

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



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

**REPLY BRIEF IN SUPPORT OF MSC's MOTION  
TO AMEND THE SCHEDULING ORDER**

At the end of last week's Pretrial Status Conference, the parties agreed to attempt to reach an accommodation regarding their proposed revisions to the current Scheduling Order. MSC has in vain sought to reach such an accommodation. But Complaint Counsel has met every request, proposal, and suggestion made by MSC with one simple response: "No."

MSC has requested four minor modifications to the Court's Revised Scheduling Order:

- A one week extension to submit supplemental expert reports;
- An extension of the expert discovery deadline from May 30, 2002 to June 14, 2002;
- A one-week extension for both parties to file their respective findings of fact and pre-trial briefs;
- A one week delay in the start of the trial date to accommodate the Fourth of July Holiday.

In addition, MSC seeks an Order permitting MSC to take third-party depositions during the month of June (and through trial, if necessary) if third-party scheduling conflicts prevent May depositions.

Complaint Counsel has rejected each of these proposals without articulating any valid reason. Its only proffered basis for rejecting MSC's proposals is its blind – or rather self-serving – adherence to the current Scheduling Order.

But, as MSC previously explained, “concern with calendar dispatch [cannot] triumph over a defendant’s right to a fair trial, which is the foundation of our system of justice.” *See Gavino v. MacMahon*, 499 F.2d 1191, 1196 (2d Cir. 1974). More fundamentally, Complaint Counsel’s protestations concerning the need to maintain the integrity of the current Scheduling Order ring hollow in light of their own unilateral failure to adhere to it. Specifically, Complaint Counsel has failed to disclose rebuttal expert reports on April 26, 2002, as required by this Court’s Revised Scheduling Order.<sup>1</sup>

Throughout this litigation, Complaint Counsel has tried to gain every unfair tactical litigation advantage it can, even if it deprives MSC of its due process rights. Complaint Counsel has not only ignored, but has again and again directly contravened, the FTC’s mandate to “to do justice.” *Berger v. United States*, 295 U.S. 78, 88 (1935) (the Government “is the representative *not* of an ordinary party . . . , but of a sovereignty . . . who interest . . . is *not* that it shall *win* cases, but that *justice* shall be done.”). Complaint Counsel’s knee-jerk rejection of MSC’s modest scheduling modifications demonstrates once-again Complaint Counsel’s refusal to adhere to this mandate.

Further evidencing its “heads-I-win, tails-you-lose” negotiation strategy, Complaint Counsel has proposed several revisions to the Proposed Scheduling Order that would permit it to

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<sup>1</sup> Significantly, MSC’s proposal, which Complaint Counsel rejected out-of-hand, would have given Complaint Counsel the additional time they sought, while preserving the month this Court gave MSC to prepare for expert depositions. Thus, rather than do justice, Complaint Counsel has ignored this Court’s Order and has unilaterally prejudiced MSC.

continue prejudicing MSC. Nevertheless, in the spirit of cooperation, MSC believes that some of Complaint Counsel's proposed revisions can be accommodated so long as minor modifications are made to eliminate the prejudice resulting from Complaint Counsel's gamesmanship.

*In short*, this Court should enter the Proposed Amended Scheduling Order previously provided to this Court and re-attached to this Reply for the Court's convenience (*See Exhibit A*). This Proposed Order would: (1) permit MSC to file its supplemental expert reports on May 6, 2002; (2) permit Complaint Counsel to file its rebuttal expert reports on May 14 or 20, 2002;<sup>2</sup> (3) allow both parties to issue third-party subpoenas until May 14, 2002; (4) allow expert discovery through June 14, 2002; (5) extend the date for both parties for filing proposed findings of fact and pre-trial briefs by one week; (6) allow depositions throughout June (and trial, if necessary) to accommodate third-party scheduling conflicts; and (7) start trial on July 9, 2002.<sup>3</sup>

#### **I. MSC's Supplemental Expert Reports Should Be Due on May 6, 2002.**

MSC requests that the date for submission of supplemental expert reports be extended from April 30, 2002 to May 6, 2002. During the meet and confer process, this request was met with the usual denial. But *no reason* for this refusal was given. Nor did Complaint Counsel state its reasons for its refusal in its Opposition to Respondent's Motion for a Second Amended Scheduling Order.

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<sup>2</sup> MSC's Proposed Amended Scheduling Order would permit Complaint Counsel to file its rebuttal expert reports on May 20, 2002. Because Complaint Counsel rejected MSC's proposals in their entirety, Complaint Counsel proposed its own due date of May 14, 2002. MSC is willing to accede to either date, so long as appropriate accommodations are made to maintain the overall fairness of the schedule, as outlined herein. For purposes of this brief, however, MSC refers to Complaint Counsel's proposed May 14<sup>th</sup> date, rather than MSC's original May 20<sup>th</sup> date.

<sup>3</sup> MSC's Proposed Amended Scheduling Order contains a number of other minor adjustments in order to accommodate the changes outlined above.

MSC believes that a one week extension is necessary so that MSC's experts can finalize their reports and can continue processing the substantial and quickly mounting record in this case. Significantly, MSC is still receiving promised documents from third-parties and is continuing depositions of relevant industry participants. In addition, substantial client review is necessary, given the complexities of this case. This review has been hampered, however, by the recent effects on MSC's stock price, which are directly attributable to reduced revenue from substantial competition and escalating legal costs.

## **II. The Deadline For Close of Expert Discovery Should Be Moved To June 14, 2002.**

Because Complaint Counsel has refused to provide MSC with their rebuttal expert reports on April 26, 2002, as mandated by this Court's Revised Scheduling Order, and also because MSC is itself seeking to extend the date for disclosure of its supplemental expert reports, a modification to the deadline for close of expert discovery is necessary.

The current Revised Scheduling Order gives MSC approximately a month to prepare for, and take, the depositions of Complaint Counsel's four expert witnesses. This time is absolutely necessary. As is shown by the Complaint Counsel's so-called "Trial Witness List," the FTC's case is becoming increasingly reliant on the testimony of their experts. Indeed, the lack of merit of the FTC's case is likely to be largely undermined by their own experts, which have contradicted each other, have used vague terminology, and based their opinions largely on their own out-of-context interpolations of MSC and third-party documents (interpolations, which are unsupported and, in many cases, directly contradicted by other evidence and direct testimony). MSC's Proposed Second Revised Scheduling Order would preserve the time allotted by this Court for the preparation, and taking, of Complaint Counsel's experts. *Pacific Molasses Co. v. FTC*, 356 F.2d 386, 390 (5th Cir.

1966) (“Effective cross-examination requires thorough preparation by counsel *before trial*. This is especially true in involved areas of the law such as the antitrust field.”)

Complaint Counsel has offered no valid justification for refusing to allow MSC to take the depositions of their experts in June. Complaint Counsel’s only basis for refusing to MSC’s request is that they “need to focus on preparing proposed findings of fact ..., pre-trial briefs ..., exhibit lists, and final witness lists.” See Complaint Counsel’s Opposition to Respondent’s Motion for a Second Amended Scheduling Order, at 6 (“CC’s Opp.”). These are things that can, and should, be ongoing projects for Complaint Counsel, and there is no reason why it would interfere with the depositions of their experts. Thus, MSC proposes that it be permitted to take the depositions of Complaint Counsel’s experts in the first two weeks of June.

### **III. Deadlines for Filing Findings of Fact and Pretrial Briefs Should Be Extended By One Week.**

In its Motion to Amend the Trial Schedule, MSC asked that the dates for *both* parties to file their findings of fact and pre-trial briefs be extended by one week. The reason for this extension is obvious. Since Complaint Counsel has not filed their rebuttal expert reports, and changes must be made to the expert discovery schedule, it only makes sense to allow an additional week to submit these findings of fact. This additional time will result in both parties providing a better set of briefing and proposed findings for the Court’s review, and will be better able to serve a useful function as the litigation proceeds. Cutting corners at the findings of fact and pre-trial brief stage serves no-one.

At the same time, this proposed extension would prejudice no-one, since the dates for all parties are simply shifted by one week. In addition, because MSC is requesting a modest three-

court day delay with regard to the start of trial, the change in the due date for pre-trial briefing and submission of proposed findings of fact would not impede the court's review of these materials prior to the start of trial.

Significantly, Complaint Counsel has not provided any reason for its blanket refusal to accede to MSC's requested modification. They cite no burden or no prejudice. As such, MSC's request should be granted.

**IV. Trial Should Begin on July 9, 2002.**

Complaint Counsel also seeks to start this trial two days before the Fourth of July Holiday. This makes no sense. As MSC explained in its opening brief, little will be accomplished by starting and stopping the trial in to observe the holiday. By starting the trial on July 9<sup>th</sup>, only three court days later, both sides will be able to better present their case. In contrast, by beginning the trial on July 2<sup>nd</sup>, Complaint Counsel's case will be interrupted and witnesses – who must make travel plans – will be unreasonably inconvenienced. Complaint Counsel offers no reasoned basis for its refusal to start the trial on July 9<sup>th</sup>.<sup>4</sup>

**V. The Parties Should Be Permitted To Take Depositions of Third-Parties Up Until And Through Trial if Necessary To Accommodate Third-Party Scheduling Conflicts.**

MSC has asked the Court to allow depositions up until (and through) trial of this case if necessary to address third-party scheduling conflicts. The urgency of MSC's request has been somewhat alleviated by Complaint Counsel's submission of its "Trial Witness List," which drops approximately 17 people from their prior revised Supplemental Revised Witness List.

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<sup>4</sup> Complaint Counsel's only stated reason for rejecting MSC's proposal is that the three court day delay *may* push back the end of the trial. There is no reason to believe, and it strains credulity to suggest, that this modest revision to the schedule would have a material impact on trial proceedings.

However, Complaint Counsel's "Trial Witness List" remains overbroad. For example, Complaint Counsel still lists seven witnesses from Boeing, although they seek to disguise that fact by listing these seven Boeing witnesses under three separate divisions. Considering that Boeing obtained extremely favorable pricing from MSC pursuant to its multi-year Enterprise-wide License Agreement, *see* Dep. Tr. E. Jones at 55:6-8; Dep. Tr. of K. Barthenhier at 85:21-86:3, it is unlikely that Complaint Counsel will call all seven of these witnesses.

Nevertheless, MSC must decide whether to depose each of these seven witnesses, as well as the other 14 third-party witnesses that have not already been deposed. In addition, there are a number of relevant third-party witnesses that the Complaint Counsel has left off, or taken off, its witness list. Some of these witnesses may still have to be deposed, since the FTC's experts apparently continue to rely, albeit impermissibly, on information pertaining to those third-parties.

MSC is making substantial efforts to line up these witnesses for deposition or trial, but because of scheduling conflicts raised by the third-parties, it may not be possible to depose all of these witnesses in the month of May. Accordingly, MSC requests the right to depose third-parties that raise scheduling conflicts during June (and into the beginning of trial, if necessary). By allowing MSC to take depositions after May, MSC will be given some respite from these highly compressed proceedings.<sup>5</sup>

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<sup>5</sup> Complaint Counsel admits that, in some circumstances, federal courts allow depositions to take place even during trial. *See* CC's Opp. at 6. MSC believes that very few, if any, depositions will need to be scheduled in July, since most scheduling conflicts should be resolvable through June depositions.

More importantly, however, Complaint Counsel's efforts to analogize these proceedings with federal court litigation is improper. FTC administrative hearings have built-in procedural differences that favor Complaint Counsel. For example, the FTC has the right to engage in, and has engaged in, a prolonged 20 month pre-complaint investigation, in which it alone had the right to use compulsory

Complaint Counsel's only objection to MSC's request is that it would interfere with the Court's Revised Scheduling Order. But that is wrong. MSC is not seeking to delay trial, it is seeking to provide a mechanism that will enhance the likelihood that trial would begin as scheduled. MSC is simply seeking an expeditious way to address third-party scheduling conflicts while preparing its case under the streamlined process adopted by the Commission for Article III litigation. In short, MSC's proposal would allow MSC to conduct needed discovery, to address third-party's burden objections, and to begin trial in early July.

Significantly, Complaint Counsel has not even attempted to justify its rejection of MSC's proposal by asserting or demonstrating burden or prejudice. Nor can Complaint Counsel claim that they will be prejudiced, since they will likewise be given an opportunity to cross-examine each of these witnesses. Nor does MSC expect there to be an inordinate number of post-May depositions, so Complaint Counsel cannot argue undue burden. The fact is that Complaint Counsel's rejection demonstrates only its steadfast opposition to any proposal that would help level the procedural playing-field or provide MSC with any of its due process rights.

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process against third-parties. This, combined with the complexity of the case and the one-year mandate of Commission Rule of Practice 3.51 (from which this Court has denied MSC relief), means that Complaint Counsel has an interest in rushing to judgment that is simply not present in federal court litigation.

