

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



\_\_\_\_\_  
In the Matter of \_\_\_\_\_  
MSC.SOFTWARE CORPORATION, \_\_\_\_\_  
a corporation. \_\_\_\_\_  
\_\_\_\_\_

Docket No. 9299

**ORDER ON RESPONDENT MSC.SOFTWARE CORPORATION'S  
MOTION TO COMPEL RESPONSES TO WRITTEN DISCOVERY**

I.

On January 25, 2002, Respondent MSC.Software Corporation ("MSC") filed a motion to compel Complaint Counsel to respond to written discovery. MSC's motion seeks an order compelling Complaint Counsel to respond more fully to MSC's First Set of Interrogatories ("Interrogatories") and to MSC's First Set of Requests for the Production of Documents and Things ("Document Requests").

Also on January 25, 2002, Complaint Counsel served MSC with its Revised Responses and Objections to MSC's First Set of Interrogatories ("Revised Responses"). After receiving Complaint Counsel's Revised Responses, MSC filed a Supplemental Memorandum in support of its motion to compel, on January 30, 2002. Although MSC did not file a motion for leave to file the supplemental memorandum, its implicit request to file this supplement is GRANTED. Complaint Counsel filed its opposition to the motion to compel and the supplemental memorandum on February 5, 2002.

On February 8, 2002, Complaint Counsel filed a Request For Leave to File and Supplemental Memorandum in Opposition to the Motion to Compel. Complaint Counsel's request for leave to file a supplemental memorandum is DENIED. 16 C.F.R. § 3.22(c) ("The moving party shall have no right to reply, except as permitted by the Administrative Law Judge."). On February 20, 2002, MSC filed a Request For Leave to File Second Supplemental Memorandum In Support of Motion to Compel. MSC's request for leave to file a supplemental memorandum is DENIED. 16 C.F.R. § 3.22(c). Complaint Counsel's supplement of February 8, 2002, and MSC's supplement of February 20, 2002 will not be considered. Any unresolved issues raised in these supplements may be presented by separate motion.

For the reasons set forth below, MSC's motion to compel is GRANTED in part and DENIED in part.

## II.

MSC seeks an order compelling Complaint Counsel to provide more complete responses to MSC's First Set of Interrogatories. MSC asserts that Complaint Counsel has failed to provide fully responsive answers and has improperly refused to answer contention interrogatories. Complaint Counsel responds that its Revised Responses contain substantial detail and adequately address MSC's contention interrogatories.

The Commission's Rule on interrogatories requires that each interrogatory be answered "fully." 16 C.F.R. §3.35(a)(2). To answer MSC's interrogatories fully requires Complaint Counsel to provide MSC with facts supporting its contentions. *See In re TK-7 Corp.*, 1990 FTC LEXIS 20 (March 9, 1990); *In re Century 21 Commodore Plaza, Inc.*, 1977 FTC LEXIS 284 (Feb. 1, 1977). Upon review of the Revised Responses, it appears that, at this stage of the discovery period, Complaint Counsel has fully answered all but a few of MSC's interrogatories. Complaint Counsel's responses may not be complete where Complaint Counsel has used qualifying language, such as "the companies include," which indicates that Complaint Counsel could have additional information that it has not provided. For example, in Revised Response Number 6, Complaint Counsel states that it contends "that the following persons, *among others*, have switched between different advanced versions of Nastran[.]" In Revised Response Number 7, which asks Complaint Counsel to identify each person using an advanced version of Nastran who was discouraged from switching to other solvers, Complaint Counsel answers generally that users are not able to switch and identifies only one specific example of a customer who was discouraged from switching. Where Complaint Counsel has used qualifying language and if Complaint Counsel has additional information that is responsive to any of MSC's Requests, Complaint Counsel is ORDERED to provide that information to MSC by February 28, 2002. In addition, the parties are reminded of the continuing duty to supplement as soon as additional information becomes available. 16 C.F.R. § 3.31(e).

## III.

MSC next asserts that Complaint Counsel has improperly referred to documents of MSC, without adequately identifying specific documents, in lieu of providing responsive answers. Complaint Counsel states that its Revised Responses provide adequate responses and also note that answers to many of the questions are ascertainable with equal, if not greater, ease by Respondent from its own information or from a review of the materials submitted in response to Respondent's document request.

Commission Rule 3.35(c) allows a party to specify records from which answers to interrogatories may be derived or ascertained if the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served. 16 C.F.R. § 3.35(c). When the option to produce records is utilized in lieu of answering interrogatories, the specification shall include sufficient detail to permit the interrogating party to identify the individual documents from which the answer may be ascertained. 16 C.F.R. § 3.35(c). MSC

charges that Complaint Counsel has not specifically identified documents responsive to various of its interrogatories. However, although Complaint Counsel's responses do state the information sought can be ascertained from sources such as MSC's own documents, current and former employees, licensees, and customers, that are more convenient, less burdensome, or less expensive for Respondent than for Complaint Counsel, Complaint Counsel does not appear to be invoking Rule 3.35(c) to avoid providing a responsive answer. Instead, Complaint Counsel has made general references to MSC's sources in addition to – not in lieu of – providing responsive answers. Accordingly, Complaint Counsel is not required to revise its answers with specific cites to documents at this time. In this respect, MSC's motion is DENIED.

