

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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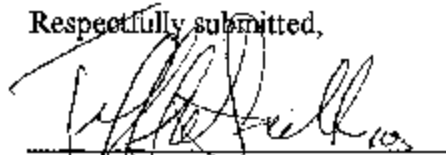
IN THE MATTER OF )  
MSC.SOFTWARE CORPORATION, ) Docket No. 9299  
a corporation. )

**RESPONDENT MSC.SOFTWARE CORPORATION'S  
MOTION FOR AN EXPEDITED RESPONSE TO MSC'S EMERGENCY  
MOTION FOR CONTINUANCE OF THE START OF TRIAL  
OR SANCTIONS PRECLUDING COMPLAINT COUNSEL'S  
PRESENTATION OF A REBUTTAL CASE**

Respondent MSC Software Corporation respectfully seeks this Court to enter an order compelling Complaint Counsel to respond to MSC's Motion For Continuance of the Start of Trial or Sanctions Precluding Complaint Counsel's Presentation of a Rebuttal Case by July 5 at noon.

This issue must be resolved immediately as the trial is scheduled to begin on Tuesday, July 9. Therefore, MSC respectfully requests that this Court grant this Motion for an Expedited Response and issue the attached Order.

Respectfully submitted,



Teft W. Smith (Bar No. 458441)  
Marimichael O. Skubel (Bar No. 294934)  
Michael S. Becker (Bar No. 447432)  
Bradford F. Biegon (Bar No. 453766)  
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(202) 879-5000 (Phone)  
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*Counsel for Respondent  
MSC Software Corporation*

Dated: July 2, 2002

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF	)	
MSC.SOFTWARE CORPORATION,	)	Docket No. 9299
a corporation.	)	

**RESPONDENT MSC.SOFTWARE CORPORATION'S EMERGENCY  
MOTION FOR A CONTINUANCE OF THE START OF TRIAL OR SANCTIONS  
PRECLUDING COMPLAINT COUNSEL'S PRESENTATION OF A REBUTTAL CASE**

Complaint Counsel's refusal to comply with the Scheduling Order's requirement for a reply brief and accompanying rebuttal exhibits ("Complaint Counsel [must] file[ a] reply to Respondent's pretrial brief, supported by documents and deposition citations and identifying any final rebuttal exhibits"),<sup>1</sup> manifests *either*

(a) Complaint Counsel's *inability* to respond to MSC's comprehensive showing in its *Pretrial Brief* and *Proposed Findings of Fact* that Complaint Counsel has failed even to define a market (the "key question" per Complaint Counsel at the first pre-hearing conference) or to offer proof of the "ultimate issue" -- the existence of any actual sustained or probable future substantial anticompetitive effects from these now *3 year old acquisitions*. (See Horizontal Merger Guidelines §.01); *or*

(b) Complaint Counsel's *unwillingness* to comply with fundamental due process requirements to allow MSC proper notice of Complaint Counsel's intended case and a timely opportunity to prepare its defense, and instead to engage in an impermissible "*trial by ambush*" in

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<sup>1</sup> Second Revised Scheduling Order, dated May 3, 2002.

a manner that is ill-becoming of a governmental agency, a “representative not of an ordinary party to a controversy, but to a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all and *whose interest, therefore . . . is not that it shall win a case, but that justice shall be done.*” *Berger v. United States*, 295 U.S. 78, 88 (1935)

If it is the *former* –an inability to respond, MSC should be entitled to immediate summary dismissal pursuant to Rule 3.22. *See* 16 C.F.R. §§ 3.22(a) and (c). If the *latter* – an effort at “trial by ambush,” Complaint Counsel should either be precluded from offering *any* rebuttal case or Complaint Counsel should immediately be ordered to make good faith filings and the trial should be – *briefly* – continued (for seven (7) days) to allow (as the existing compressed schedule provides) MSC time to review Complaint Counsel’s intended responses to MSC’s case and to incorporate that into MSC’s opening statement and its cross-examination of Complaint Counsel’s witnesses.

This unfortunate act by Complaint Counsel and the necessity for relief require no extended discussion. The fairness principles and law are clear. “Due process requires that [Respondents] are entitled to appropriate discovery in time to reasonably and adequately prepare themselves, and their defenses, before facing the charges in the administrative ‘trial.’” *Standard Oil Co. v. F.T.C.*, 475 F. Supp. 1261, 1275 (citing *Morgan v. United States*, 304 U.S. 1 (1938)).

The Scheduling Order’s requirement of a Reply Brief and accompanying papers is part of the discovery process, particularly given Complaint Counsel’s known practice of reserving much of its “case” for rebuttal. As explained in *U.S. v. Rodriguez*, “*the reply brief . . . is the best vehicle for narrowing the true issues*, and is especially important – and *called for* – when *a new point or issue . . . is raised[.]*” 15 F.3d 408, 414-15 n.7 (5th Cir. 1994)

Here, Complaint Counsel has inexplicably violated this Court's Scheduling Order ignoring its *duty* to this Court, the public, and MSC. On November 13, 2001, March 5, 2002, and again on May 3, 2002, Your Honor ordered that Complaint Counsel file a reply brief with rebuttal exhibits. This is *not an optional submission*.

