

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

Docket No. 9299

**RESPONDENT MSC.SOFTWARE CORPORATION'S MOTION SEEKING
AN EXTENSION TO THE FILING DATE FOR PRETRIAL BRIEF,
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Once again, Complaint Counsel's delay tactics have impinged upon MSC's ability – indeed, its right – to litigate effectively and defend this case. In this most recent incident, Complaint Counsel has failed to provide MSC with public versions of its Pretrial Brief and Proposed Findings of Fact, despite repeated reminders of their necessity to MSC's preparation. As a result, MSC requests that it be granted seven days from the receipt of these documents to file its Pretrial Brief, Proposed Findings of Fact and Conclusions of Law. MSC needs this time, as originally allocated, to consult with its client.

MSC's counsel reminded Complaint Counsel of the importance for MSC to receive a public version of these submissions, so that MSC's counsel would "be able to obtain the assistance of MSC in preparing a timely response." [e-mail from T. Smith to P. McCartney, dated June 14, 2002, attached at Tab A] Then, after having received only the non-public versions, counsel for MSC again contacted Complaint Counsel and requested the public versions of the filed documents:

"Please let us know immediately when to expect the MSC version of the Findings and electronic copies of same and electronic copies of the filings that Complaint Counsel have made. As Complaint Counsel should be well aware -- and committed to provide -- due process and fundamental fairness require that MSC be able to have adequate time to review the proposed findings and conclusions of law and provide

input to the response, particularly given the Draconian relief demanded by Complaint Counsel in this matter.”

[e-mail from T. Smith to P. McCartney, dated June 15, 2002, attached at Tab B] It is now June 18, and *MSC has still not received a public version of Complaint Counsel's Pretrial Brief and Findings of Fact*,¹ nor any response from Complaint Counsel to its requests. As a result, counsel for MSC has been hamstrung in its attempts to consult meaningfully with its client in the drafting of its pretrial filings, or otherwise defend against Complaint Counsel's specious claims.

The ability of an attorney to communicate with his or her client, especially in a case involving an industry as complex and detailed as the F&A solver industry, is fundamental to core Constitutional due process rights. This issue has been litigated in front of Your Honor in past motions; unfortunately it must be raised yet again. See Order, dated February 21, 2002 (ordering Complaint Counsel to redesignate its responses to MSC's First Set of Interrogatories, following a determination that designating each page "Restricted Confidential," and thereby precluding MSC's review of the responses, was improper)

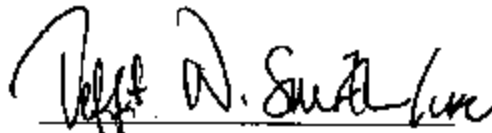
As the court in *United States v. Lever Bros. Co.* stated, "[i]t is equally clear that Lever counsel should be permitted to discuss this data with company personnel. The information involved is of a nature which inherently requires discussion with expert personnel and those intimately familiar with the industry, to be meaningful. Expert analysis and comparisons will be a necessity if the defense of this action is to be adequately prepared. . . . [T]o deprive the knowledgeable personnel of the absolute right to examine and discuss these documents at the trial would be tantamount to depriving Lever of the right to defend." 193 F. Supp. 254, 257-58 (S.D.N.Y. 1961) The same holds

¹ After counsel for MSC's second e-mail reminder indicating the necessity of these public documents, Complaint Counsel indicated that the Conclusions of Law, as filed, were viewable by MSC.

true in the instant case. Counsel for MSC *must* be able to confer and consult with MSC regarding the technicalities of the product and market at issue in this case. This will not happen unless and until Complaint Counsel supplies a public version of its June 14 filings.

For the foregoing reasons, MSC respectfully requests that this Court extend MSC's deadline for filing its Findings of Fact and Conclusions of Law until seven days after receipt of a public version of Complaint Counsel's filings, thereby allowing MSC's attorneys to consult meaningfully with their client. Subsequently, Complaint Counsel's Reply to MSC's Pretrial Brief would be due seven days from MSC's filing of its Pretrial Brief, Proposed Findings of Fact and Conclusions of Law.

Respectfully submitted,



Jeffrey W. Smith (Bar No. 458441)
Marimichael O. Skubel (Bar No. 294934)
Michael S. Becker (Bar No. 447432)
Bradford E. Diegon (Bar No. 453766)
Larissa Paule-Carres (Bar No. 467907)
KIRKLAND & ELLIS
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000 (tel.)
(202) 879-5200 (fax)

Counsel for Respondents,
MSC Software Corporation

Dated: June 18, 2002

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

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

PROPOSED ORDER

IT IS HEREBY ORDERED that Respondent MSC Software Corporation's Motion Seeking An Extension to The Filing Date For Findings of Fact and Conclusions of Law is GRANTED.

