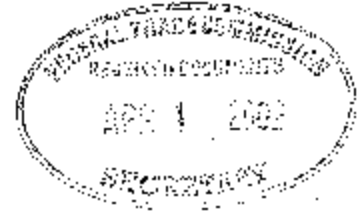


United States of America  
Federal Trade Commission



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 by Respondent on March 13, 2002 and served on March 18, 2002, 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. Complaint Counsel served a subpoena on November 30, 2001 upon DCC in the instant matter. That subpoena called for the production of an additional 4 categories of documents pertaining to the acquisition of UAI by MSC. DCC made a full response to that subpoena in March, 2002.
4. Respondent's subpoena calls for production of virtually all of the documents provided in response to Complaint Counsel's November 30, 2001 subpoena<sup>1</sup>, as well as an additional 6 categories of documents.

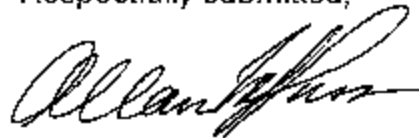
<sup>1</sup> Respondent has copied each specification from Complaint Counsel's subpoena except for the requirement of production of a current organization chart for DCC. The instructions incorporated in Respondent's subpoena, however, are far broader and more burdensome. For example, Instruction 6(c)(1) requires production of the full path name of the file, despite the fact that such information differs from local machine to local machine, and is therefore meaningless to Respondent.

5. Because of the additional categories of documents which must be searched, the time estimates for search set forth in DCC's prior Motion to Limit (which was withdrawn after the November 30, 2001 Subpoena was limited by Complaint Counsel) are also applicable. This is due to the fact that the search must be performed again, and must include additional.
6. In the prior Motion to Limit, the responsible manager of DCC's Technical Computing Center, which is the location from which DCC employs finite element analysis software, estimated that approximately 150 man-hours would have been required to locate and copy the additional documents required by the six specifications pertaining to that operation. This included 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 were subject to this search.
7. In the prior Motion to Limit, the manager of DCC's purchasing organization responsible for purchasing of FEA solver software estimated that its search could have been accomplished in 30 man-hours. There are 2 employees who were affected by this search.
8. In the prior Motion to Limit, the director of DCC's Computer Aided Engineering (CAE) organization estimated that its search could have been accomplished in approximately 250 man-hours. There are 235 employees in that organization.
9. Each of these time estimates assumed that:
  - a) The responsive documents were located within that organization, and did not include documents which have been sent to archival document storage; and
  - b) The e-mail messages were contained on the user's computer, and did not entail search of the encrypted, compressed system backup tapes.
10. I have been informed that 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.

11. 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.
12. 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.
13. Certain of the terms used in the subpoena are vague and ambiguous, and lead DCC to be required to guess at the types of documents called for by the specification. Specifically, Specifications 10 and 11 speak to "advanced versions of Nastran" and "advanced FEA solver", although that term is not defined anywhere in the subpoena. These terms may be terms of art within the market at issue in the litigation, but DCC is not in that business. It manufactures and sells motor vehicles and parts for motor vehicles. DCC should not be required to guess at the types of documents that are called for by the subpoena.
14. It is clear that subpoenas should be enforced if they are within the agency's authority, they are reasonably relevant to the inquiry, are not unduly burdensome, and reasonably describe the documents that must be produced. *E.g. U.S. v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950), *Doe v. United States*, 253 F.3d 256 (6<sup>th</sup> 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 12 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 "Easter holiday/Spring Break" season (when many employees are taking vacation time due to the public school calendar) is even more surprising, especially when given the facts that:
  - DCC is not a party to this case;
  - This is the third time that DCC has been subpoenaed to provide documents in the matter, despite not being a party to the case; and
  - The matter has been pending for more than 10 months prior to the issuance of the subpoena at issue.
15. Accordingly, DCC, through its counsel, moves that the subpoena in this matter be limited as follows:
  - a) The instructions to the subpoena are 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 instructions to the subpoena are modified to exclude all requirements for document production and submission that are beyond the requirements for returns to subpoenas set forth in Federal Rule of Civil Procedure 45(d).
  - c) Specifications 10 and 11 are deleted in their entirety.
  - d) The time for response to the subpoena is extended to May 2, 2002, or 30 days after the date a ruling is made on this Motion to Limit, whichever is later.
16. 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.
17. Counsel for DCC certifies, pursuant to Section 3.22(f) of the Rules of Practice, that he has attempted to raise these issues with Counsel for Respondent 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.
18. 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 Counsel for Respondent, by overnight courier.
19. An appropriate proposed order is attached to this Motion.

Respectfully submitted,



Allan M. Huss, Senior Staff Counsel  
DaimlerChrysler Corporation  
1000 Chrysler Drive, CIMS 485-13-65  
Auburn Hills, Michigan 48326-2766  
(248)-512-4126  
Fax: (248)-512-4202

Dated: March 29, 2002

United States of America  
Federal Trade Commission

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

Dkt. No. 9299

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 Respondent 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 Respondent is modified as follows:
  - a) The instructions to the subpoena are 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 instructions to the subpoena are modified to exclude all requirements for document production and submission that are beyond the requirements for returns to subpoenas set forth in Federal Rule of Civil Procedure 45(d).
  - c) Specifications 10 and 11 are deleted in their entirety.

2. The date set for production of the documents required by the Subpoena is extended to May 2, 2002, or 30 days after the date of the mailing of this ruling to DaimlerChrysler Corporation and to the parties in this matter, whichever is later.

---

D. Michael Chappell,  
Administrative Law Judge

Dated: