

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
OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO
COMPEL AN EXPEDITED ANSWER TO THIS MOTION AND
COMPLIANCE WITH COMPLAINT COUNSEL'S FIRST REQUEST
FOR PRODUCTION OF DOCUMENTS AND THINGS**

After many months of diligent, yet often one-sided, negotiations regarding the scope of Complaint Counsel's First Request for the Production of Documents and Things, several facts are evident: MSC has spent an unconscionable amount of money attempting to meet with Complaint Counsel's unrealistic discovery demands; MSC has already produced an extraordinary amount of responsive documents; Complaint Counsel has thwarted an efficient flow of discovery; and MSC is deserving of relief from Complaint Counsel's excessively burdensome and expensive discovery demands.

In Complaint Counsel's May 10, 2002, Motion to Compel, Complaint Counsel conveniently ignores the fact that MSC has produced 322 boxes of documents to date and Complaint Counsel is silent on the delay caused because of its rigid insistence that the search list be finalized before the documents were searched. Complaint Counsel, however, has made it clear that it expects to receive all requested documents, regardless of the burden imposed on MSC. To date MSC has spent over \$1.5 million to comply with Complaint Counsel's document request -- an amount totaling almost fifteen percent of MSC's 2001 reported net income. Finally, Complaint Counsel mischaracterizes

MSC's "promise to complete production of responsive documents" by a date certain, and disregards the importance of MSC's financial condition as an encumbrance to the completion of the production.

ARGUMENT

MSC has attempted to work with Complaint Counsel to attempt to narrow the substantive scope and physical reach of Complaint Counsel's First Request for Production of Documents and Things, and, in fact, even highlighted the pending disagreements with this Court at the February 25, 2002, status hearing. At that time, MSC offered to search electronic files of ten key MSC personnel in response to Complaint Counsel's outstanding document request. Since that time, MSC and Complaint Counsel have been involved in ongoing negotiations regarding the persons to be searched and the terms used in performing the electronic search.¹ Complaint Counsel adamantly refused,

¹ Brief chronology of the negotiations:

- March 13, 2002, MSC forwarded to Complaint Counsel a list of electronic terms for consideration, however, never received a response;
- March 25, 2002, MSC forwarded to Complaint Counsel a revised list of electronic terms for consideration;
- April 3, 2002, MSC and Complaint Counsel agree on list of persons to search;
- April 4, 2002, Complaint Counsel responded to MSC's March 25 list of electronic terms, adding 438 search terms to the already existing 192 terms, creating a new list of 630 terms;
- MSC responded promptly on April 5, 2002, explaining why many of the terms listed by Complaint Counsel were either unnecessary, or likely to lead to an over-encompassing collection of documents, and suggested another revised listing;
- Two weeks later, on April 18, 2002, MSC received complaint Counsel's response to its April 5th letter;
- MSC determined on April 19, 2002, not to argue or burden this Court over minutia, and accepted the terms contained in Complaint Counsel's April 18 letter, despite believing many of the terms to be unnecessary or over-broad (such as simulat*, test*, pric*, saving*, enter*, entry*, charg*, valu*). MSC notified Merrill of the 343 terms to be included in the query (*See Exhibit A*); and

(continued...)

however, to negotiate these items simultaneously, but rather *insisted on resolution of who would be searched prior to discussing what would be searched*. (See 4/3/02 letter from M. Skubel to K. Mills, attached as Exhibit B.) MSC's hands were tied, for if it began the process of searching based on the terms already identified to Complaint Counsel, and then Complaint Counsel refused to accept those terms, MSC would be forced to perform yet another round of searches and review— all at great expense to MSC. This document production could have been much further along had Complaint Counsel not been so unreasonable; the prolonged delay in the completion of this document production is a result of Complaint Counsel's own creation. Clearly there was no reason for Complaint Counsel to link the search terms to the search list terms. Both MSC and Complaint Counsel agreed on February 25 that certain key individuals would have to be searched, yet due to the recalcitrance of Complaint Counsel, this search did not begin until April 25, 2002.

In the midst of the above events, MSC's stock value tumbled forty percent, causing a ripple effect in the company. Forced cutbacks were implemented at the same time that the electronic discovery was finally coming through the door. Despite such significant setbacks, MSC has not "refused to comply" with discovery; to the contrary, it has been diligently gathering and reviewing a voluminous amount of material responsive to Complaint Counsel's overly-broad document requests. MSC has been forced, however, due to its current financial conditions, to limit the number of people reviewing documents to six, down from thirty.² MSC simply cannot afford to spend untold thousands

¹ (...continued)

• April 25, 2002, Merrill completes creation and testing of the query and begins to process documents.