Specifically, it is hereby ORDERED that MSC Software Corporation will be required to file its Pretrial Brief, Findings of Fact and Conclusions of Law seven (7) days following its receipt of public versions of Complaint Counsel's filings. In addition, it is further ORDERED that Complaint Counsel must have served MSC with public versions of its June 14 filings no later than Monday, June 24, 2002, thereby causing MSC's filings to be due no later than June 31, 2002, or seven days following its receipt of public versions of Complaint Counsel's filings, whichever occurs first. Finally, it is ORDERED that Complaint Counsel's Reply to MSC's Pretrial Brief be filed seven days following the filing of MSC's Pretrial Brief, Proposed Findings of Fact and Conclusions of Law, but not later than July 7, 2002.

June , 2002

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

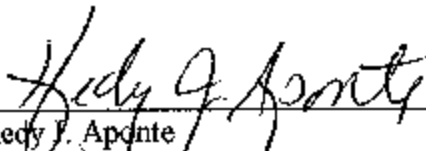
This is to certify that on June 18, 2002, I caused a copy of the **Respondent MSC Software Corporation's Motion Seeking an Extension to the Filing Date for Pretrial Brief, Findings of Fact and Conclusions of Law** to be served upon the following persons by hand delivery:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania 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)

▶ **Tefft Smith**
06/14/2002 03:30 PM

.....

To: pmccartney@ftc.gov
cc: (bcc: Larissa Paule-Carres/Washington DC/Kirkland-Ellis)

Subject: Complaint Counsel's Pre-Trial Brief and Proposed Findings

Abbott,

In order for MSC's counsel to be able to obtain the assistance of MSC in preparing a timely response, we must receive an immediate copy of the MSC version of the pleading(s) for transmission to the client.

When can we expect to receive both the non-public and the redacted for MSC version?

Respectfully,

Tefft

1
2
3
4
5
6
7
8

► **Tefft Smith**
06/15/2002 09:22 AM

.....

To: pmccartney@ftc.gov
cc: (bcc: Larissa Paule-Carres/Washington DC/Kirkland-Ellis)

Subject: Complaint Counsel's Pre-Trial Brief and Proposed Findings

Abbott,

We have yet to receive the MSC version of the Findings to share with our client MSC and, therefore and as we warned yesterday as indicated below [to which we received no response], we consider Complaint Counsel to be in default of the ALJ's Order and will govern ourselves accordingly.

We have also not yet received an electronic version of the filings that Complaint Counsel DID make last evening [i.e. beyond the close of business]. Complaint Counsel own practice has been to treat such a filing as untimely, meaning that the filing is deemed received on the next business day which, in this case, would be Monday June 17th.

Please let us know immediately when to expect the MSC version of the Findings and electronic copies of same and electronic copies of the filings that Complaint Counsel have made. As Complaint Counsel should be well aware -- and committed to provide -- due process and fundamental fairness require that MSC be able to have adequate time to review the proposed findings and conclusions of law and provide input to the response, particularly given the Draconian relief demanded by Complaint Counsel in this matter.

Also, we received yet another overdue CD of Complaint Counsel's proposed exhibits yesterday, four days beyond when Complaint Counsel promised the ALJ that they would complete the production of exhibits [other than from the recent electronic production]. We are still missing at least 18 "documents," identified by Complaint Counsel on its existing List. Of course, many of the "documents" provided consist of a single page taken out of context from a document and other incomplete documents and collections of unrelated documents, all of which are objectionable.

When will Complaint Counsel complete its production of the exhibits on it previously supplied list?

The dates agreed upon for MSC's various submissions were all premised on Complaint Counsel's compliance with the schedule approved by the ALJ. Complaint Counsel's multiple and continuing defaults in derogation of the ALJ's orders means that MSC cannot respond until those defaults are cured and minimally adequate time, as contemplated in the Scheduling Order, is afforded.

We await your immediate notification as to when Complaint Counsel is going to get itself into compliance with the ALJ's Order.

Tefft

..... Forwarded by Tefft Smith/Washington DC/Kirkland-Ellis on 06/15/2002 08:47 AM
.....

► **Tefft Smith**
06/14/2002 03:30 PM

.....

To: pmccartney@ftc.gov
cc:

Subject: **Complaint Counsel's Pre-Trial Brief and Proposed Findings**

Abbott,

In order for MSC's counsel to be able to obtain the assistance of MSC in preparing a timely response, we must receive an immediate copy of the MSC version of the pleading(s) for transmission to the client.

When can we expect to receive both the non-public and the redacted for MSC version?

Respectfully,

Tefft