

United States of America
Federal Trade Commission



In the Matter of)
MSC Software Corporation,)
)
a corporation.)

Dkt. No. 9299

Motion of DaimlerChrysler Corporation to Limit Subpoena Duces Tecum

To: The Honorable D. Michael Chappell
Administrative Law Judge

Pursuant to Section 3.34 of the Commission's Rules of Practice, DaimlerChrysler Corporation ("DCC"), through its attorney, moves that the subpoena duces tecum issued to it on November 28, 2001 and served on November 30, 2001, be limited. In support of this motion, DCC states as follows:

1. DCC is not a party to this litigation.
2. Commission Staff originally served a subpoena upon DCC in its Part 2 investigation (File No. 001 0077) in September, 2000. That subpoena called for the production of 5 categories of documents pertaining to the acquisition of UAI by MSC. DCC made a full response to that subpoena in October, 2000, and allowed two of its employees to testify in investigational hearings in that matter. More than 1700 pages of documents were produced at that time.
3. The instant subpoena calls for production of all of the documents to be made in Washington, D.C. at 5:00 p.m. on Christmas eve.
4. It is the custom and practice in the automotive industry for all offices and plants to be closed for the 10-day period surrounding Christmas and New Year's Day. This is required under the collective bargaining agreement between DCC's unions and DCC, and is further required under the terms of the employee benefits it offers to its employees. As a result, DCC offices are closed from Saturday, December 23, 2001 through January 1, 2002, and no employees are available to look for documents during that period.
5. The responsible manager of DCC's Technical Computing Center, which is the location from which DCC employs finite element analysis software, estimates that approximately 150 man-hours will be required to locate and copy the documents

required by the eight specifications pertaining to that operation. This includes searching each employee's computer for both e-mail messages and other documents responsive to each request. There are approximately 50 employees in the department within the Technical Computing Center whose locations may be subject to this search. The manager of DCC's purchasing organization responsible for purchasing of FEA solver software estimates that its search can be accomplished in 30 man-hours. There are 2 employees who may be affected by this search. The director of DCC's Computer Aided Engineering (CAE) organization estimate that its search can be accomplished in 250 man-hours. There are 235 employees in that organization.

6. Each of these time estimates assume that:
 - a) The responsive documents are located within that organization, and do not include documents which have been sent to archival document storage; and
 - b) The e-mail messages are contained on the user's computer, and do not entail search of the encrypted, compressed system backup tapes.¹

7. I have been informed by DaimlerChrysler retains e-mail backups for a short period of time. These are maintained in an encrypted and compressed format for up to 90 days. To search these backups requires off-line mounting of each tape, decompression of each tape and de-encryption of its contents, followed by a programmed key-word search for particular key words within the contents of the tape. Further, to prevent DCC's electronic mail system from being unavailable during the search, such searches must be limited to computing time available during non-business hours. There is no reliable estimate of the amount of time necessary to complete such a search, but it is likely that the time period required would extend more than 6 months. Given that most DCC users keep e-mail available on-line for more than 90 days (DCC users are allowed up to 95 MB of on-line storage), such a search of archival backup is unlikely to discover documents not otherwise available.

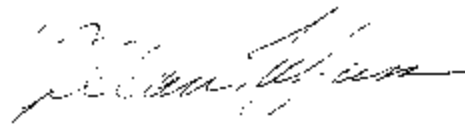
8. Similar issues exist with respect to archived paper documents. These documents are maintained off-site in storage boxes, for varying amounts of time in accordance with DCC's document retention guidelines. Searches of these boxes would take hundreds of man-hours to retrieve and manually search, and it is unlikely that such searches would produce a significant quantity of documents beyond those that will be produced, or which were produced in response to the prior subpoena.

¹ This also assumes that Counsel for DCC will be available to assist and advise DCC in the preparation of its return. Counsel for DCC notes that he is scheduled to be involved in a preliminary injunction hearing in Chicago, Illinois, in a matter alleging denial of an essential facility under Section 2 of the Sherman Act, beginning January 9, 2002. This hearing is scheduled to last for 3 weeks, ChoiceParts, LLC v. General Motors Corp., et al., No 01 C 0067 (N.D.Ill.)

9. DCC is an indirect, wholly-owned subsidiary of DaimlerChrysler AG ("DCAG"). DCAG maintains its own technical computing facilities in the Federal Republic of Germany. While there may be documents at that location, they are not within the possession, custody or control of DCC.
10. The instructions to the subpoena request that previously produced documents be omitted from the return.
11. In the instant subpoena, 9 categories of documents have been required for production. In many instances, these documents are the same as those previously produced. However, in many instances, documents are required that have not been previously produced. Moreover, the records detailing which documents have been previously produced have been lost. Accordingly, DCC must treat all documents as if they had not been previously produced, increasing the burden of production of these documents.
12. It is clear that subpoenas should be enforced if they are within the agency's authority, they are reasonably relevant to the inquiry, and are not unduly burdensome. *E.g. U.S. v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950), *Doe v. United States*, 253 F.3d 256 (6th Cir. 2001). In the instant matter, the burden on DCC is extreme. It calls for production of documents where the search must entail hundreds of hours and examination of the computers of literally hundreds of DCC employees. Giving DCC only 15 working days to ascertain the scope of the subpoena, locate the people involved and make a full return to the subpoena is impossible. Doing so during the holiday season (when many employees are taking unused vacation time) and demanding a return at 5:00 p.m. on Christmas eve is a legal "Rambo-style" litigating that would be astounding if DCC were a respondent, and is even more appalling given that DCC is only a third-party witness (and, if Complaint Counsel is correct in their assertions, a victim of the challenged merger).
13. Accordingly, DCC, through its counsel, moves that the subpoena in this matter be limited as follows:
 - a) The instructions to the subpoena is modified so that the following classes of documents are excluded:
 - (i) Archival and backup materials, including backup tapes of DCC's e-mail system; and
 - (ii) Documents located outside of the United States.
 - b) The time for response to the subpoena is extended to February 4, 2002.

14. DCC further moves that Complaint Counsel be directed to seek any documents requested from DCAG by issuance of a subpoena directly to DCAG, pursuant to Section 3.36 of the Rules of Practice.
15. Counsel for DCC certifies, pursuant to Section 3.22(f) of the Rules of Practice, that he has attempted to raise these issues with Complaint Counsel directly, but has not received an answer as of this date. This is the last day that Counsel for DCC may submit by overnight courier a timely motion to limit in accordance with Sections 3.34(c) and 4.3 of the Rules of Practice.
16. Counsel for DCC certifies, pursuant to Section 3.34(c) of the Rules of Practice, that he has served a copy of this Motion to Limit upon Complaint Counsel, by overnight courier. An appropriate proposed order is attached to this Motion.

Respectfully submitted,



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Dated: December 11, 2001

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Order Granting Motion of DaimlerChrysler Corporation to Limit Subpoena Duces Tecum

DaimlerChrysler Corporation ("DCC") has submitted its Motion to Limit a subpoena Duces Tecum served upon it by Complaint Counsel in this matter. Having considered the motion, and being otherwise advised, it appears to me that the Motion should be granted.

Accordingly, IT IS ORDERED THAT:

1. The Subpoena Duces Tecum issued by Complaint Counsel is modified by excluding from the scope of production the following items:
 - a. Archival and backup materials, including backup tapes of DCC's e-mail system; and
 - b. Documents located outside of the United States.
2. The date set for production of the documents required by the Subpoena is extended to 5:00 p.m., February 4, 2002.

D. Michael Chappell,
Administrative Law Judge

Dated: