

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF  
MSC.SOFTWARE CORPORATION,  
a corporation.

PUBLIC VERSION

Docket No. 9299

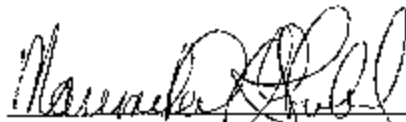


TO: The Honorable D. Michael Chappell  
Administrative Law Judge

**MSC.SOFTWARE CORPORATION'S MOTION FOR LEAVE FOR *IN CAMERA*  
TREATMENT OF MSC'S REVISED OPPOSITION TO COMPLAINT COUNSEL'S  
MOTION TO COMPEL COMPLIANCE WITH FIRST REQUEST FOR DOCUMENTS  
AND THINGS AND MSC'S MOTION FOR PROTECTIVE ORDER**

Pursuant to 16 C.F.R. § 3.45, Respondent MSC Software Corporation hereby requests leave for *in camera* treatment of MSC's Opposition to Complaint Counsel's Motion to Compel Compliance with First Request for Documents and Things and MSC's Motion for Protective Order filed on February 15, 2002, and MSC's Revised Opposition to Complaint Counsel's Motion to Compel Compliance with First Request for Documents and Things and MSC's Motion for Protective Order filed on February 19, 2002. MSC Software Corporation hereby submits its public version.

Respectfully submitted,



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Dated: February 20, 2002

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**MSC.SOFTWARE CORPORATION'S REVISED OPPOSITION TO  
COMPLAINT COUNSEL'S MOTION TO COMPEL COMPLIANCE  
WITH FIRST REQUEST FOR DOCUMENTS AND THINGS AND  
MSC'S MOTION FOR PROTECTIVE ORDER**

Complaint Counsel cannot have it both ways.

Complaint Counsel demands that MSC produce close to ten million of pages of documents from more than one hundred and fifty individuals, from across the globe, from emergency network backup tapes, and from storage warehouses – yet in the same breath Complaint Counsel demands that every single one of those documents be gathered, reviewed, stamped and produced by February 22, *i.e.*, the end of next week. Complaint Counsel's demands are not only unreasonable, they are unconscionable. Complaint Counsel demands that MSC turn over documents from every transaction with every customer in every industry in every conceivable market – yet Complaint Counsel suggests that the relevant customers may be only an elite fringe of aerospace and automotive customers and continues to cling to a still-undefined “advanced Nastran” market.

Complaint Counsel demands that MSC turn over ream upon ream of documents that are outdated, duplicative and otherwise unnecessary – yet Complaint Counsel continues to withhold key, presumably exculpatory evidence.

Complaint Counsel demands that MSC reproduce close to a hundred boxes of documents because it believes MSC's Protective Order designations are improper – yet Complaint Counsel has

designated its generic interrogatory responses “Restricted Confidential” and has refused to redesignate or provide a redacted version of those responses.

And why is Complaint Counsel protesting so much, anyway? Complaint Counsel cannot seriously contend that it still needs the flood of materials it demands while its expert witness, Dr. Hillek, simultaneously claims in his expert report to have sufficient evidence to support the draconian remedy proposed by Complaint Counsel of a forced divestiture of MSC.Nastran as well as the UAI and CSAR assets. If Complaint Counsel and its expert already have sufficient evidence to support this punitive relief, then the materials still sought by Complaint Counsel – particularly those seeking dated off-site documents, electronic copies of documents often already produced in paper form, and emergency backup materials – are simply cumulative, of dubious importance to this case, and will only serve to further delay these proceedings and punish MSC immediately with burden and substantial expense.

It is time to put an end to Complaint Counsel’s heads-they-win, tails-MS-loses philosophy – it cannot continue to spout “gimme, gimme, gimme” while stonewalling and playing hide-the-ball. “Too often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.” *Rowe Entm’t, Inc. v. The William Morris Agency, Inc.*, 2002 WL 63190 (S.D.N.Y. Jan 16, 2002).

Accordingly, MSC hereby also cross-moves for a protective order limiting the scope of information that Complaint Counsel is entitled to or, in the alternative, shifting the costs of the review and production of this voluminous information to Complaint Counsel, who is unwilling to engage in good faith efforts to narrow its requests.

Simply put, Complaint Counsel cannot have it both ways.

## STATEMENT OF FACTS

In an effort to put Complaint Counsel's demands in context, MSC provides the following background. On November 26, 2001, MSC received over 90 document requests from Complaint Counsel. Those requests asked for essentially all documents produced or maintained at MSC anywhere in the world, requiring MSC to object on various grounds, including extreme and unjustifiable burden and overbreadth. As a result, MSC attempted to engage Complaint Counsel in a series of meet-and-confer discussions over the scope of these requests and possible ways to narrow the production to a more manageable size and a more pertinent universe of documents.

When Complaint Counsel refused to narrow its requests or otherwise budge from its original demands, MSC faced a quandary – if MSC began a search for what it believed was a reasonable scope of information, it would have to incur the significant expense of a repeat search if it later was required to engage in a broader search based on agreements with Complaint Counsel or an order of the ALJ. As a result, and given MSC's efforts underway at the time to work through these issues with Complaint Counsel, MSC informed Complaint Counsel that it would begin its search *after* the parties worked out a proper scope of search. At all times, Complaint Counsel was aware of MSC's position and approach in this regard. (See 12/18/01 and 12/19/01 Letters from M. Skubel to K. Mills (attached as Exhibits A and B respectively).)

Regrettably, given what we respectfully submit has been Complaint Counsel's shoe pounding, Soviet style of negotiating, the discussion between MSC and Complaint Counsel have not proved

fruitful.<sup>1</sup> Finally, after over one month of attempted negotiations with no meaningful success<sup>2</sup> and in light of the aggressive scheduling order in the case, MSC counsel – while certainly not withdrawing its objections to Complaint Counsel’s requests began gathering documents, without any agreement from Complaint Counsel on the proper scope. As anticipated, however, it quickly became clear that the overbreadth of Complaint Counsel’s document requests would preclude completion of that production within the next two months, let alone the discovery cut off date of March 29, 2002.

While Complaint Counsel likes to brag that MSC “backed down considerably” and “abandoned many of its written objections,” nothing of the sort actually happened. The merits of MSC’s objections have never been resolved and Complaint Counsel’s document requests are still excessively overbroad and unduly burdensome. What MSC did, in a good faith attempt to advance the ball, was take a broader view of discovery than it believes to be necessary in order to move this case along. Despite those efforts, Complaint Counsel continues to pound for new demands, with further ultimatums.<sup>3</sup>

MSC has already provided – as a result of Complaint Counsel’s sweeping requests – 170 boxes of documents and will continue to produce as fast as it is reasonably practicable. MSC is not obligated to do more just because Complaint Counsel says it wants more; MSC has done more than

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<sup>1</sup> For example, Complaint Counsel’s request for documents from 1995 through today is not only unnecessary and excessive, but adds considerable time and expense to the search for and production of documents, yet Complaint Counsel – like it does with most of its positions – declared this “non-negotiable.” MSC faced similar refusals to negotiate over whether it really needed to search MSC employees worldwide and across industries not even mentioned in Complaint Counsel’s complaint or interrogatory responses.

<sup>2</sup> Even in instances where Complaint Counsel “agreed” to consider a suggested modification, it demanded a large amount of information and a sampling of documents before even considering the modification. As a result, the burden of providing this information for just the uncertain chance that Complaint Counsel would narrow its requests strongly outweighed the benefit of even trying to narrow the requests.

<sup>3</sup> *E.g.*, Complaint Counsel recently added several individuals to the list of people whose files had to be searched, included those of former employees, and it required the search of archival documents. (See 2/1/02 Letter from K. Mills to M. Skubel (attached as Exhibit C).)

it should ever have been required to and Complaint Counsel's ever-expanding demands should be put to rest once and for all.

## **ARGUMENT**

### **I. MSC's Search For Documents Is Thorough, Exhaustive And More Than Adequate.**

Since it began its document review last year, MSC has (1) interviewed dozens of MSC employees; (2) collected and reviewed over 300 boxes of documents from over 150 MSC employees; (3) looked into the capabilities of retrieving documents from MSC's "File Keepers" off-site document archival system; (4) restored approximately 2 million pages of electronic documents; (5) explored the possibility of gathering e-mail documents from each employee's computer; and (6) investigated the nature of thousands of MSC emergency back-up tapes and the concomitant time, expense, viability, and value of searching and reviewing that information.

This process was interrupted by what in hindsight were wasted efforts to narrow the scope of Complaint Counsel's requests. In essence, the month of December was basically lost while MSC tried in vain to reach an agreement with Complaint Counsel as to what was a reasonable scope of documents.

In addition to the over 300 boxes of paper documents already collected – some 170 plus boxes of which have already been provided to Complaint Counsel – MSC continues to receive documents from foreign offices and personnel working in the field on a daily basis. MSC's search, review and production process is an efficient and intensive one – yet it has already required substantial time and effort from dozens of MSC personnel and extensive legal and financial resources.

#### **A. Archived Documents.**

In addition to all of the files kept on site by MSC personnel that have been produced already, Complaint Counsel demands that MSC search for paper documents that are archived in an

off-site storage facility known as “File Keepers”. The fact is that boxes are *not* stored off-site according to the name of the MSC employee whose documents are contained therein, but rather by a coding system based on the general type of documents contained therein (e.g., finance, executive, etc.) and the support staff who delivers the box to the offsite vendor. So locating a particular person’s files is not practicable.

According to the MSC employee responsible for the File Keepers system for the past nine months, Connie Stokes (*see* Aff. of Connie Stokes (attached as Exhibit D)), there are significant hurdles to gathering documents from the File Keepers system. While the system has the capability for detailed information to be submitted with boxes destined for off-site storage, in reality most MSC personnel merely pack the boxes, do little if any coding or indexing of the materials, and then ship the box to File Keepers – where they are placed in an expansive warehouse reportedly reminiscent of the final scene in the movie Raiders of the Lost Ark. This practice – like many off-site storage options – renders the materials impracticable to retrieve on a person-by-person or document-specific basis.

Accordingly, to review the MSC documents located at File Keepers, MSC would have to go through over 2400 boxes of outdated material that MSC personnel felt was not worth keeping in their offices due to its outdated or useless nature.

There is no comprehensive “index” of these materials. As the responsibility for MSC’s off-site storage moved from person to person over the years, several *different* databases have been created and used to track the boxes, with no effort at continuity. This system is plagued by inadequately indexed and coded boxes, lost data due to unretrievable database files, and, more recently, the discovery of stacks of handwritten index forms that have never been entered into any database.

Currently, the MSC procedures for coding documents for archival storage consists of a list of identification codes. (*See* Aff. of Connie Stokes ¶ 3 (attached as Exhibit D)). Upon inspection of



this list of codes, it becomes readily apparent that the codes in place are vague, not tailored to the issues in this matter, and will not facilitate searches of the archived boxes for information responsive to Complaint Counsel's requests.

The burden of rummaging through a warehouse of 2400 boxes of outdated and useless documents certainly outweighs the virtually nonexistent benefit of producing those materials. If Complaint Counsel disagrees, MSC can certainly make those materials available for an on-location review by Complaint Counsel.

**B. Electronic Discovery.**

In addition to the ever-increasing number of paper documents that MSC must review in order to respond to Complaint Counsel's documents requests, electronic discovery is underway and proving to be much more burdensome and time consuming than ever imagined. In order to address electronic documents, each individual initially searched by MSC must back up any responsive documents from his hard drive to a shared network server. Those files are then gathered and saved from the server and sent to an outside copy vendor for "blowing back" and printing. Initial projections of the scope of this effort indicated that more than 6 million pages of materials will fall within Complaint Counsel's requests and will need to be reviewed, a task that cannot possibly be completed in advance of the current May 21<sup>st</sup> trial date, let alone by Complaint Counsel's February 22<sup>nd</sup> unilateral deadline or the March 29<sup>th</sup> discovery cutoff.

In an effort to resolve this dilemma, MSC asked Complaint Counsel to prioritize and limit the people from whom they truly needed to receive electronic productions. (*See* 1/25/01 Letter from M. Skubel to K. Mills (attached as Exhibit E); 2/1/02 Letter from K. Mills to M. Skubel (attached as Exhibit C).) To facilitate and aid Complaint Counsel in this process, on January 25, 2002, MSC sent a listing of all people whose files had already been searched as well as all persons and offices from

which MSC still expected to receive documents. Complaint Counsel's response was to "prioritize" over one hundred people at MSC – including some whose names were not on MSC's listing at all, were not listed on Complaint Counsel's witness list,<sup>4</sup> and were raised for the first time by Complaint Counsel on February 1, 2002. (See 2/1/02 Letter from K. Mills (attached as Exhibit C).) Characteristically, Complaint Counsel has taken the position that it needed to receive all materials from the 103 "priority" sources within 3 weeks or it would renege on its "prioritization."<sup>5</sup>

The fact that Complaint Counsel believes that MSC – after providing all materials (paper, electronic and e-mail) for those 103 sources – should nevertheless continue providing materials for personnel not on the 103-person "priority" list reveals that Complaint Counsel never really narrows or limits its discovery demands after all.

Given the two million pages of documents gathered already, it is not unreasonable to expect that, in the course of MSC's electronic production, this number will increase five-fold merely for the "prioritized" list of MSC personnel. Complaint Counsel has the ability to and must genuinely limit its requests to that which is truly necessary for trial, given the onerous process and expense of this electronic production.

