

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

**RESPONDENT MSC.SOFTWARE'S MOTION FOR
SEVEN DAY ADVANCE NOTICE OF WITNESS ORDER**

Complaint Counsel's continuing attempts at "trial by ambush" are neither legitimate nor geared toward doing justice. In its most recent incarnation, Complaint Counsel – while continuing to insist that it might call up to 27 trial witnesses – refuses to agree to identify the order of those witnesses one week ahead of the date of their testimony. Complaint Counsel's only possible rationales for disagreeing with this stipulation – which would affect both parties equally – are that it wishes to use surprise as a tactical advantage or punish MSC by having it prepare expensive cross-examinations for witnesses that Complaint Counsel may never call at trial.

In light of the Court's letter of June 12, 2002, indicated that "some notice" will be required regarding the timing and order of witnesses to be called, MSC requests that such notice be seven (7) days, the same amount of notice required by the ALJ before a party can read deposition transcript designations at trial. (See 6/12/02 letter from V. Arthaud to Counsel, attached as Exhibit A.) In a trial that could span more than a month – and include testimony from any combination of the 27 witnesses still on Complaint Counsel's trial witness list – it is

both fair and reasonable that each party be given seven days advance notice so as to avoid the burden and expense of preparing unnecessary cross-examinations.

As this Court is well aware, preparing for trial is a time-consuming and expensive undertaking. This is especially true where the other side has only “limited” its witness list to over two dozen witnesses, four of whom are experts. Neither party has time (and MSC does not have the financial resources) to waste doing unnecessary work for witnesses that may never testify, or going back and having to redo work because of the order in which witnesses are called. Giving seven days advance notice of when each witness is going to testify is a reasonable way to ensure that trial proceeds efficiently and no resources are unnecessarily wasted.

Further, each side is likely to know the order of their witnesses seven days prior to calling them, so there can be no legitimate claim that a seven-day notice requirement is burdensome. It is a matter of common courtesy to inform the other side about where your case is going, rather than trying to “surprise” or “ambush” them. A strong, well-organized case does not need to employ such tactics to gain an advantage or win.

In these circumstances, Complaint Counsel has a particularly weak argument that it cannot provide its witness order a week ahead of time. Complaint Counsel has had more than 24 months of pre-filing investigation followed by another 9 months of adjudicative discovery to prepare its case against MSC. Complaint Counsel’s proposed Findings of Fact have been completed, as has its trial brief. Complaint Counsel by now should – and hopefully does – know who it is going to call to trial and when. Of course, some scheduling snafus may present themselves during the course of a complicated trial – but if each party knows who is to testify in the next week, switching the order of one or two witnesses should schedules require is no big deal. But to have to guess who of Complaint Counsel’s 27 witnesses will testify on the first day

of trial until the Sunday before trial – as Complaint Counsel proposes with 48 hours notice – is not a search for justice but an unfair trial by ambush.

Moreover, Your Honor has ordered that both parties provide seven days notice of the intended use of previously-designated deposition testimony to the other side. As Your Honor recognized, each party will need time to react, prepare and respond to the other's decisions regarding designations. This approach is even more apt for live testimony – particularly where Complaint Counsel has listed 27 witnesses on its 'final' witness list.

The parties should also have to disclose their witness scheduling a week in advance to finally make Complaint Counsel admit which of its witnesses it truly intends to call at trial. As the Court will recall, Complaint Counsel's "witness lists" have been a source of contention throughout this case and, despite finally shrinking from its original 89 witnesses, Complaint Counsel's current list of 27 possible witnesses still likely contains witnesses Complaint Counsel has no intention of calling as witnesses. Indeed, MSC has recently learned that Complaint Counsel has informed at least one of its "witnesses" that Complaint Counsel believes it could take as little as two weeks to put on its case-in-chief and has not informed that witness whether it intends to call him at trial. Complaint Counsel will be hard-pressed to call 27 witnesses in two weeks and the more logical view is that, as MSC believes, Complaint Counsel will not be calling all of the 27 witnesses on its current list. MSC should not have to waste time and financial resources preparing to cross examine witnesses who will never be called. Disclosure by both parties of their planned witnesses seven days ahead of time will avoid that waste of time, effort and money at a time when neither party, particularly MSC, can afford it.

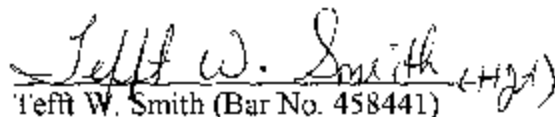
When MSC proposed such a seven-day notice requirement, Complaint Counsel rejected that approach. Instead, Complaint Counsel stated that it would provide its witness order

more only 48 hours before they were to take the stand. Complaint Counsel's view that telling MSC on Saturday morning which witnesses it intends to call on Monday morning is unacceptable and does little, if anything, to reduce the expense and burden of preparing to cross-examine all 27 of Complaint Counsel's witnesses (many of which are unlikely to be called) with sufficient lead time. Therefore, despite Your Honor's guidance on this issue, the parties have been unable to reach a agreed-upon disclosure schedule. See Smith Declaration at ¶¶ 3-6.

