

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



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

Docket No. 9299

**COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S  
MOTION FOR A SECOND AMENDED SCHEDULING ORDER**

This case can be ready for trial by July 2, 2002. To meet that date, however, both parties will need to comply with the interim calendar dates set forth in the current Amended Scheduling Order. Respondent fails to offer any good cause for further amendments to the scheduling order; in fact what is needed for Respondent to cease its foot-dragging so that the parties can proceed to meet the dates already set.

Since its February 2002 efforts to delay this proceeding by six months or longer, Respondent has continued to pursue its discovery in a most casual manner. It claimed in its February delay motion that it needed time to engage in substantial discovery, having earlier asserted that it would offer substantial consumer support for its defense (*see* Hearing Transcript of November 8, 2002, at 29). Yet until today MSC has not yet identified any actual witnesses whom it may call at trial from among the 65 customer firms identified on its most recent so-called "witness" list. *See* Exhibit A to Complaint Counsel's April 26, 2002, Motion. Though MSC has sent out 50-some document subpoenas to third parties, some as recently as last week, it has taken only five depositions in the case to date, and only one of these from a person employed by a consumer.

Respondent has also continued to delay in responding to discovery. After five months, MSC still has not completed its production of responsive materials called for under Complaint Counsel's document request. Since April 15, 2002, MSC has been unwilling to schedule depositions of MSC's highest level executives or the parties' respective experts. For this reason, Complaint Counsel finds it necessary to file simultaneously with this paper a motion to compel six MSC's executives and the former CEO of CSAR to appear for depositions.

MSC has no claim that it has used wisely the two additional months of discovery time provided in the last Amended Scheduling Order. MSC's efforts to restructure the scheduling order and postpone fact and expert depositions create uncertainty and only impede the parties' ability to prepare for trial. Counsel, witnesses, and experts are already attempting to schedule their calendars and a swift resolution of these issues is necessary to ensure that the parties are able to proceed to meet the July 2, 2002, trial date.

**I. The Court's Current Scheduling Order is Reasonable And Can be Accomplished.**

Consumer concerns about MSC's acquisitions of UAI and CSAR are central to this case. Complaint Counsel have lined up a series of consumer witnesses for trial to discuss the anticompetitive consequences of the acquisitions, and anticipate presenting further consumer stories through documents from MSC and third parties, to reduce the duration of the trial. Complaint Counsel now project that our case should take no more than three weeks, with many of our 20-some witnesses, most of which are customers, on the stand for only brief examination.

The parties can maintain the existing scheduling order and complete this trial plan with only the minor modifications sought by Complaint Counsel. However, the parties need to honor

the deadlines set in the current Amended Scheduling Order. In order to meet those dates, Respondent must cease its foot-dragging and join Complaint Counsel to accomplish the following:

- **Scheduling MSC Executive Depositions:** Complaint Counsel have been attempting to schedule depositions of high-level MSC executives since April 15, 2002. MSC has refused to confirm deposition dates. Complaint Counsel is filing simultaneously a separate motion seeking immediate scheduling of those depositions.

- **Scheduling Depositions of MSC's Own Employees It Will Call at Trial:** MSC thus far has been unwilling to list its employees that it will call at trial, but claims it will do so in the witness list due today. Complaint Counsel expect to notice these depositions upon receipt of MSC's witness list. MSC needs to cooperate in scheduling these depositions so that they can proceed promptly.

- **Scheduling Expert Depositions:** Complaint Counsel have sought to schedule expert depositions prior to the deadline set in the current Scheduling Order, namely, May 31, 2002. Respondent has insisted that these depositions occur in June. Its unwillingness to schedule those depositions consistent with the current Scheduling Order interferes with Complaint Counsel's ability to prepare its case for trial. MSC should immediately schedule these depositions for times consistent with the current Amended Scheduling Order.

- **Scheduling Depositions of MSC's Third-Party Witnesses:** MSC has informed Complaint Counsel that in its witness list due today it will actually list the actual names of at least some of the actual persons it may call at trial. Complaint Counsel will review MSC list and attempt to schedule appropriate depositions promptly.

• **Scheduling Depositions of Complaint Counsel's Third-Party Witnesses:** Over the course of several months, Complaint Counsel have notified MSC of third-party witnesses who were potential trial witnesses in our case. We have now provided a much-shortened list of third-party witnesses that we expect to call at trial. If MSC wishes to take these depositions (having thus far chosen largely to forego the opportunity for depositions) it should act immediately to establish a deposition schedule consistent with the May 28, 2002, close of discovery.

**II. Respondent Has Failed To Show Good Cause For Further Scheduling Order Changes.**

Respondent has not shown good cause for its proposed further changes to the current Amended Scheduling Order, and its motion should be denied.

In regard to the possibility of conducting depositions after the scheduled close of discovery, there already is sufficient flexibility in the Amended Scheduling Order to govern special situations where extraordinary circumstances may exist for a later deposition date. No general dispensation is appropriate, particularly since MSC has largely chosen thus far not to pursue depositions within the scheduled discovery period of third parties identified as potential witnesses by Complaint Counsel.

In regard to Complaint Counsel's rebuttal expert witnesses and reports, the only change needed is to move the date to May 14 (from the deadline in the current order, which was last Friday, April 26). The current Amended Scheduling Order requires MSC to submit any supplemental expert reports by today, April 30. Complaint Counsel intend to confine further reports (if any) to the proper scope of rebuttal, but need an opportunity to review and determine whether any rebuttal expert reports are needed.

Respondent seeks to extend the date for issuing document requests, requests for admission, interrogatories, and subpoenas duces tecum until May 14. No such general extension is appropriate. MSC has not shown why it could not meet the April 26, 2002, deadline set in the current Amended Scheduling Order. On the other hand, it is appropriate to provide an extension for Complaint Counsel to issue such discovery, because we have not yet received from MSC a list with the names of actual witnesses for most of the third-party firms that MSC plans to call at trial, and because after five months MSC still has not completed its production of responsive documents.

MSC seeks to postpone expert depositions until the first two weeks of June. However, it has not shown why those depositions cannot be conducted within the May 31 deadline set in the current Amended Scheduling Order. Complaint Counsel have sought since April 15, 2002, to schedule those depositions within the time set in the Scheduling Order. MSC, however, has refused to set dates consistent with the current deadline. Postponing these depositions to June will only interfere with preparation of the parties' respective pre-trial briefs and proposed findings of fact. The Court also will be denied the benefit of more thorough briefing if the parties' time in early June is consumed taking and defending expert depositions.

MSC also has failed to show good cause for a new briefing schedule. The Amended Scheduling Order is a reasonable approach to exchanging pre-trial materials so that both sides and Your Honor may be better prepared for trial.

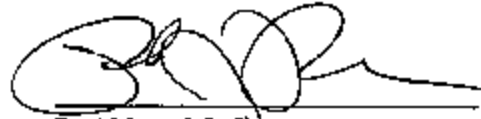
Finally, there is little basis to delay the start of trial by one week. Such a postponement will only lead to extending the trial into August and September and make it more difficult on Your Honor to complete your initial decision within the time frame required under the

Commission's Rules.

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MSC's motion to extensively re-write the current Amended Scheduling Order should be denied. Except for the minor changes requested by Complaint Counsel, the current Amended Scheduling Order, entered by Your Honor after considering MSC's earlier attempts to delay the resolution of this case, is fully consistent with the fair and prompt resolution of this case within the time frame required by the Commission's Rules.

Respectfully submitted,



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Dated: April 30, 2002

**CERTIFICATE OF SERVICE**

This is to certify that on April 30, 2002, I caused a copy of Complaint Counsel's Opposition to Respondent's Motion for a Second Amended Scheduling Order to be served by hand-delivery to the following person:

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

and by facsimile transmission with hand-delivery of a copy the next business day to the following persons:

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