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<sup>4</sup> At 10:10 pm last night (February 14, 2002), MSC served its Revised Witness List. Rather than getting smaller – and narrowing the scope of necessary discovery – the list has grown. Complaint Counsel added fourteen new names and the revised list now has eighty-nine names (including forty-nine non-MSC employees). The list also has the same, virtually identical, vague boilerplate summaries for each witness' testimony.

For example, the entry for Thomas Avery, a Boeing employee fails to even list which part of the Boeing Company Mr. Avery works for and says only: "Mr. Avery is a manager with Boeing. We expect that Mr. Avery will testify about: (a) the business of Boeing; (b) Boeing's evaluation, selection, procurement, and use of Nastran; (c) switching and interchangeability among solvers, including Nastran; and (d) principles and methods of aerospace engineering and computing." (Complaint Counsel's Revised Witness List at 5.)

Complaint Counsel's next entry is for Rudolph Yurkovich, also a Boeing employee. The entry for Mr. Yurkovich also does not identify which part of Boeing he works for and goes on similarly to state: "Mr. Yurkovich is a manager with Boeing. We expect that Mr. Avery will testify about . . ." (*Id.*) Complaint Counsel's list is little more than a cut-and-past job with no substance added.

<sup>5</sup> This exchange is only one example of the Soviet-style, shoe-pounding negotiating tactics by Complaint Counsel.

**C. E-Mail Documents.**

As a threshold matter, it should be noted that many printouts of e-mail messages have already been gathered and produced. This section is limited to those e-mail messages residing on each person's office notebook or desktop computer.

The burden of collecting and reviewing the electronic mail is also formidable. Under MSC's network, all electronic mail messages are stored locally on an individual's hard drive and not on a central site or server. Therefore, collecting e-mail from MSC employees requires that each individual's computer be accessed and files copied locally, a procedure which is both invasive and time consuming. If each of the 103 "priority" employees designated by Complaint Counsel lined up with their computer in hand, it would still take two shifts of technicians more than a week to even gather all of the data for review.

Again, to alleviate some of the burden of this element of production and to expedite the completion of the production, MSC asked Complaint Counsel to prioritize and limit the sources from which it truly needed to receive electronic mail. Again, MSC was provided a 103-source "prioritization" that Complaint Counsel again said was contingent and would be reneged if MSC didn't provide all paper, electronic, and e-mail documents within 3 weeks. (*See* 1/25/02 Letter from M. Skubel to K. Mills (attached as Exhibit E); 2/1/02 Letter from K. Mills to M. Skubel (attached as Exhibit C).)

**D. Emergency Back-Up Tapes.**

Not content with documents in MSC personnel's offices, computers and e-mail boxes, Complaint Counsel demands that MSC search company emergency backup tapes for responsive material. However, the costs and labor necessary even to just determine what is on MSC's backup tapes are prohibitively burdensome. As MSC has informed Complaint Counsel, MSC is currently in

possession of thousands of backup tapes, each of which would need to be indexed and searched in order to ascertain the contents of the tape. Then, if a tape contains backed-up documents of a person who could have material responsive to the requests, the tape would need to be restored to a dedicated server and such documents would need to be printed for review. Because of MSC's use of a "jukebox" (or multiple-tape) system to loop the backup tapes, there is no way to determine ahead of time whose documents are on a particular tape and one individual's files could be spread across multiple tapes. Thus, even if only a certain number of files were necessary, all tapes need to be restored and indexed in order to merely find the location of such files. Also, MSC's equipment cannot be taken offline and dedicated to this task because backups must continue to be made in order to protect MSC in the event of an actual emergency.<sup>6</sup>

Unlike its position on e-mail or electronic documents, Complaint Counsel claims that it "has attempted to narrow the scope of search required" by identifying fifteen people whose backup files need be searched. (See 2/1/02 Letter from K. Mills to M. Skubel (attached as Exhibit C).) What Complaint Counsel fails to recognize is that regardless of the number of sources identified, *any search of the backup tapes is excessively burdensome* and expensive. Even if Complaint Counsel only requested two people's files, MSC would still need to review and index *thousands* of backup tapes merely to find those two persons' files.

No legitimate value has been demonstrated for this financially draining and labor intensive exercise of searching the backup tapes. Given that MSC does not enforce any document purge policy, most of these documents have already been produced in paper form and will likely be

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<sup>6</sup> MSC conservatively estimates that it will take approximately eleven hours to review and to restore a backup tape. Using an outside vendor with a conservative estimate – before any documents are reviewed for production – each tape would cost at least \$2200 and to do all of the tapes would cost millions of dollars. And for what legitimate purpose? (See 2/15/02 Letter from J. Scarpitti to L. Horton (attached as Exhibit F).)

encompassed again by a production of electronic documents on individuals' computers. Furthermore, backups only exist of documents that reside on a server, documents that only reside on an individual's hard drive – such as e-mail messages – are not backed up during the normal daily, weekly or monthly backup process.

Accordingly, the burden and expense of searching emergency backup tapes outweighs Complaint Counsel's unending curiosity.

**E. Complaint Counsel's Demand For Documents From Several Former Employees Is Not A Basis For Challenging MSC's Document Search.**

Complaint Counsel, in its February 1, 2002 listing of 103 "priority" sources, included many people who are no longer employed by MSC. As such, files are no longer maintained at MSC in those former employee's names and therefore there is no tracking system for those old documents. To the extent that their files were transferred to current MSC employees, they would have been captured by the comprehensive search that MSC performed of the files and documents of its current employees, thereby rendering Complaint Counsel's demand moot.

Even more unjustifiable is Complaint Counsel's demand that MSC search for *former* employees' electronic files. Like most companies, when an employee leaves MSC, his computer and hard drive does not get placed in storage – rather, it is cleaned, recycled and provided to another MSC employee for use. As such, Complaint Counsel's suggestion that MSC's search for responsive documents is somehow inadequate simply underscores Complaint Counsel's overreaching and unreasonableness.

**II. MSC'S Rate Of Progress Is Appropriate Given The Extent Of The Document Production Demanded And The Constant Obstacles Interposed By Complaint Counsel.**

In its February 1, 2002 letter to MSC, Complaint Counsel demands a February 22, 2002 deadline for the production of *all* hard-copy documents, electronic documents and electronic e-mail

from *all* employees whose files were searched. This is obviously impossible and Complaint Counsel knows it.