Accordingly, in light of the number of witnesses Complaint Counsel has indicated it may call at trial - as well as basic fairness and a desire in trying this case on the merits and not through surprise tactics - MSC requests that each side be required to provide notice as to the timing and order of their witnesses on a seven-day, rolling basis. By way of example, under this approach on July 1st, Complaint Counsel will inform MSC of the witness it plans to call during the week of July 8th and the order in which it intends to call those witnesses.

Similarly, on July 8th, Complaint Counsel will informed MSC of the witnesses it intends to call during the week of July 15th. MSC will have the same disclosure obligations for the witnesses that it intends to call during its case.

Respectfully submitted,



Jeffrey W. Smith (Bar No. 458441)
Marimichael O. Skubel (Bar No. 294934)
Bradford E. Biegon (Bar No. 453766)
Larissa Paule-Carres (Bar No. 467907)
KIRKLAND & ELLIS
655 15th Street, N.W.
Washington, DC 20005
(202) 879-5000 (tel)
(202) 879-5200 (fax)

Dated: June 17, 2002

**Counsel for Respondents,
MSC Software Corporation**



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

June 12, 2002

Victoria Arthaud
Attorney-Advisor

Direct Dial
202 326 2321

Via facsimile

P. Abbott McCartney, Esq.
FEDERAL TRADE COMMISSION
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Tefft W. Smith, Esq.
Marimichael Skubel, Esq.
KIRKLAND & ELLIS
655 Fifteenth St., N.W.
Washington, D.C. 20005

Re: *In re MSC Software, Corp., Docket No. 9299*

Dear Counsel,

In response to the questions raised by Tefft Smith's e-mail of June 11, 2002, I write the following:

(1) The parties should work out between themselves the issue regarding advance disclosure of witnesses to be called. To the extent that the parties cannot, you may file a motion. Complaint Counsel will be required to respond to such motion in two days. Be advised, Judge Chappell will likely order some notice to be given in advance of calling witnesses.

(2) Properly offered and admitted designations from transcripts of MSC employees may be, but are not required to be, read in open court. Properly offered and admitted portions of the transcripts are part of the record without having been read in at the hearing.

Judge Chappell will allow the use of properly offered and admitted depositions of third parties in lieu of live testimony where such use is agreed to by both sides. If the parties are unable to agree to the use of depositions in lieu of live testimony, the issue may be raised by motion.

If Complaint Counsel intends to read previously offered and admitted designations in open court, it must provide MSC with notice of those designations that it intends to read in court by July 5, 2002. MSC must then provide Complaint Counsel with notice of those counter-designations that it intends to read in court by July 9, 2002.

If MSC intends to read previously offered and admitted designations in open court, it must provide Complaint Counsel with notice of those designations 7 days prior to the dates on which it intends to read such designations. Complaint Counsel must then provide MSC with notice of those counter-designations that it intends to read in court in response within 4 days of notice.

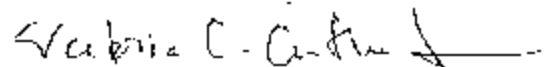
(3) Judge Chappell does intend to hold the trial five days per week, except that Judge Chappell will schedule days off, approximately one day every two weeks. Counsel should be prepared to discuss scheduling days off at the final prehearing conference.

(4) Judge Chappell does intend to hear opening statements.

(5) Oral argument may be permitted on motions in limine if Judge Chappell finds that it would be helpful.

(6) MSC is permitted to set up and keep in the hearing room for the duration of the trial whatever additional trial presentation equipment MSC deems desirable, so long as it does not disrupt the equipment already in place or obscure views. MSC should be advised, however, that the FTC cannot be held liable for theft or damage to private property left in the hearing room.

Very truly yours,



Victoria C. Arthaud

CERTIFICATE OF SERVICE

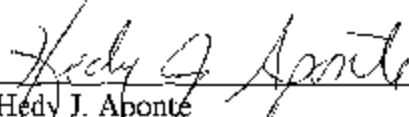
This is to certify that on June 17, 2002, I caused a copy of the Respondent MSC Software's Motion For Seven Day Advance Notice Of Witness Order to be served upon the following persons by hand delivery:

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

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

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

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



Hedy J. Aponte
KIRKLAND & ELLIS
655 15th Street, NW
Washington, D.C. 20005
(202) 879-5000 (tel.)
(202) 879-5200 (fax)