This Court has demonstrated that when it intends for an item on the Scheduling Order to be *discretionary*, it says so, e.g., "Respondent's Counsel provides supplemental expert witness reports, *if necessary*." The purpose of the Reply filings is the disclosure of Complaint Counsel's intended rebuttal case to allow MSC a fair opportunity to anticipate and formulate its defense accordingly.

Complaint Counsel's concealment of its intended responses to MSC's evidence is not just a "hard blow" but a "foul one." *Berger, supra* 295 U.S. at 88. Modern discovery rules are intended "to narrow and clarify the issues and give the parties mutual knowledge of all relevant facts, thereby preventing" such "*trial-by-ambush*" tactics. *Dilmore v. Stubbs*, 636 F.2d 966, 969 n.2 (5th Cir. 1981). Fairness dictates that this administrative proceeding should be "less a game of blind man's bluff and more a *fair contest* with the basic issues and facts *disclosed to the fullest*, practical extent possible." *United States vs. Proctor & Gamble*, 356 U.S. 677, 683 (1958).

To insure that justice is done, Complaint Counsel should either be prohibited from presenting a rebuttal case, or it should be ordered to file a good faith reply brief setting forth its response to the defense MSC has put forth in good faith. MSC needs a brief period of time to analyze and respond. This short additional time -- the seven (7) days contemplated by the existing schedule -- is reasonable and essential to assure MSC's due process rights.

“Concern with calendar dispatch [cannot] triumph over a defendant’s right to a *fair trial*, which is the foundation of our justice system.” *Gavino v. MacMahon*, 499 F.2d 1191, 1196 (2d Cir. 1974) “[O]ur system of justice” requires that the “court . . . avoid creating an appearance of unfairness through an unnecessary *rush to judgement*.” *Fitzgerald v. Penthouse Intern., Ltd.*, 776 F.2d 1236, 1238 n.3 (4<sup>th</sup> Cir. 1985).

For the foregoing reasons, MSC respectfully requests that Your Honor enter the attached Order requiring Complaint Counsel to “file[ a] reply to Respondent’s pretrial brief, supported by documents and deposition citations and identifying any final rebuttal exhibits” and briefly continue the start of trial to allow MSC the opportunity to incorporate Complaint Counsel’s reply into its defense, or in the alternative, precluding Complaint Counsel from introducing any rebuttal documentary or testimonial evidence or otherwise presenting a rebuttal case.

Respectfully submitted,



Tefft W. Smith (Bar No. 458441)  
Marimichael O. Skubel (Bar No. 294934)  
Michael S. Becker (Bar No. 447432)  
Bradford E. Biegon (Bar No. 453766)  
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Washington, DC 20005  
(202) 879-5000 (Phone)  
(202) 879-5200 (Facsimile)

*Counsel for Respondent*  
*MSC Software Corporation*

Dated: July 3, 2002

**CERTIFICATE OF SERVICE**

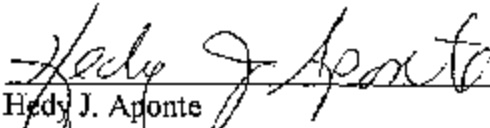
This is to certify that on July 3, 2002, I caused a copy of Respondent MSC Software Corporation's Emergency Motion For An Expedited Response to MSC's Motion For Continuance Of The Start Of Trial Or Sanctions Precluding Complaint Counsel's Presentation Of A Rebuttal Case to be served upon the following persons by hand delivery:

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

Richard B. Dagen, Esq.  
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(202) 879-5200 (fax)

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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IN THE MATTER OF	)	
	)	
MSC SOFTWARE CORPORATION,	)	Docket No. 9299
	)	
a corporation.	)	
_____	)	

**ORDER**

IT IS HEREBY ORDERED that Respondent MSC Software Corporation's Motion For an Expedited Response to MSC's Emergency Motion For Continuance of the Start of Trial or Sanctions Precluding Complaint Counsel's Presentation of a Rebuttal Case is GRANTED. Complaint Counsel is hereby ORDERED to respond to this Motion no later than 12:00 p.m. on Friday, July 5, 2002.

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

Dated: \_\_\_\_\_

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

IN THE MATTER OF	)	
	)	
MSC.SOFTWARE CORPORATION,	)	Docket No. 9299
	)	
a corporation.	)	

**ORDER**

IT IS HEREBY ORDERED that Respondent MSC. Software Corporation's Emergency Motion For A Continuance of the Start of Trial is GRANTED, IT IS THEREFORE ORDERED that

Complaint Counsel is to file a reply to Respondent's Pre-Trial Brief, supported by documents and deposition citations and identifying any final rebuttal exhibits by Monday, July 8, 2002, by 12:00 p.m.

IT IS FURTHER ORDERED that

The trial in this proceeding will commence on July 16, 2002.

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

Dated: \_\_\_\_\_



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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IN THE MATTER OF	)	
MSC.SOFTWARE CORPORATION,	)	Docket No. 9299
	)	
a corporation.	)	
_____	)	

**ORDER**

IT IS HEREBY ORDERED that Respondent MSC Software Corporation's Motion for Sanctions Precluding Complaint Counsel's Presentation of a Rebuttal Case is GRANTED.

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

Dated: \_\_\_\_\_