² MSC has limited its resources company-wide. As announced on May 14, 2002, by Reuters (continued...)

of dollars to review and produce every piece of paper that may be potentially responsive to Complaint Counsel's requests in an expedited review -- especially when the review could have been taking place months ago, absent Complaint Counsel's refusal to negotiate.

The purpose of discovery is to glean information from the parties to a case, not to bankrupt the same. To date, MSC has provided Complaint Counsel with 322 boxes, at a cost of over \$1.5 million; this is hardly "refusing to comply with discovery." Furthermore, despite the aforementioned corporate cutbacks, MSC has collected 306 boxes of electronic documents, 32 of which have been produced to Complaint Counsel. MSC intends to continue its review of the 274 boxes, many of which contain single page e-mails and privileged documents; however, MSC cannot afford to hire an army of people to review them on an expedited basis. Rule 3.31(d)(1) provides specifically, that "[t]he Administrative Law Judge may deny discovery or make any order which justice requires to protect a party or other person from . . . undue burden or expense." 16 CFR § 3.31 (d)(1). Given MSC's current financial condition, and the amount of discovery already afforded Complaint Counsel, it is appropriate to invoke the relief encompassed in Rule 3.31(d)(1) and deny an expedited review of the remaining documents.

Finally to clarify, in an effort in good faith to accommodate Complaint Counsel's request for information, MSC did suggest that it *may be able* to complete the production by May 10, 2002. At

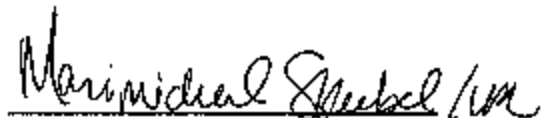
² (...continued)

News Service, "[d]esign software maker MSC Software Corp. (MNS, Trade) on Tuesday said it laid off 8 percent of its staff, or about 140 people, in a bid to reduce operating expenses by 5 percent to 7 percent this year. . . . In April, shares of MSC plunged after the company said it expected to post a first-quarter loss instead of a profit because of weak international markets and legal costs related to an investigation by the U.S. Federal Trade Commission regarding two acquisitions completed in 1999." See Reuters News Service "MSC Software Lays Off 140 Workers, 8 Percent of Staff" at ETRADE Financial - Investing.htm (May 14, 2002).

no time was this a promise to complete the production on a date certain. MSC made this representation before it was aware that certain executives would be submitting dozens, and in one case over 100, boxes for attorney review, or that it would be forced to respond to an enormous financial loss. Moreover, MSC informed Complaint Counsel in a letter that it was impossible to complete the production by May 10. (See 5/10/02 letter from M. Skubel to K. Mills, attached as Exhibit C.)

For the foregoing reasons, Complaint Counsel's Motion to Compel an Expedited Answer to this Motion and Compliance with Complaint Counsel's First Request For Production of Documents and Things must be DENIED.

Respectfully submitted,



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Marimichael O. Skubel (Bar No. 294934)
Michael S. Becker (Bar No. 447432)
Bradford E. Biegon (Bar No. 453766)
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*Counsel for Respondent
MSC Software Corporation*

Dated: May 20, 2002

CERTIFICATE OF SERVICE

This is to certify that on May 20, 2002, I caused a copy of Respondent MSC Software Corporation's Opposition to Complaint Counsel's Motion to Compel an Expedited Answer to this Motion and Compliance with Complaint Counsel's First Request for Production of Documents and Things to be served upon the following persons by hand delivery:

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

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

P. Abbott McCartney, Esq.
Federal Trade Commission
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Karen Mills, Esq.
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EXHIBIT

A

Search Terms
Ball
ARI
Intergraph
Hughes
Swami
*Marshall
Loral
Textron
"Credit Suisse"
"First Boston"
evaluat*
CSA
UAI
analy*
nastran
module*
applic*
dmap*
ASTROS
fea
DYTRAN
"MARC"
flight
model
train*
merge*
QMM
licens*
saving*
paid up
in house
lock in
AP 209
market*
*aba*us*
elfini
algor
altair
cdh
permas
intes
hks
Hibbitt
Karlson
Karlsson
Sorens*n
Livermore
lms

Search Terms
macro
noran
ptc
SRAC
DS*
ansys
GM*
Honda
cosm
conver**
Borg
"BWA"
Caterpillar
"CAT"
Daimler*
Chrysler*
DC*
Dana
Deere
Delphi
Eaton
Ford
BSS
Flat
Dryden
Johnson
Lear
Lockheed
LM*
Martin
Magna
Navistar
Nissan
Bosch
Toyota
TRW
Visteon
Airbus
Bath
Bell
Boeing
TBC
boa*
hsv*
BAS*
ISSI
SASSI
Phantom*

Search Terms
Bombardier
Cessna
Embraer
SWOP
V*5
Volvo
Dentsu
"ISI"
catia
MD
McDonnell
JPL
Pratt
Whitney
PW*
WPAFB
Orbital
Saab
USA
UTC
*DYNA
Ideas
antitrust
Antitrust
"anti-trust"
"Anti-trust"
benchmark*
compar*
clone
SBL
rfp
Northr*p
Grum*
vought
matur*
saturat*
"General Motors"
satisf*
FTC
"Federal Trade"
Mitsubishi
Rockwell
develop*
generative
*linear
static*
dynamic*
Mazda

Search Terms
alliance*
Messier
Microsoft
monop*
network
"site license"
"contract out"
retrofit*
stress*
design*
Honeywell
*Langley
*Goddard
F*22
F 22
F22
F-22
F*18
F 18
F18
F-18
C*130
C 130
C130
C-130
JSF
JPL
Propulsion
NVH
noise
vibrat*
harshness
optimiz*
parallel*
ROI
"return on investment"
revenue*
SAMCEF
solve*
element*
finite*
Rocketdyne
limit*
usage
utiliz*
board
manag*
acqui*

Search Terms
recruit*
compet*
customer*
Sundstrand
Sikorsky
Lewis
support
service*
qualit*
feature*
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interfac*
architect*
compatib*
ibm
dassault
enter*
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Airforce
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charg*
valu*
shift*
transit*
proficien*
translat*
exchang*
format*
standard*
fatigu*

Search Terms
load*
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expens*
sav*
stress*
geog*
industr*
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"input deck"
"output file"
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contract*
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techni*
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invest*
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covenant
copyright
patent
trademark
secret
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econom*
synerg*
switch*
substitut*
forecast
commodity
share
Atir
Chargin, Dunne, Herting
Parametric
Samtech
Scanscot
SAS
Schaeffer
EDS
SDRC
UG*
Unigraphics
Daratech
Gartner
legacy
modifi*
personnel
staffing
Vanderplaats
NISA
ArvinMeritor
BIW
Textron
Department of Defense
Electric
Raytheon
Swales Aerospace, Inc.
"United Technologies"
LSTC

Search Terms
*DEAS
Sysnoise
DADS
EMRC
*Mechanica
*Engineer

EXHIBIT

B

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Marimichael O. Skubel
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April 3, 2002

Karen A. Mills, Esq.
Federal Trade Commission
Bureau of Competition
601 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: MSC Software Corporation, Docket No. 9299

Dear Karen:

After yesterday's conversation, Larissa and I discussed further ways in which Complaint Counsel and MSC could arrive at a compromise with regard to the remaining electronic document production issues, taking into account your need for documents and the substantial cost to MSC. We arrived at the following solution: the documents and e-mail of a select group of top executives have been uploaded to a shared network drive and will be converted and searched for responsiveness by an outside vendor. We will need your prompt approval of the search terms for this search to take place. For the remainder of the persons to be searched, we will request that they review their e-mail and electronic documents and burn relevant documents onto a CD, which we will then "blow back" and review. We are hopeful that this process will allow Complaint Counsel to obtain the documents responsive to its subpoena while keeping the costs from escalating to prohibitive levels.

This proposal rests on two fundamental requisites. First, in accordance with your representation yesterday afternoon, should it be discovered during the course of the document search that a particular person has an inordinate amount of documents seemingly responsive to the subpoena, Complaint Counsel will be open to discussing ways in which to narrow the scope of the subpoena to eliminate the production of redundant material and information that is less important. We have already indicated one such situation which needs to be addressed - Tyler Smithson's seven gigabyte electronic document collection.

Second, MSC would like to have closure on the discussion of the list of MSC personnel subject to an electronic search. Based on our ongoing discussions, it is MSC's

KIRKLAND & ELLIS

Karen Mills, Esq.