In addition, unlike federal court litigation, the discovery served by MSC on third-parties is not self-enforcing by the Administrative Law Judge. Rather, in order to sanction non-compliance, third-parties must be brought into federal court. This additional layer of review gives third-parties an added level of comfort that stonewalling during discovery will payoff. Indeed, MSC has already been prejudiced by ANSYS's use of this strategy. In light of this Court's unwillingness to enforce MSC's subpoena to ANSYS, either as written or as initially modified in its Opposition to ANSYS's Motion to Quash, MSC has been forced (since resistance has proved futile) to accede to many third-parties' unreasonable limitations on the scope of their subpoenas.



Significantly, it was Complaint Counsel's own abuse of the preliminary Witness List disclosure process that has necessitated MSC's request. Complaint Counsel's Revised Witness List contained 89 individuals, including 51 third-parties. Because of the magnitude of this list, and because it was not possible to "guess" which individuals Complaint Counsel really intended to call, MSC was unable to engage in targeted depositions.<sup>6</sup> At the hearing on February 25, 2002, *over eight weeks ago*, Complaint Counsel agreed to pare down their witness list, unequivocally stating that they "plan clearly to reduce [their Witness] list." Hearing Tr. at 89:25-90:4. Complaint Counsel failed to do this until just last week.<sup>7</sup> Now that it is possible to engage in targeted discovery, however, Complaint Counsel seeks to impose the May 30<sup>th</sup> discovery deadline on MSC to prevent MSC from scheduling and taking all the necessary depositions. Such gamesmanship of the Witness List and the Scheduling Order is an affront to fundamental notions of fairness and due process, and should not be tolerated.

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<sup>6</sup> Indeed, as noted above, it is still unclear which, if any, of the witnesses on the "Trial Witness List" Complaint Counsel really intends to call live at trial. While Complaint Counsel has pared down its Witness List, it is hard to believe that Complaint Counsel currently has lined up each of these witnesses to testify at trial. Rather, as is shown by Complaint Counsel's use of the word "*expects*" in quotes, it is likely that Complaint Counsel is continuing to "preserve" its options by listing all the people it is aware of that may be able to say something in support of Complaint Counsel's case, a list that is quickly dwindling. Thus, the Witness List is shrinking, not because Complaint Counsel has only now decided to call each of the witnesses on the "Trial Witness List," but because it is finding out that there is no fire behind Complaint Counsel's smoke and mirrors.

<sup>7</sup> Significantly, the Witness List provided by Complaint Counsel following the February 25<sup>th</sup> hearing actually added new 13 witnesses. In addition, although there were in total 10 fewer third-parties listed in its Supplemental Revised Witness List, Complaint Counsel continued to reserved the right to call any of the witnesses on its prior Revised Witness List. It was not until April 26, 2002 that Complaint Counsel actually pared down its Witness List in accordance their agreement on February 25, 2002.

**VI. Complaint Counsel's Proposed Revisions to the Scheduling Order Should Be Modified To Eliminate the Prejudice to MSC.**

Despite Complaint Counsel's insistence on adhering to the current Scheduling Order when discussing MSC's requested revisions, Complaint Counsel abandons this principle in seeking its own extension for the disclosure of its rebuttal expert reports from April 26, 2002 to May 14, 2002. (A deadline that has already passed). Unlike Complaint Counsel, MSC is willing to agree to this modification (or even to May 20<sup>th</sup>) so long as it does not prejudice the time that has been allotted for the preparation, and taking, of Complaint Counsel's experts. Specifically, MSC agrees to allow Complaint Counsel to submit their rebuttal expert reports on May 14, 2002, so long as the deadline for expert discovery, which should be extended in any event for the reasons described above, is moved to June 14, 2002. Because Complaint Counsel is unwilling to agree to any modification that does not give them an unfair advantage, Complaint Counsel has not agreed to this modification.

Similarly, Complaint Counsel is willing to abandon its principal of adhering to the current scheduling order to *extend* the date for issuance of subpoenas, requests for admission, and interrogatories from April 26, 2002 to May 14, 2002. As stated, this proposal is wholly unjustified. While MSC agrees that both parties should be permitted to issue subpoenas on third parties until May 14, 2002, there is simply no reason why Complaint Counsel should be allowed to continue to burden MSC with additional interrogatories and document requests.<sup>8</sup> Complaint Counsel has had over two

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<sup>8</sup> Complaint Counsel argues that it must have more time because the deadline for issuance of party discovery precedes MSC's Revised Witness List and supplemental expert reports. See CC's Opp. at 7. But this argument is a red-herring, since MSC has already agreed that the deadline for issuance of discovery to *third-parties* should be extended to May 14<sup>th</sup> and there is no reason why Complaint Counsel could not have previously asked for relevant information from MSC. Indeed, it is hard to imagine that Complaint Counsel could suck any more relevant documents from MSC's files, given the over breadth of their prior discovery requests.

years to investigate MSC's acquisitions of UAI and CSAR, and has already issued burdensome interrogatories and document requests. Complaint Counsel offers no justification for its failure to ask for relevant information (assuming it was even possible to ask for relevant information, not already produced) within the time previously allotted for party discovery. Thus, Complaint Counsel's one-sided request to extend party discovery against MSC by an additional two-weeks should be denied.

## **VII. Conclusion**

For the foregoing reasons, the Court should enter MSC's Proposed Revised Scheduling Order.

Respectfully submitted,



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*Counsel for Respondent  
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Dated: April 30, 2002

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Significantly, Complaint Counsel knows that, while its proposal is facially neutral, its effect is to disproportionately burden MSC, since party discovery in this case has largely been a one-way street, especially since Complaint Counsel has successfully hidden its conduct during the investigation stage under a cloak of privilege. See February 21<sup>st</sup> Order at 3-4 (denying MSC discovery into the identities and transcripts of individuals with exculpatory evidence).

**CERTIFICATE OF SERVICE**

This is to certify that on April 30, 2002, I caused a copy of the attached Respondent MSC Software Corporation's Reply Brief in Support of MSC's Motion to Amend the Scheduling Order to be served upon the following persons by hand-delivery:

Honorable D. Michael Chappell  
Administrative Law Judge  
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# **EXHIBIT**

# **A**



- May 20, 2002                      Complaint counsel provides rebuttal expert(s) reports. Any such reports are to be limited to rebuttal of matters set forth in Respondent's expert reports. If material outside the scope of fair rebuttal is presented, Respondent will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit sur-rebuttal expert reports on behalf of Respondent).
- May 28, 2002                      Parties that intend to offer into evidence at the hearing confidential materials on an opposing party or non-party must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).
- May 31, 2002                      Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
- June 5, 2002                      Status conference to report on discovery and settlement negotiations, if requested by the parties.
- June 11, 2002                      Deadline for filing motions *in limine* and motions to strike.
- June 11, 2002                      Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
- June 12, 2002                      Respondent's Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including designated testimony to be presented by deposition and copies of all exhibits (except for demonstrative, illustrative or summary exhibits), and a brief summary of the testimony of each witness.
- Respondent's Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists, including a list of designated testimony to be presented by deposition, and a brief summary of testimony of each witness.
- June 14, 2002                      Complaint Counsel files pretrial brief, to include proposed findings of fact and conclusions of law. To the extent possible, findings of fact shall be supported by document citations and/or deposition citations. Conclusions of law shall be supported by legal authority.
- June 14, 2002                      Deadline for depositions of experts (including rebuttal experts).

June 14, 2002 Complaint Counsel provides to Respondent's counsel its final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative or summary exhibits), and a brief summary of the testimony of each witness.

Complaint Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists, including a list of designated testimony to be presented by deposition, and a brief summary of testimony of each witness.

June 18, 2002 Deadline for filing responses to motions *in limine* and motions to strike.

June 18, 2002 Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.

June 20, 2002 Exchange and serve courtesy copy on ALJ, objections to final proposed witness lists and exhibits, including objections to the designated testimony to be presented by deposition.

June 20, 2002 Exchange proposed stipulations of law, facts, and authenticity.

June 21, 2002 Respondent's Counsel files pretrial brief, to include proposed findings of fact and conclusions of law. To the extent possible, findings of fact shall be supported by document citations and/or deposition citations. Conclusions of law shall be supported by legal authority.

June 25, 2002 File final stipulations of law, facts and authenticity. Any subsequent stipulations may be filed as agreed by the parties.

June 28, 2002 Complaint Counsel files reply to Respondent's pretrial brief, supported by documents and deposition citations and identifying any final rebuttal exhibits (together with copies thereof).

July 2, 2002 Final prehearing conference to be held at 10:00 a.m., in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C. The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity and any designated deposition testimony. Counsel may present any objections to the final proposed witness list and exhibits, including the designated testimony to be presented by deposition. Trial exhibits will be admitted or excluded to the extent practicable.



July 9, 2002

Commencement of Hearing, to begin at 10:00 in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C.

ORDERED:

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D. Michael Chappell  
Administrative Law Judge

Dated: