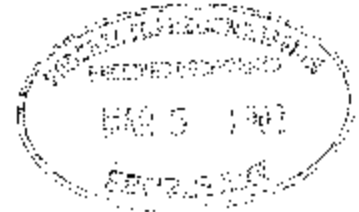


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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

Docket No. 9299

**ORDER ON RESPONDENT MSC SOFTWARE CORPORATION'S
MOTION TO EXTEND TRIAL DATE**

I.

On February 11, 2002, Respondent MSC Software Corporation ("MSC") filed a motion to extend the trial date. Complaint Counsel filed an opposition on February 21, 2002. Oral arguments of the parties were heard on February 25, 2002. For the reasons set forth below, MSC's motion is GRANTED IN PART and DENIED IN PART.

II.

MSC's motion seeks an immediate two month extension of the discovery period, the hearing date, and the filing date for the initial decision. MSC's motion also seeks either a six month extension of the discovery period or certification for appeal to the Commission the constitutionality of the application of Commission Rule 3.51(a) to these proceedings.

MSC asserts that there is not enough time remaining before the deadline for the close of fact discovery to conduct adequate discovery it believes that it needs to defend itself in this proceeding. MSC argues that this is an exceedingly complex field, necessitating comprehensive discovery, and that MSC has been hampered in its abilities to discover useful information by discovery tactics employed by Complaint Counsel. MSC asserts that it is prejudiced by the expedited discovery schedule. MSC believes that, as a minimum, a two month extension should be granted immediately, as a stop-gap measure, to allow this matter to proceed in an orderly fashion until the larger question, whether Rule 3.51(a) is unconstitutional as applied in this case, can be resolved.

Commission Rule 3.51(a) states that the Administrative Law Judge shall file an initial decision within one year of the issuance of the administrative complaint, except that the Administrative Law Judge may, upon a finding of extraordinary circumstances, extend the one-year deadline for a period of up to sixty days. 16 C.F.R. § 3.51(a). Such extension, upon its

expiration, may be continued for additional consecutive periods of up to sixty days, provided that each additional period is based upon a finding by the Administrative Law Judge that extraordinary circumstances are still present. *Id.*

MSC asserts that Rule 3.51 is unconstitutional as applied to the facts of this case because the case is too complicated to be tried in one year and that extending the trial schedule in successive two-month extensions is not sufficient to cure the defect, because MSC would be forced to “perennially cut . . . corners in discovery and compromis[e] its defense out of fear that no other extensions will be granted.” The relief MSC seeks is a six month extension of the discovery period and hearing date. MSC recognizes that such a request is not consistent with Rule 3.51, but argues that Rule 3.51 is unconstitutional as applied in this case. Accordingly, MSC asks that if it is not granted the six month extension, MSC requests that the Administrative Law Judge certify to the full Commission the issue of whether 3.51(a) is unconstitutional, as applied to this case.

Complaint Counsel opposes all aspects of the relief requested in MSC’s motion. Complaint Counsel asserts that this case should proceed in order to promptly restore the competition lost through Respondent’s acquisitions of its two rivals. Complaint Counsel argues that Respondent has not established “extraordinary circumstances” to justify a delay in the trial. Complaint Counsel further asserts that there is no valid constitutional challenge to Rule 3.51(a) and no basis for any interlocutory review by the Commission.

III.

The current Scheduling Order, entered into on November 13, 2001, sets March 29, 2002 for the close of fact discovery and May 21, 2002 for the start of the hearing. It contemplates that an initial decision will be filed by October 9, 2002, one year from the filing of the Complaint. Although the parties have already had five months of discovery, MSC has demonstrated that it needs more time to conduct fact discovery. However, MSC has not demonstrated extraordinary circumstances at this time for delaying the filing of the initial decision. A revised Scheduling Order, issued herewith, grants an extension of two months for the close of discovery and an extension of six to eight weeks for most other dates remaining in the Scheduling Order, including the commencement of the hearing. In addition, it allows the parties to file Supplemental Expert Reports, if such supplementation is necessary. However, the Revised Scheduling Order does not contemplate an extension for the issuance of the initial decision, which is still scheduled to be issued by October 9, 2002, within one year from the filing of the Complaint. In this respect, MSC’s motion for extension of two months is GRANTED IN PART and DENIED IN PART.

IV.

The plain language of Commission Rule 3.51(a) does not allow the additional relief requested by MSC, a six month extension of the discovery period, the hearing date, and the filing date for the initial decision. Commission Rule 3.51(a) requires an initial decision to be filed

within one year of the filing of the complaint. An extension of up to sixty days may be granted upon a finding of extraordinary circumstances. "Such extension, *upon its expiration*, may be continued for additional consecutive periods of up to sixty (60) days, provided that each additional period is based upon a finding by the Administrative Law Judge that extraordinary circumstances are still present." 16 C.F.R. § 3.51(a) (emphasis added). The plain language of Rule 3.51 does not permit a six month extension.

In amending Rule 3.51 to its current form, the Commission recognized that "unnecessary delay in adjudications can have a negative impact on the Commission's adjudicatory program . . ." Rules Of Practice Amendments, 61 Fed. Reg. 50640, 50640 (Federal Trade Commission Sept. 26, 1996). "The agency's longstanding policy has been that, to the extent practicable and consistent with requirements of law, adjudicative proceedings shall be conducted expeditiously and that both the Administrative Law Judge and litigants shall make every effort to avoid delay at each stage of a proceeding." *Id.* "In the Commission's view, a one-year deadline for the initial decision is a realistic time frame for most adjudicative proceedings. . . ." *Id.* at 50642.

Because MSC's request for a six month extension would violate the plain language of Rule 3.51 and the express purpose of the rule, MSC's request for a six month extension is DENIED.

V.

MSC's request for interlocutory appeal fails to comport with Commission Rule 3.23(b). Commission Rule 3.23(b) allows review *of a ruling* by the Administrative Law Judge upon a determination by the Administrative Law Judge: (1) that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion; *and* (2) that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation; *or* (3) subsequent review will be an inadequate remedy. 16 C.F.R. § 3.23(b). Applications for review may be filed within five days after notice of the Administrative Law Judge's determination and shall not exceed fifteen pages, exclusive of attachments. 16 C.F.R. § 3.23(b). Apparently anticipating an adverse ruling on its motion for an extension of six months, MSC has filed a request for interlocutory review. This request is improper. A preemptive request for interlocutory review of a ruling is not allowed.

Moreover, Commission precedent makes it clear that the Commission disfavors interlocutory appeals, especially those seeking review of matters committed to the discretion of the Administrative Law Judge. *See In re Gillette Co.*, 98 F.T.C. 875, 875 (Dec. 1, 1981); *In re Bristol Myers Co.*, 90 F.T.C. 273, 273 (Oct. 7, 1977) (interlocutory appeals disfavored as intrusions on the orderly and expeditious conduct of the adjudicative process). The Commission has vested broad discretion in its Administrative Law Judges in controlling the conduct of adjudicatory proceedings. *In re Kellogg Co.*, 1978 FTC LEXIS 532, *3-4 (Feb. 3, 1978) (denying motion for interlocutory appeal of order requesting modification of scheduling order).

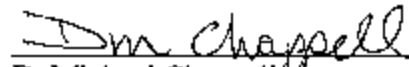
See also In re Maremont Corp., 77 FTC 1654, 1970 FTC LEXIS 260, *13 (Oct. 22, 1977) (denying motion for leave to file interlocutory appeal from order scheduling hearings).

Accordingly, MSC's request for full Commission review of the issue of whether Rule 3.51 is unconstitutional as applied to the facts of this case is DENIED.

VI.

For the above stated reasons, MSC's motion to extend the trial date is GRANTED IN PART and DENIED IN PART. A Revised Scheduling Order is issued herewith.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: March 5, 2002