

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

Docket No. 9299

**COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION FOR
CONTINUANCE OF THE START OF TRIAL OR SANCTIONS PRECLUDING
COMPLAINT COUNSEL'S PRESENTATION OF A REBUTTAL CASE**

In its continuing effort to delay these proceedings, Respondent once again engages in sanctionable conduct. In attempting to change a discretionary reply brief into a mandatory discovery device, Respondent's only citation even vaguely on point runs so counter to Respondent's position that the three ellipses used in the abstracted quote do not begin to cover the gap. While citing the case for the proposition that the reply brief is mandatory, Respondent leaves out the following language from United States v. Rodriguez, 15 F.3d 408 (5th Cir. 1994):

"... a reply brief is not mandatory..."¹

There is no justification for such sleight of hand, even if the case otherwise justified Respondent's position. The Court must be able to rely on the citations by the parties, especially

¹The entire quote is as follows:

Rodriguez did not file a reply brief in response to the Government's brief, which urged the plain error standard of review. At oral argument, his counsel asserted that the issue should be reviewed de novo. Needless to say, a reply brief containing such an assertion, with supporting authorities, should have been filed. Although a reply brief is not mandatory, see Fed. R. App. P. 28(c), it is the best vehicle for narrowing the true issues, and is especially important -- and called for -- when a new point or issue (such as application of the narrow plain error standard of review) is raised in the appellee's brief.

given the tight deadlines and scarce resources available.

And Rodriguez does not support Respondent. The court suggested that a reply brief should be filed in an appellate case where the appellee raised a new point or issue, such as a new standard of review. Unlike in Rodriguez, the instant situation does not involve an appeal where Respondent has raised a new standard of review. In fact, Respondent's contentions were addressed in an unprecedented 246 pages of pretrial brief and findings submitted by Complaint Counsel. This case is as far from "trial by ambush" as one could imagine.

Other than its deceptive citation to Rodriguez, Respondent cites to no authority to justify treating this reply trial brief different from the manner in which the Commission or federal courts generally treat reply briefs. With respect to motions, the Commission Rules generally provide "no right to reply, except as permitted by the Administrative Law Judge or the Commission." (See Rule § 3.22). Trial briefs are not specifically required or addressed by the Rules, but with respect to appeals to the Commission, the Rule states that an "appellant may file a reply brief." (See Rule § 3.52).²

MSC can only turn an optional brief into a mandatory one through additional editorial maneuvering; that is, by inserting one small, but critical word ["must"] into the scheduling order.³ Such tactics cannot be countenanced. The scheduling order simply did not turn a discretionary filing into an obligatory one.

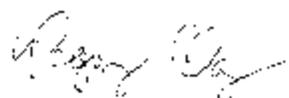
²Traditionally, it is the party denied the opportunity to submit a reply brief that claims foul. See City of Los Angeles v. Santa Monica Baykeeper, 254 F.3d 882 (9th Cir. 2001)("The Company claims that it is a denial of due process not to give a mandatory right to file a reply brief. We know of no such requirement.")(citation omitted).

³Notably, the initial draft scheduling order circulated by Your Honor did not even mention reply briefs. See Proposed Scheduling Order (Nov. 1, 2001).

Respondent's attempt to divert Complaint Counsel's attention from final pre-trial preparation with a facially meritless pleading should not be further rewarded - it has already caused the expenditure of needless resources.⁴

A separate comprehensive motion for sanctions against Respondent's continuing dilatory tactics was filed separately.

Respectfully Submitted,



P. Abbott McCartney
Peggy D. Bayer
Michael G. Cowie
Kent E. Cox
Karen A. Mills
Nancy Park
Patrick J. Roach
Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580
(202) 326-2695
Facsimile (202) 326-3496

Dated: July 8, 2002

CERTIFICATE OF SERVICE

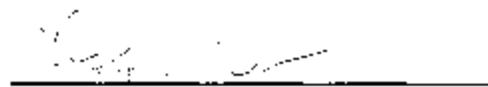
⁴Given the shortness of time, this brief is not comprehensive. Should the Court desire additional briefing on this issue, Complaint Counsel is happy to oblige.

This is to certify that on July 8, 2002, I caused a copy of Complaint Counsel's Response to Respondent's Motion for Continuance of the Start of Trial or Sanctions Precluding Complaint Counsel's Presentation of a Rebuttal Case to be served via facsimile transmission and/or by hand-delivery of a copy the following day to the following person:

The Honorable D. Michael Chappell
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Tefft W. Smith, Esquire
Colin M. Kass, Esquire
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5034
Fax (202) 879-5200

Counsel for MSC Software Corporation



Peggy D. Bayer