

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



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

Docket No. 9299

**RESPONDENT MSC SOFTWARE CORPORATION'S  
MOTION TO AMEND TRIAL SCHEDULE**

Repeating an all too familiar pattern, MSC made a proposal and Complaint Counsel flatly rejected it, forcing MSC to make this motion to amend the trial schedule. MSC believes that its proposed adjustments to the schedule will result in a better, more focused trial. As laid out in the attached proposed scheduling order, MSC's changes are minor and leave much of the remaining schedule in tact. The proposed changes affect the dates of the remaining expert reports, the close of discovery, the schedule for pre-trial briefs, and the start of the trial.

MSC's proposal to Complaint Counsel began with the idea that both parties would exchange "real" witness lists. That is, both parties would name only those individuals that they in good faith presently intend to call to testify live at trial. MSC suggested that any additions to these witness lists be made only after a showing of good cause and with Your Honor's permission and that parties would be able to depose any individuals added in this manner before they testified. Complaint Counsel said that it would provide MSC with its *twenty plus "expected" witnesses* by close of business today, but would not agree or even discuss any other changes to the schedule.

This is regrettable, because again Your Honor is forced to intercede in a matter that the parties should have easily been able to resolve. As we describe below, the changes to the schedule proposed by MSC are reasonable and do not prejudice Complaint Counsel.

MSC offered that Complaint Counsel need only provide the name of its rebuttal witness today. Complaint Counsel could then submit the reports on May 20. MSC proposed that its expert reports be turned over to Complaint Counsel on May 6, 2002. These extensions would allow both sides to submit fuller, more complete reports. Moreover, having Complaint Counsel's experts submit rebuttal reports after MSC's supplemental expert reports would allow the rebuttal reports to be targeted to the most recent expert reports.

MSC's next proposal was to move the end of discovery of third parties until May 14 and to end all fact discovery on May 31. This would allow both parties to issue subpoenas for documents or testimony after the exchange of the final witness lists and complete this discovery by the end of May, an extension of only three days. MSC proposed one caveat to this cut-off date. If a witness's schedule precluded the taking of a deposition before May 31, a party could schedule it after this date, if the notice for the deposition was issued by May 14.

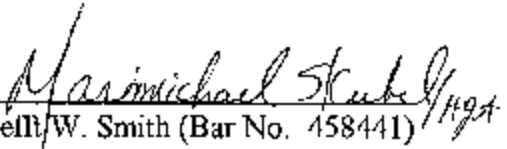
MSC's proposal on the deposition of experts was also rejected by Complaint Counsel. MSC proposed that expert depositions take place the first two weeks of June. The reason for this modification should be obvious to Complaint Counsel: the depositions follow the end of discovery. This timing allows both sides to explore fully the bases of the experts' testimony based on a full record. It precludes surprises in trial, because it prevents each side from arguing that newly discovered facts have altered previously held opinions.

MSC also proposed that the pre-trial briefing and findings of fact schedule be moved back one week for both sides. This allows more time for the parties to articulate their theories based on the record developed through the completion of discovery and after the expert depositions have taken place. Under this plan, Complaint Counsel would file on June 14; MSC would file on June 21; and Complaint Counsel would file its reply on June 28.

Finally, MSC proposed that the trial begin on July 9 and July 2 be reserved for a final pretrial conference, if necessary. MSC believes that starting the trial after the July 4 holiday is reasonable, and a humane adjustment to the schedule. Little will be accomplished by starting and stopping the trial to observe the holiday. It is only fair to the witnesses, who have to travel and be away from their families, and it will give Your Honor and both sides a welcome break before the long battle begins.

For the reason stated above, MSC respectfully requests that Your Honor make these minor changes to the schedule and issue the proposed scheduling order attached to this Motion. For Your Honor's convenience, we have also attached a marked-up version of the current schedule. (See Exhibit A).

Respectfully submitted,

  
Tell/W. Smith (Bar No. 458441)  
Marimichael O. Skubel (Bar No. 294934)  
Michael S. Becker (Bar No. 447432)  
Bradford E. Biegon (Bar No. 453766)  
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655 15<sup>th</sup> Street, N.W., 12<sup>th</sup> Floor  
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*Counsel for Respondent*  
*MSC Software Corporation*

Dated: April 26, 2002

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

In the Matter of  
MSC SOFTWARE CORPORATION,  
a corporation.

Docket No. 9299

**[PROPOSED]  
SECOND REVISED SCHEDULING ORDER**

For the reasons set forth in the Order on Respondent MSC Software Corporation's Motion to Extend Trial Date, and in consideration of MSC's motion, and Complaint Counsel's opposition thereto, the Scheduling Order in this matter is hereby revised to establish the following deadlines. All "Additional Provisions" from the November 13, 2001 Scheduling Order remain in place.

April 26, 2002	Deadline for issuing document requests, requests for admissions, interrogatories, except for discovery for purposes of authenticity and admissibility of exhibits.
April 26, 2002	Complaint Counsel to identify rebuttal expert(s).
April 30, 2002	Respondent's Counsel provides supplemental revised witness list, if necessary, including preliminary sur-rebuttal witnesses, with description of proposed testimony.
May 6, 2002	Respondent's Counsel provides supplemental expert witness reports, if necessary.
May 14, 2002	Deadline for issuing subpoenas <i>duces tecum</i> and <i>ad testificandum</i> .

- 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:

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

Dated:



**CERTIFICATE OF SERVICE**

This is to certify that on April 26, 2002, I caused a copy of Respondent MSC Software Corporation's Motion to Amend Trial Schedule to be served upon the following persons by hand delivery:

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

Richard B. Dagen, Esq.  
Federal Trade Commission  
601 Pennsylvania Avenue, N.W.  
Washington, DC 20580

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KIRKLAND & ELLIS  
655 15<sup>th</sup> Street, NW  
Washington, D.C. 20005  
(202) 879-5000 (tel.)  
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# **EXHIBIT**

**A**

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



In the Matter of  
MSC SOFTWARE CORPORATION,  
a corporation.

Docket No. 9299

REVISED SCHEDULING ORDER

For the reasons set forth in the Order on Respondent MSC Software Corporation's Motion to Extend Trial Date, and in consideration of MSC's motion, and Complaint Counsel's opposition thereto, the Scheduling Order in this matter is hereby revised to establish the following deadlines. All "Additional Provisions" from the November 13, 2001 Scheduling Order remain in place.

- March 19, 2002 - Complaint Counsel provides supplemental expert witness list, if necessary.
- April 2, 2002 - Respondent's Counsel provides supplemental expert witness list, if necessary.
- April 9, 2002 - Complaint Counsel provides supplemental expert witness reports, if necessary.
- April 16, 2002 - Complaint Counsel provides supplemental revised witness lists, if necessary, including preliminary rebuttal witnesses, with description of proposed testimony.
- April 25, 2002 - Status conference with ALJ to address disputes regarding discovery and expert reports, if requested by the parties.
- April 26, 2002 - Deadline for issuing document requests, requests for admission, and interrogatories ~~and subpoenas duces tecum~~, except for discovery for purposes of authenticity and admissibility of exhibits.
- May 14, 2002 - *Deadline for issuing subpoenas duces tecum and ad testific*

- April 26, 2002  
~~May 20, 2002~~ ] - Complaint Counsel to identify rebuttal expert(s) [and provide rebuttal expert report(s). 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).]
- ~~April 30, 2002~~  
May 6, 2002 - Respondent's Counsel provides supplemental expert witness reports, if necessary.
- April 30, 2002 - Respondent's Counsel provides supplemental revised witness list, if necessary, including preliminary sur-rebuttal witnesses, with description of proposed testimony.
- May 28, 2002 - Parties that intend to offer into evidence at the hearing confidential materials of 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 28, 2002~~  
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.
- ~~May 31, 2002~~  
June 14, 2002 - Deadline for depositions of experts (including rebuttal experts).
- ~~June 4, 2002~~  
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 the testimony of each witness.
- June 5, 2002 - Status conference to report on discovery and settlement negotiations, if requested by the parties.
- ~~June 7, 2002~~  
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 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 the testimony of each witness.
- ~~June 14, 2002~~  
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 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~~  
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).
- June 25, 2002 - File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be filed as agreed by the parties.

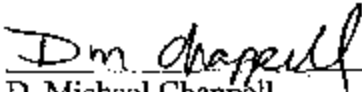
~~June 27, 2002~~  
July 2, 2002

- 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 lists and exhibits, including the designated testimony to be presented by deposition. Trial exhibits will be admitted or excluded to the extent practicable.

~~July 2, 2002~~  
July 9, 2002

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

ORDERED:

  
\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

Date: March 5, 2002