be produced without further delay. In addition, please state the amount of such additional production so that we may plan, particularly in light of the current tight trial schedule. (As we have noted elsewhere, given Complaint Counsel's misconduct, the current trial schedule is unworkable and cannot be complied with consistent with MSC's due process rights to a fair hearing, something we expect to take up with the Administrative Law Judge shortly.)

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We request that Complaint Counsel immediately confirm that it will promptly provide full and complete responses to these requests so that MSC may proceed with its discovery and prepare its case for trial. Should we be unable to resolve these issues by January 9, 2002, we will have no recourse but to ask for Judge Chappell's intervention.

Respectfully,



Jeff W. Smith