April 3, 2002

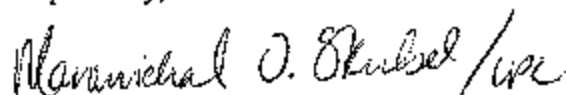
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understanding that the universe of persons to be searched for documents responsive to the subpoena is as follows: Ken Blakely, Lou Greco, Omar Ibrahim, Hal Mattson, Jeff Morgan, Rick Murphy, Frank Perna/Jane Smith, George Riordan, Reza Sadeghi, Joe Baldwin, Rick Barclay, Keane Barthenheier, Tom Bastanza, David Beer, Tom Cully, Ron Dyer, Bob Lowers, Albrecht Pfaff, Paulo Sauer, Bill Torres, Aage Torvund, Todd Brown, Bruce Hart, Lou Long, Bill Maher, John Mowrey, Jim Murphy, Doug Roach, Steve Sacro, Brian Thornton, Bill Wass, Mark Guillam, Kevin Kilroy, Anil Mehta, David Dimas, Mark Kenyon, Greg Moore, Tyler Smithson, Paul Spangler, Paul Wright, Christopher St. John, Wai Ho, and the successor to Mars Tateishi (for a limited amount of time, to be determined). This list totals forty-four people, nine more than MSC had most recently agreed to.

Finally, as mentioned above and in our ongoing conversations, MSC is eager to begin the process of converting and searching the files of the senior executives who will have their files electronically converted and searched. MSC has alerted Complaint Counsel on numerous occasions to the length of time required to complete this process. However, MSC has regularly met opposition to the discussion of this matter until after the finalization of the MSC personnel search list. MSC is hopeful that Complaint Counsel will work with MSC to finalize both the list of personnel to be searched and the list of electronic search terms so that this process can begin.

We look forward to hearing from you as soon as you have had an opportunity to review this information.

Respectfully,



Marimichael O. Skubel

EXHIBIT

C

KIRKLAND & ELLIS

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Marl Michael O. Skubel
To Call Writer Directly:
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May 10, 2002

Via Facsimile

Karen A. Mills, Esq.
Federal Trade Commission
Bureau of Competition
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: MSC Software Inc.

Dear Karen:

I am writing to address several document production issues that we discussed yesterday afternoon. First, in order to expedite the production process, we propose to produce all documents without any confidentiality designations. We will do this with the understanding that all documents produced will be treated as if they were designated "Restricted Confidential." Pursuant to the protective order, this designation does not restrict your ability to show these documents to your experts. The practical effect of this is that no documents will be shown to competitors or customers (or any other third parties not covered by the protective order) without informing MSC. MSC promises at that time to review those documents quickly and designate the documents with the appropriate confidentiality designation. Similarly, once MSC is in receipt of Complaint Counsel's proposed Exhibit List, MSC will review and designate those documents. You expressed a concern about MSC's designations and its impact on the trial date. MSC represents that it will review and designate quickly so as not to interfere with the trial date.

Second, concerning the ongoing production of electronic documents, we will continue to prioritize the documents to be produced, starting with those documents belonging to MSC personnel with pending depositions. As I explained, the volume of e-mails and electronic documents is quite large. Although many of the documents are not responsive - likely due to the broad search terms - reviewing the documents for privilege is taking longer than expected. In addition, as I explained, MSC, because of necessary budget cuts, has been forced to reduce the number of reviewers to six. At this point, we have collected 203 boxes of documents and anticipate receiving documents from seven people within the next few days. We expect that the production of all of the documents will be completed by the end of June. Of course, we will be producing them on a rolling basis.

KIRKLAND & ELLIS

Karen A. Mills, Esq.
May 10, 2002
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Also, as I mentioned, there are MSC people currently on the electronic discovery list who are no longer on the witness list -- Kevin Kilroy and Reza Sadeghi -- and there are account representatives whose customers are no longer going to be called by MSC or the FTC as witnesses -- Steve Sacro (Navistar, Deere, Caterpillar), Aage Torvund (Saab and Volvo), and Albrecht Pfaff (Airbus). We propose removing these individuals from the search list as the reason for their inclusion no longer applies.

Finally, I would like to respond to your questions pertaining to the archived documents. As you recall from your review of the storage facility's inventory printout, many of the boxes were irrelevant and non-responsive. MSC retrieved approximately fifty boxes identified as potentially containing responsive documents. A review of these boxes found that the documents were not responsive to the subpoena, as they include payment transfers, purchase requisitions, invoices, commission expenses, inventory listing reports, and overhead calculations. As we expected, and discussed with you and Pat Roach, the archive facility has proved to be a repository of day-to-day financial documents that are not called for by the subpoena.

If you have any questions, please call me. I would be happy to discuss these issues in detail.

Sincerely,



Marimichael O. Skubel