#### IV.

MSC asserts that Complaint Counsel has improperly invoked privileges to refuse to answer the interrogatory seeking the names of all individuals that Complaint Counsel has communicated with concerning MSC's acquisitions. MSC states that Complaint Counsel has refused to disclose anyone it communicated with except those disclosed on Complaint Counsel's preliminary witness list. Complaint Counsel argues that the identity of persons who communicated with the government in the investigation may be withheld from disclosure on grounds of informant's privilege and the work product doctrine.

The informant's privilege is "the government's privilege to withhold from disclosure the identity of persons who provide information about violations of the law to law enforcement officials and others who render assistance that is necessary to effective law enforcement." *In re Harper & Row, Publishers, Inc.*, 1990 FTC LEXIS 213, \*8-9 (June 27, 1990). The privilege recognizes the public interest in the flow of information to the government concerning law violations, and by preserving the anonymity of the informants, encourages them to come forward. *Id.* at \*9 (*citing Roviario v. United States*, 353 U.S. 53, 59 (1957)). "The privilege is not absolute but is qualified by the need of the respondents for the information to prepare their defense." *Id.* "The respondents have the burden of showing that the identity of the informants is essential to their defense." *Id.* "The party seeking disclosure must show that the privileged information sought is 'essential to a fair determination of' the issues." *Id.* at \*12 (*citations omitted*).

Complaint Counsel has provided the identities of individuals it communicated with who are also on its preliminary witness list. MSC has not demonstrated substantial need to overcome the informer's privilege with respect to identities of any other individuals Complaint Counsel may have communicated with. Accordingly, MSC's motion to compel Complaint Counsel to respond to interrogatories seeking the names of individuals Complaint Counsel has communicated with is DENIED.

#### V.

MSC seeks an order compelling Complaint Counsel to produce "all exculpatory evidence in its possession, custody, or control." In its objections to MSC's interrogatories, Complaint

Counsel has stated that it objects to the interrogatories to the extent they “seek identification of any exculpatory evidence. Such requests seek attorney work product materials and information that is protected by the informant’s investigatory records, and governmental deliberative process privileges.” MSC argues that this objection is improper and that Complaint Counsel is obligated to produce exculpatory evidence, pursuant to *United States v. Brady*, 373 U.S. 83, 87 (1963).

Complaint Counsel counters by asserting that the Commission and numerous decisions by Administrative Law Judges of the FTC have squarely held that *Brady* and its progeny requiring the government to provide exculpatory information in a criminal investigation were developed in the context of criminal charges involving capital offenses and do not apply in Commission administrative proceedings. Accordingly, Complaint Counsel argues it is not required to produce documents that MSC has characterized as exculpatory.

The Commission has consistently held that “the rulings of *Brady* and its progeny are inapplicable to administrative proceedings.” *In re Amrep Corp.*, 102 F.T.C. 1362, 1983 FTC LEXIS 17, \*566-67 (Nov. 2, 1983) (*citing Allied Chemical Corp.*, 75 F.T.C. 1055, 1056 (1969) (*Brady*, which involved suppression of evidence where the defendant was found guilty and sentenced to death, has little, if any direct relevance to administrative proceedings.)). Subsequent decisions by Administrative Law Judges have consistently held that Complaint Counsel is not required to produce documents in response to demands for exculpatory evidence. *E.g. In re College Football Assoc.*, 1991 FTC LEXIS 119 (April 16, 1991); *In re Textron, Inc.*, 1990 FTC LEXIS 549 (Jan. 16, 1990). The case upon which Respondent relies, *Olin*, Docket 9196, Nov. 26, 1985, which stated that officials of a law enforcement agency may not deliberately withhold a document which they believe to be exculpatory, was later held to be inconsistent with the Commission’s decision in *Allied Chemical Corp.*, 75 F.T.C. 1055, 1056 (1969). *In re California Dental Assoc.*, 1994 FTC LEXIS 31 (Feb. 16, 1994).

Respondent does not contend that there is any particular exculpatory evidence that is being withheld by Complaint Counsel. Nor does Respondent point to any specific Request for Documents for which it feels Complaint Counsel’s Response is deficient in this regard. Rather, MSC seeks generally an order compelling Complaint Counsel to produce any exculpatory evidence it might have. For the reasons stated above, Respondent’s motion to compel Complaint Counsel to produce exculpatory documents is DENIED.

## VI.

MSC seeks an order compelling Complaint Counsel to produce a privilege log, asserting that Complaint Counsel is required to comply with Commission Rule 3.38A. Complaint Counsel argues that demands for production of documents in the files of the Commission may be quashed upon general assertion of privilege, and that the description of documents for which the privileges are asserted may be made by general category and need not include detailed specifications of each document.

Commission Rule 3.38A states that any person withholding material responsive to written interrogatories requested pursuant to § 3.35 or a request for production pursuant to § 3.37 shall assert a claim of privilege not later than the date set for production of the material. 16 C.F.R. § 3.38A. "Such person shall, if so directed, . . . submit, together with such claim a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged." 16 C.F.R. § 3.38A.

MSC's Definitions and Instructions in its Interrogatories and in its Document Requests did direct Complaint Counsel to provide a privilege log. Complaint Counsel has improperly refused to provide a privilege log, as is required by Commission Rule 3.38A. The cases upon which Complaint Counsel relies to argue that it may assert privilege by general category and need not include detailed specifications of each document are inapposite. *In re Great Atlantic & Pacific Tea Co.*, 82 F.T.C. 1860, 1973 FTC LEXIS 224 (June 27, 1973) and *In re Chock Full O'Nuts Corp., Inc.*, 82 F.T.C. 747, 1973 FTC LEXIS 219 (March 2, 1973) were both decided before the Commission added Rule 3.38A to its Rules of Practice. Trade Regulation Rulemaking Procedures, 44 Fed. Reg. 54,042 (Sept. 18, 1979). In the cases relied upon by Complaint Counsel that were decided subsequent to the adoption of Rule 3.38A, the Administrative Law Judges addressed situations where the respondents sought documents located in the files of offices of the Commission other than those of complaint counsel. Privileges may be generally asserted for documents that are located in offices of the Commission other than those of Complaint Counsel. *In re R.J. Reynolds*, 1998 FTC LEXIS 179 (Sept. 24, 1998) ("Other offices of the Commission, being third parties to this litigation, and not parties, need not be specific in describing items withheld for privilege."); *In re Flowers Indus., Inc.*, 1981 FTC LEXIS 117 (Sept. 11, 1981) (Subpoenas for documents in the files located in offices of the Federal Trade Commission other than those of Complaint Counsel are quashed upon general assertion of privileges.); *In re Champion Spark Plug Co.*, 1980 FTC LEXIS 200 (Dec. 16, 1980) ("Since an application under Rule 3.36 for documents in files of offices at the Federal Trade Commission other than those of counsel supporting the complaint is, in effect, a demand directed at a third party, the general description of the documents by category and a broad ruling on privileges would be sufficient."). But, where, as here, it appears that the documents Complaint Counsel is withholding are located in the files of Complaint Counsel, Complaint Counsel may not rely on a general assertion of privilege.

Complaint Counsel, as a party to this litigation, is required by Commission Rule 3.38A to submit a detailed privilege log of the items withheld from Complaint Counsel's files, if so directed by MSC. Because MSC has demanded a privilege log, Complaint Counsel must comply with 16 C.F.R. § 3.38A. In this respect, MSC's motion is GRANTED. Complaint Counsel shall provide a privilege log by February 28, 2002.

## VII.

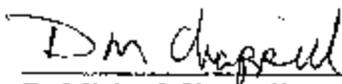
Finally, MSC asserts that Complaint Counsel has improperly designated each page of its responses to interrogatories as "Restricted Confidential, Attorney Eyes Only." Documents designated Restricted Confidential, Attorney Eyes Only may only be disclosed to persons specified in the Amended Protective Order Governing Discovery, entered in this matter on December 6, 2001 ("Protective Order"). Complaint Counsel asserts that its designation of its responses as "Restricted Confidential, Attorney Eyes Only," is appropriate because the information was prepared from a broad range of evidence and information obtained from numerous sources, including sources considered confidential by the originators of the information.

The Protective Order contemplates that the Restricted Confidential, Attorney Eyes Only designation is a "particularly restrictive designation . . . to be utilized for a limited number of documents." A cursory review of the Responses reveals that much of the information designated by Complaint Counsel does not qualify for this higher standard of confidentiality. Complaint Counsel is hereby ORDERED to review its responses and make a determination on which, if any of the responses, meet the standards of Paragraph 2(b) of the Protective Order. Complaint Counsel shall redesignate its responses as appropriate by February 28, 2002. If MSC is not satisfied with Complaint Counsel's redesignations, it may follow the procedures in place in the Protective Order for challenging the designations.

## VIII.

For the above stated reasons, MSC's motion to compel is GRANTED IN PART and DENIED IN PART.

ORDERED:

  
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D. Michael Chappell  
Administrative Law Judge

Date: February 21, 2002