MSC has kept Complaint Counsel informed of the progress it has made and the problems it has encountered. On several instances, MSC has indicated to Complaint Counsel that it would not be able to provide an accurate estimate until it had a handle on the universe of documents ultimately to be searched and produced. At one point, in an attempt to reach an accommodation with Complaint Counsel, MSC estimated that it would be able to complete production of hard-copy documents by February 15, 2002, *provided that MSC was able to facilitate an expedited review and production by making a "universal 'Restricted Confidential' designation for the remainder of the production."* (1/25/02 Letter from M. Skubel to K. Mills (attached as Exhibit E).) While Complaint Counsel now demands an entire reproduction of those materials, at the time Complaint Counsel did not reject MSC's proposal or inform MSC that it should not proceed in that manner. Notably, this estimate did not contemplate Complaint Counsel's baseless accusations as to the adequacy of the search performed, or the inexplicable and belated addition of numerous personnel to be searched, proposed.

The production of electronic files has hit significant obstacles, making it impossible to predict when it can be completed. *First*, MSC is still receiving electronic files from MSC personnel. Without a better grasp on the volume of electronic documents to be produced, any estimate of a completion date would be meaningless. *Second*, the number of electronic files that have already been retrieved is quite voluminous. By way of example, the collection of electronic data from just seven people yielded over two million pages of material. At this rate, a completion date for electronic documents of February 22, 2002 is obviously impossible. *Finally*, the difficulties in actually collecting the

documents, as discussed above, further foreclose MSC's ability to accurately project when the production can be completed.

In an effort to make the electronic document portion of the production more reasonable, in its January 25, 2002 letter, MSC requested that, "Complaint Counsel limit the number of persons from whom electronic documents and e-mail shall be gathered." Complaint Counsel's response was to provide the previously mentioned list of 103 "priority" sources from whom it needs electronic documents. (*See* 2/1/02 Letter from K. Mills to M. Skubel (attached as Exhibit C).) This response is meaningless and does nothing to further the discovery process. Without imposing a reasonable limitation on its demands, Complaint Counsel cannot expect more than what MSC has already provided.

Complaint Counsel demands that MSC expend unlimited funds to hire dozens of contractors and attorneys to interview, gather, review, classify and produce paper, electronic, e-mail, archived and backup tape documents on Complaint Counsel's schedule. Had Complaint Counsel engaged in good faith and realistic negotiations—whether by limiting the responsive dates, the worldwide scope, the breadth of the defined terms, or the sheer volume of documents and information contemplated by its document requests, then we would be in a different posture. But Complaint Counsel refuses to cooperate or compromise, and insists on making unreasonable and impossible demands.

In sum, the delay here is the direct result of Complaint Counsel's overreaching and intransigence.

### **III. Complaint Counsel's Attack On MSC'S Confidentiality Designations Is Disingenuous.**

Complaint Counsel asserts that "a new production compliance issue has arisen: Respondent has indiscriminately marked documents CONFIDENTIAL and RESTRICTED CONFIDENTIAL." *See id.* This attack comes with ill grace. Complaint Counsel was well aware that in MSC's effort

to expedite the review and production of documents *pursuant to Complaint Counsel's requests*. MSC had eliminated the confidentiality determination from the multi-step review process and was simply marking all of the documents produced as "Restricted Confidential" at this time. This was clearly explained to Complaint Counsel in a letter dated January 25, 2002. (See 1/25/02 Letter from M. Skubel to K. Mills (attached as Exhibit E).)

Complaint Counsel has expressed its desire to receive documents in a timely fashion. In an effort to accommodate this request, MSC opted to forego the time consuming step of confidentiality designation at this time. To come before Your Honor now, and insinuate that MSC is *not* acting inappropriately is simply bad faith. But if Complaint Counsel demands that all documents be appropriately designated at the time of production, then Complaint Counsel must accept that the production schedule will be further delayed.

Complaint Counsel cannot have it both ways.

**IV. Due To The Burden And Expense Of Electronic Production MSC'S Requests For Protective Order To Either Shift The Burden And Expense To Complaint Counsel Or Place Reasonable Limits On The Production Demands.**

"Too often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter." *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 02 Civ. 8272 RPP, JCF, 2002 WL 63190, slip op., at \*1 (S.D.N.Y., Jan 16, 2002). To date, MSC has expended over \$400,000, *not including Kirkland & Ellis' attorneys' fees*, in its attempts to respond to just the hard-copy document portion of Complaint Counsel's requests, and this amount increases daily.<sup>7</sup>

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<sup>7</sup> This includes over \$180,000 in copying costs, almost \$250,000 for contract attorneys to review the massive volume of documents covering the time period 1995-the present and more than \$8,000 in shipping costs.



**A. Costs And Burden Associated With Electronic Document Production.**

The costs associated with complying with the electronic document and e-mail portions of Complaint Counsel's all-encompassing requests is unwieldy. In just the first collection of electronic data, MSC retrieved 37 *gigabytes* of data. This equates to over 2.2 million pages. A discovery firm that specializes in conducting electronic searches and "blowing back" the potentially responsive documents so that they can be reviewed was consulted on this project. Based on their analysis of the initial sample, they quoted MSC a price of \$2,918,160 to obtain the materials sought by Complaint Counsel. (See 2/15/02 Letter from J. Scarpitti to L. Horton (attached as Exhibit G).) In addition, before the documents can be blown back, the electronic data retrieved has to be searched for potentially responsive documents. Further, assuming that the search results in 40% of the information gathered, a conservative estimate, these documents will have to be printed at the quoted price of \$.105 per page, or another \$680,904. Finally, there are incidental costs associated with any electronic retrieval, search and gathering project. These include approximately \$12,000 for consultation time and shipping, thus bringing the total cost to a conservative estimate of \$3,602,464 – before any of those documents have been reviewed by an attorney. (*Id.*) Further, none of the figures quoted above includes any of the fees for MSC's counsel or MSC's in house IT personnel. That Complaint Counsel expects a small company like MSC to expend millions of dollars responding to its impossibly broad document requests represent an unreasonable and paralyzing burden.

**B. Shifting The Burden Of Discovery Costs Is Proper Under Fed. R. Civ. P. 26(c).**

Rule 26(c) of the Federal Rules of Civil Procedure provides courts with a mechanism to protect producing parties from such outrageous discovery costs incurred while responding to broad production requests, like the ones in this case. Rule 26(c) permits a court to issue an order "to protect a party or person from . . . undue burden or expense." Fed. R. Civ. P. 26(c). Similarly, the

Federal Trade Commission Rules extend this power to administrative law judges. See 16 CFR § 3.31(d) Furthermore, Courts have asserted that with regard to electronic discovery, “the producing party [should] be protected against undue burden and expense . . . .” See, e.g., *Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1053-54 (S.D. Cal. 1999).

Electronic discovery is a relatively recent development, which is presenting “increasingly common problems of fair allocation of [discovery] costs.” *In re Bristol-Myers Squibb Secs. Litig.*, No. Civ A. 00-1990, 2002 WL 169201, at \*1 (D.N.J. Feb. 4, 2002). Two reasons for these excessive discovery costs include: a) corporations’ tendency to retain greater quantities of electronic data, given the lack of physical storage space limitations;<sup>8</sup> and b) the fact that magnetic tapes used by companies to backup data can hold enormous amounts of data (the equivalent to 1500 boxes). Given corporations’ general practices of not reusing or deleting these tapes, there tend to be astronomical amounts of stored data that need to be reviewed in responding to discovery. See Corinne I. Giacobbe, *Allocating Discovery Costs In the Computer Age: Deciding Who Should Bear The Costs of Discovery of Electronically Stored Data*, 57 Wash. & Lee L. Rev. 257, 262-64 (2000). These issues, which are becoming increasingly common to litigation, are clearly at issue in this case, as delineated in the preceding paragraphs.

**C. The Balancing Test In *Rowe Entertainment* Weighs In Favor Of Shifting The Production Burden To Complaint Counsel.**

In *Rowe Entertainment*, a case very similar to the one presently before the Court, several defendants sought relief after receiving estimates of the costs involved in complying with the electronic discovery requests that had been made. See *Rowe Entm’t*, 2002 WL 63190, at \*2. These

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<sup>8</sup> Note that this greater amount of stored material over a longer period of time leads to increased costs to translate the material, in the event that over time, different computer programs were utilized.

costs, which included cataloging,<sup>9</sup> restoring<sup>10</sup> and processing<sup>11</sup> stored e-mail, would be prohibitively expensive. *Id.* Specifically, the defendants found that the costs could range anywhere from \$290,110 - \$515,000 for a sampling of only eight persons files (depending on the type of retrieval system used), or \$9,750,000 if all employee files were produced. *Id.* at \*\*2-4. Furthermore, the defendants estimated that it would take as long as *two years* to complete the onerous electronic discovery. *See id.*

While recognizing that the presumption is traditionally for the responding party to “bear the expense of complying with discovery requests,” the court in *Rowe Entertainment* also acknowledged that with electronic discovery “a court may protect the responding party from ‘undue burden or expense’ by shifting some or all of the costs of production to the requesting party.” *Rowe Entm’t*, 2002 WL 63190, at \*7 (citing *Oppenheimer Fmd, Inc. v. Sanders*, 437 U.S. 340, 358 (1978)). In evaluating whether the production costs were imposing “undue burden or expense,” the court in *Rowe Entertainment* adopted an eight-part balancing test, including: (1) the specificity of the discovery requests; (2) the likelihood that any information would be discovered; (3) the availability of such information from other sources; (4) the purpose for which the responding party maintains the data; (5) the benefit to the parties from obtaining the data; (6) the total costs associated with the production; (7) the ability and incentive of each party to control the costs of production; and (8) the resources available to each party. *Id.* at \*\*8-11. The factors relevant in this case weigh heavily in

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<sup>9</sup> The “identification [of] tapes that contain the . . . files of the designated employees and marking them for restoration.” *Rowe Entertainment*, 2002 WL 63190, at \*2.

<sup>10</sup> “[S]aving all e-mails [or other production documents] from the identified files to a master database and then removing all duplicates.” *Id.*

<sup>11</sup> “[E]ach file must be processed so that it is not only readable on a computer screen, but also may be printed and Bates-stamped.” *Id.*

favor of MSC.<sup>12</sup> In the interests of fairness, the burden should be shifted to Complaint Counsel, or, at the very least, this Court should limit the breadth and scope of the current discovery requests as applied to electronic documents, e-mail, backup tapes and archived documents.

**1. The lack of specificity of the document requests weighs in favor of shifting the burden to Complaint Counsel.**

“The less specific the requesting party’s discovery demands, the more appropriate it is to shift the costs of production.” *In re Gen. Instrument Corp. Secs. Litig.*, No. 96 C 1129, 1999 WL 1072507, at \*6 (N.D. Ill. Nov. 18, 1999) (denying motion to compel production). Complaint Counsel has served more than 90 overly broad discovery requests, requiring essentially all of MSC’s documents. By way of example, Specification No. 9 requests “[all documents relating to any person’s plans relating to any relevant product or service . . .” over a seven year period.<sup>13</sup> Given the limitless definition of “plan” (i.e., any plan proposed or actually executed), and the similarly broad definitions of “relevant product” or “service,” this specification will capture an enormous magnitude of documents. These requests smack of improper fishing expeditions, and cannot be tolerated. The lack of any specificity in the document requests makes them virtually impossible to respond to absent a production of every document in MSC’s possession. It is simply unfair to require MSC to bear the burden of responding to such an open-ended request.

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<sup>12</sup> In the interest of time and space, this memorandum of law will limit its discussion to those factors which clearly weigh in favor of MSC.

<sup>13</sup> Another example is Specification No. 3 which requests, “[a]ll budget and financial statements . . . together with all documents relied upon to compile such documents.” This request also covers a seven year time frame.

2. **The likelihood that searches of the archived documents or the backup tapes will produce responsive documents not also found through other sources is small and cannot justify the expense.<sup>14</sup>**

While it is likely that relevant documents would be collected from a search of the electronic documents and e-mail documents, any such search of either the backup tapes or the archived documents is not likely to be as fruitful, as discussed in Section I above. Further, as indicated above, MSC does not have a policy for purging documents. As a result, despite the creation of backup tapes, most of the documents that would be found on those tapes still exist in the directories of the MSC employees who created them. Requiring a search of both sources will likely result in unnecessary duplication, not to mention having to endure the futile exercise of cataloging, restoring and processing the numerous backup tapes, for what turns out to be minimal return.

3. **MSC retains electronic data for use in the case of an emergency.**

Courts have determined that if a party maintains electronic data for the purpose of actually utilizing it in the regular course of business, then it stands to reason that that party be required to produce and bear the burden of production. *See Daewoo Elec. Co. v. United States*, 650 F. Supp. 1003, 1006 (Clear through. Int'l Trade 1986) "Conversely . . . a party that happens to retain vestigial data for no current business purpose, *but only in case of an emergency or simply because it has neglected to discard it, should not be put to the expense of producing it.*" *Id.* (emphasis added). At MSC, backup tapes are merely created for the purpose of reconstruction of a network system in the event of an emergency. This, combined with the burden and expense of searching backup tapes that has been spelled out in Section I, weigh in favor of requiring Complaint Counsel be responsible for the costs affiliated with their production.

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<sup>14</sup> These two factors are discussed together because they are closely related.

**4. The total costs associated with the electronic document production are prohibitive.**

As has been delineated in greater detail above, the total costs associated with complying with Complaint Counsel's excessive electronic document requests will run in the millions of dollars. In *Oppenheimer Funds*, the Supreme Court stated that "a threshold expense of \$16,000 . . . hardly can be viewed as an insubstantial burden," despite the defendant's assets which exceeded one-half billion dollars. 437 U.S. at 361-62. Clearly, the millions of dollars that MSC will necessarily have to expend in order to comply fully with Complaint Counsel's expansive document requests falls within the Court's definition of a substantial burden, and weighs in favor of shifting the burden of this production to Complaint Counsel.

**5. Complaint Counsel has the ability to control the costs and will likely do so if the burden is placed on it.**

Weighing most heavily in favor of shifting the burden of this production to Complaint Counsel is the fact that the ability to control the costs associated with this document production rests squarely with Complaint Counsel. It is highly likely that, if forced to pay for this discovery, Complaint Counsel will appropriately limit the breadth of the documents sought to those it truly needs for this litigation. "[W]here the discovery process is going to be incremental, it is more efficient to place the burden on the party that will decide how expansive the discovery will be." *Rowe Entm't*, 2002 WL 63190, at \*11. Throughout the discovery process, MSC has attempted to negotiate the scope of discovery with Complaint Counsel, to no avail. Specifically with respect to the electronic aspects of the discovery, MSC has requested that Complaint Counsel limit the number of MSC personnel from whom electronic and e-mail discovery must be obtained. As demonstrated above, such discovery is extremely burdensome and expensive. Yet, Complaint Counsel's only response has been to "prioritize" its list for electronic discovery to 103 persons and to limit the need

to search for backup tapes for only fifteen people. However, Complaint Counsel will only make these 'concessions' if MSC also completes its full document production, in its entirety, by February 22, 2002. (See 2/1/02 Letter from K. Mills to M. Skubel (attached as Exhibit E).)

This style of "negotiating" highlights Complaint Counsel's bad faith and complete unwillingness to place any meaningful limits on the scope of its discovery requests.<sup>15</sup> Complaint Counsel has complete control and discretion over the scope of its discovery requests and the number of MSC personnel whose files are required to be search. It alone has the ability to reduce the costs and burden of this production to a more manageable level.

**6. MSC does not possess the resources necessary to pay for this overly burdensome, extremely expensive discovery.**

MSC is decidedly not Microsoft as MSC has previously explained. It does not have unlimited resources. The multi-million dollar production currently being demanded by Complaint Counsel would cripple this small company. As part of the government, Complaint Counsel has access to virtually unlimited funds that could be used if Complaint Counsel truly believes that it absolutely must have every electronic and hard-copy document for over 150 people, and the backup tapes for over a dozen people. The burden to make this decision, and to bear the burden of that decision, should rest with Complaint Counsel.

## **CONCLUSION**

Complaint Counsel's Motion to Compel tells only part of this story. It fails to describe MSC's efforts at cooperation and willingness to negotiate the numerous discovery issues that have arisen in this litigation. MSC has demonstrated its good faith intentions by producing over 170 boxes of documents (with approximately 60 more being produced at the end of this week) to date.

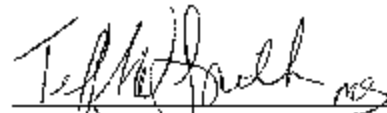
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<sup>15</sup> Complaint Counsel's statement that – if MSC reviews its hard-copy production and can identify marginally relevant sources – Complaint Counsel will *consider* a limitation on its requests is both insulting and not at all helpful.

Complaint Counsel also makes completely unfounded assertions of delinquency and untrustworthiness that do nothing to further the common goal of reaching a resolution on this complex issue. For these reasons, MSC respectfully requests that the Court deny Complaint Counsel's Motion to Compel Compliance with Complaint Counsel's First Request For Production of Documents and Things.

Furthermore, Complaint Counsel's intransigent demands and conditional negotiating result in minimal modifications to the ultimate burden and expense to be incurred during the course of electronic production. That, combined with the balancing test measuring the benefits of the discovery requested against the burdens of the same, requires that this Court shift the costs of all non-paper discovery onto Complaint Counsel, or at the very least, impose limitations onto the breadth of the discovery requests. For these reasons, MSC also respectfully requests that this Court enter the attached Protective Order.

Respectfully submitted,



Jeffrey W. Smith (Bar No. 458441)  
Marimichael O. Skubel (Bar No. 294934)  
Michael S. Becker (Bar No. 447432)  
Bradford E. Biegon (Bar No. 453766)  
Larissa Paule-Carres (Bar No. 467907)  
KIRKLAND & ELLIS  
655 15<sup>th</sup> Street, N.W., 12<sup>th</sup> Floor  
Washington, DC 20005  
(202) 879-5000 (Phone)  
(202) 879-5200 (Facsimile)

*Counsel for Respondent*  
*MSC Software Corporation*

Dated: February 20, 2002



## CERTIFICATE OF SERVICE

This is to certify that on Tuesday, February 20, 2002, I caused a copy of the *Public Version* of MSC Software Corporation's Request for Leave to File a Revised Opposition to Complaint Counsel's Motion to Compel Compliance with First Request for Documents and Things and Respondent MSC's Motion for Protective Order, and *Public Version* of MSC's Revised Opposition served via hand-delivery upon the following persons.

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

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

P. Abbott McCartney  
Federal Trade Commission  
601 Pennsylvania Avenue, N.W.  
Washington, DC 20580

Karen Mills, Esquire  
Federal Trade Commission  
601 Pennsylvania Avenue, N.W.  
Washington, DC 20580

  
David Shotlander

KIRKLAND & ELLIS  
655 15<sup>th</sup> Street, NW  
Washington, D.C. 20005  
(202) 879-5000 (tel.)  
(202) 879-5200 (fax)

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

IN THE MATTER OF  
MSC.SOFTWARE CORPORATION,  
a corporation.

Docket No. 9299

**ORDER ON MSC.SOFTWARE CORPORATION'S OPPOSITION TO COMPLAINT  
COUNSEL'S MOTION TO COMPEL COMPLIANCE WITH FIRST REQUEST FOR  
DOCUMENTS AND THINGS AND MSC'S MOTION FOR PROTECTIVE ORDER**

On February 5, 2002, Complaint Counsel filed a motion to compel compliance with Complaint Counsel's First Request For Documents And Things. Respondent MSC.Software Corporation ("MSC") filed an opposition and a Motion For Protective Order on February 15, 2002.

For the reasons set forth in MSC's Opposition, Complaint Counsel's motion and additional demands regarding document discovery are DENIED.

Furthermore, for the reasons set forth in MSC's Motion For Protective Order, the costs of MSC's compliance with Complaint Counsel's electronic discovery requests are to be shifted to complaint counsel.

ORDERED:

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

Date: \_\_\_\_\_

**A**

# KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

655 Fifteenth Street, N.W.  
Washington, D.C. 20005

202 879-5000

Facsimile:  
202 879-5200

Marimichael O Skubel  
To Call Writer Directly:  
(202) 879-5034  
Marimichael\_skubel@dc.kirkland.com

December 18, 2001

Via Facsimile

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

Subject: MSC Software Inc.

Dear Ms. Mills:

MSC has raised objections to the time period governing Complaint Counsel's First Set of Documents. You have asked for documents going back to 1995. As stated in our Objections, we believe that documents of this vintage are irrelevant and unlikely to lead to relevant information. MSC has already provided numerous documents to the FTC dating from 1995 through 2000. Further, simulation software is a dynamic industry and the market place today is very different than it was seven years ago and the crux of your case is your assertion that the market is not competitive now because of these acquisitions. In an effort to reach a compromise, however, we will agree to search for documents back to 1995 provided we have some relief, as detailed below, on the burden of complying.

We have already discussed and sent you proposed language for Specifications 9 and 15. These specifications, without modification, would double the document production, because they would require the production of every document related to Patran.

We have also discussed modifications to Specification 16 in that it asks for all customer contract files. These files are voluminous and would result in the production of several hundreds of boxes of documents. Many of these contracts and related documents would be of no interest to the FTC, e.g., university and non-commercial accounts. In order to facilitate our search, yet provide you with relevant documents, we have asked that this Specification be limited to customer files that had contracts exceeding \$25,000 in value. Standard Nastran lists for \$30,000 per seat so this cut-off would exclude products such as Nastran for Windows. Contracts below this amount would also generally include non-commercial accounts where a mere administrative

## KIRKLAND & ELLIS

Miss Mills  
December 18, 2001  
Page 2

fee or no fee is charged. Examples of such non-commercial accounts include 90-day evaluation contracts, demonstration contracts, and contracts to hardware firms testing whether the software runs on their platform. This cut-off would also eliminate university contracts as MSC charges below market rates (\$1,500 per seat) for use of the codes for academic uses. In addition, it is our understanding that CSAR and UA1 targeted larger accounts because they did not have the sales force or technical support required to reach the wide range of customers supplied by MSC. This modification would greatly reduce the burden to MSC. MSC estimates that copying the files of customers with contracts in excess of \$25,000 would involve an additional 170-200 boxes. There are approximately 1,783 contract files that would have to be reviewed if this modification were not made, approximately 400 of these have a value greater than \$25,000. MSC proposes to review the files for each year from 1995 to present. If a customer has or had a contract at any time during that period that exceeded \$25,000, for any relevant product or service, MSC would search that customer's files in headquarters and in the United States field offices. Per your request, attached is a list of customers whose files would be reviewed.

We have also discussed limiting the search of foreign offices to documents relating to competitors or competition. The foreign offices are sales offices, whose staff are sales, technical support, or other administrative and other miscellaneous personnel reporting to MSC personnel in the United States. The foreign offices are not involved with strategic planning, and they do not set the corporate pricing policy. Documents that would be relevant to your inquiry would be found primarily in MSC's headquarters. The only documents that might not be found in the United States are contracts and sales related documents that may comment on competitors. We propose that the search of these offices be limited to documents relating to competitors and competition in the licensing or sale of FEA solvers. In addition, MSC proposes that only English language documents be submitted. If the contract files had to be produced throughout the world, an additional 500 boxes would be produced.

Finally, we propose a limitation to Specification 3, precluding the production of financial documents of companies recently acquired by MSC. The old financial documents of these companies would not be relevant to this litigation. These companies are Silverado, Knowledge Revolution, Atria, Compumod, and MacSoft.

Assuming these modifications are accepted, MSC would begin production the week of January 3, 2002, and estimates that it could complete its production by February 8, 2002.

**KIRKLAND & ELLIS**

Miss Mills  
December 18, 2001  
Page 3

Thank you for your attention to this matter. We look forward to resolving these issues at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Marimichael O Skubel". The signature is written in a cursive style with a large, stylized initial "M".

Marimichael O Skubel

Enclosure

**REDACTED**

**REDACTED**



**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

REDACTED

REDACTED

**REDACTED**

**B**



# KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

655 Fifteenth Street, N.W.  
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Marimichael O Skubel  
To Call Writer Directly:  
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Marimichael\_skubel@dc.kirkland.com

December 19, 2001

## Via Facsimile

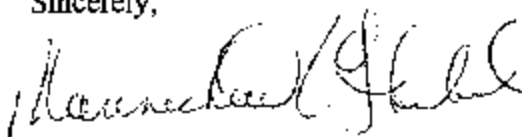
Karen A. Mills, Esq.  
Federal Trade Commission  
Bureau of Competition  
601 Pennsylvania Avenue, N.W.  
Washington, DC 20580

Subject: MSC Software Inc.

Dear Ms. Mills:

In my letter dated December 18, 2001, regarding Complaint Counsel's document request, I inadvertently state that submitting contract files *in excess* of \$25,000 would mean an additional 170-200 boxes of documents. I meant to say that contract files \$25,000 or below would represent an additional 170-200 boxes. Thank you for bringing this mistake to my attention.

Sincerely,



Marimichael O Skubel

**C**



UNITED STATES OF AMERICA  
**FEDERAL TRADE COMMISSION**  
 WASHINGTON, D.C. 20580

Marimichael O. Skubel, Esq.  
 Kirkland & Ellis  
 655 15<sup>th</sup> Street, N.W.  
 Washington, DC 20005

February 1, 2002

Re: FTC Docket No. 9299

VIA FAX

Dear Ms. Skubel,

Since Judge Chappell's January 18, 2002, order encouraging us to resolve four outstanding disputes about Respondent's compliance with Complaint Counsel's Document Request, and more specifically, since the filing of our emergency motion on January 22, 2002, two of the four outstanding disputes have been resolved by your withdrawal of your previously asserted objections. However, two issues remain unresolved. Although Judge Chappell's Order of January 25, 2002, authorized Complaint Counsel to re-file a motion to compel if the outstanding discovery disputes were not resolved by January 25, 2002, and only one of the four disputes was resolved by that date, Complaint Counsel has spent an additional week prodding you for more information and diligently attempting to resolve the remaining disputes.

Two issues have been resolved as follows:

- By letter of January 24, 2002, you withdrew your objection to producing a privilege log, and promised to provide the privilege log required by the Document Request.
- On January 30, 2002, you told me by telephone that you were withdrawing your objection to producing data responsive to specification 22 of the Document Request in the form that MSC produced the data in the Part 2 investigation, bringing up to date the two data sets generated using the "Data Mart" query and the "All" query. While Respondent now has agreed to provide data in this form, you have not committed to a production date.

Two issues remain unresolved, however, and it therefore appears that Complaint Counsel may have to seek the court's intervention:

- You offer no final production date, and the tardy and slow pace of production is unacceptable.
- You object to producing from backup tapes, and while Complaint Counsel has attempted to narrow the scope of search required, no resolution has been reached.

Marimichael O. Skubel  
February 1, 2002

Page 2 of 3

In addition, in the course of your production, a new production compliance issue has arisen:

- Respondent has indiscriminately marked documents CONFIDENTIAL and RESTRICTED CONFIDENTIAL.

We outline below a plan for production that we would find acceptable, if production were completed by February 22, 2002. Without written confirmation from you that you will produce as described by that date, we are likely to have to move to compel and put this matter again before Judge Chappell for resolution.

- Production must be completed by February 22, 2002.
- Production will be prioritized for the persons, files and offices listed on Attachment A.
- Prioritized production will include hard copy, electronic documents, and e-mails, but not backups, except as provided below.
- If any of the persons identified on Attachment A are no longer with the company, the production still will include documents resulting from a search for their documents, whether in storage, archived, passed on to other individuals, or electronically stored.
- Among the contract files, priority within the priority production will be made of the files relating to those customers we identified to you in our letter of December 14, 2001, and in Complaint Counsel's Preliminary Witness List of December 18, 2001
- Responsive documents of persons not identified in Attachment A but on the search lists you produced to Complaint Counsel on January 25, 2002, and January 28, 2002, will be produced after the priority production.
- Respondent will search backup tapes for responsive documents of the 15 individuals listed on Attachment A next to whose names we have placed a "(B)".
- Respondent will properly designate all documents entitled to be marked CONFIDENTIAL or RESTRICTED CONFIDENTIAL, and correct erroneous designations by submitting properly marked documents, by March 1, 2002.

Please advise promptly whether you agree to this resolution of the remaining outstanding issues. If not, we will be required to place the unresolved issues before Judge Chappell.

Very truly yours,



Karen A. Mills

Marimichael O. Skubel  
February 1, 2002

Page 3 of 3

ATTACHMENT A

Allahbadi, Rakesh (B)	MacNeal, B.*
Bakhtary, N.*	Maher, William
Baldwin, Joe	Mattson, Harold (B)
Barclay, Richard	Mehta, Anil* (B)
Barthenheier, Keane	Morgan, Jeff* (B)
Beer, Dave	Mowrey, John
Benson, Doug*	Murphy, Rick (B)
Bentley, Steve*	Nagy, D.*
Blakely, Ken (B)	Neill, Douglas
Brar, Deepak	Parady, John*
Brown, Todd	Perna, Frank (B)
Bryce, Dan*	Platzick, Joe*
Bush, Richard	Privett, Cory
Casario, Alan	Ramirez, R.*
Castro, Jack*	Reymond, Antoine
Central Files	Reymond, Mike
Clark, Jay*	Riordan, George*
Conrardy, Jackie	Roach, Doug
Crooks, Matthew	Robertson, Alastair
Crum, Lois*	Rose, Ted
CSA	Roundy, Lance*
Cully, Tom	Sacro, Steve*
Curry, Tom*	Sauer, Paulo
Davis, Chuck	Schultz, Jeff
DiLullo, John	Schwartz, Peter
Doyle, Dan*	Sheridan, Lynn
Dyer, Ron (B)	Sikes, Greg*
Glickman, Donald*	Smith, Jane (B)
Gockel, Mike	Smith, L.*
Grassinger, Thomas*	Smithson, Tyler
Greco, Louis (B)	Spangler, Paul
Greg, Bryan*	Staunton, Ed
Grun, William*	Stass, Bob
Harder, Robert	Swan, James*
Hart, Fritz*	Swedburg, Debbie*
Hart, Bruce (B)	Swartz, Robert
Heil, Joan*	St. Johns, Christopher* (B)
Hoff, Claus	Tateishi, Mats* (B)
Hubert, Lum*	Tecoo, Thomas*
Hunt, H. Harris*	Thomson, Brian
Ibrahim, Omar	Torres, Bill
Johnson, Dan*	Towles, Linda
Jones, Edward* (B)	UAI*
Kenyon, Mark	Wallerstein, Dave
Krauski, Mike* (B)	White, James*
Kurifink, Robert	Williams, Charles
Layfield, Dale	Wilson, Charles
Long, Lou*	Wright, Paul*
Long, Jon*	Asia-Pacific offices
Louwers, Robert	European offices
MacKay, John*	South American offices
	Contract Files

**D**

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

**IN THE MATTER OF**  
**MSC.SOFTWARE CORPORATION,**  
a corporation.

Docket No. 9299

**AFFIDAVIT OF CONNIE STOKES**

I, Connie Stokes, declare and state as follows:

1. I am the Administrative Assistant for Omar Ibrahim at MSC.Software ("MSC") Corporation, which is located at 815 Colorado Boulevard, Los Angeles, California 90041-1777. I have held this position for two years, although I have been employed by MSC for eleven years as Administrative Assistant to other MSC personnel. The following statement is based on my personal knowledge.
2. As part of my responsibilities as Administrative Assistant, I sometimes have general tasks that are aimed at assisting the corporation as a whole, as opposed to merely the person to whom I am assigned to work. For the past nine months, I have been solely responsible for the management and maintenance of MSC's archival system at an outsourced storage facility—File Keepers. I assumed this responsibility after other personnel left the company.
3. To submit a box of documents to File Keepers, forms documenting a new transfer of boxes must be completed. MSC personnel can obtain these forms from me. This form contains blanks for the following information: a bar code, MSC's corporate name/identification, the MSC account number, the name of the MSC department transferring the boxes for storage (ex.: Finance), the name of the person actually completing the form and storing the boxes, the box code (see Attachment A), and a description, or index of the contents of the box. These forms are maintained in hard copy and then supposed to be inputted into a database.

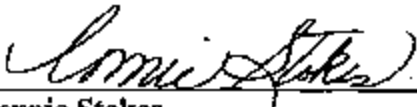
4. The name of the MSC person actually completing the form and storing the boxes is generally that of an administrative assistant performing this task for the various MSC personnel for whom he or she works.
5. The index is intended to be a description of the contents of the box, which provides a bit more specificity in the event that someone was attempting to locate archived documents at a later date. Over the course of MSC's use of the File Keepers system, it is my experience that people have not diligently completed these indices, thereby making retrieval or searching for documents off site a much more difficult a process.
6. It is also my experience that the general box codes do not provide the requisite specificity to remedy inadequate indexing. For example, one of the codes used is "EX" for executive files. There are almost 200 boxes with the code "EX" listed in the database I maintain. Absent detailed indices, MSC would have to search all 200 boxes individually to attempt to find responsive documents.
7. Currently there are over 2,400 boxes registered to MSC at the File Keepers facility; the large majority of which are filed by MSC's Financial Department and Executive Offices (most of which I believe contain information that is financial in nature).
8. When I first assumed responsibilities over the File Keepers system, I was not told that the File Keepers transfer forms were to be documented in a database. Although I immediately attempted to input data and develop the database when I was informed of this several months later, there is still a significant backlog of transfer forms that have not yet been entered into the system.
9. Additionally, I was only recently told that my predecessor, an administrative assistant in the Finance Department who is no longer with MSC, maintained a separate database. I can only assume that she was never told of the File Keepers database either, and therefore created her own. When I attempted to gather the data from her database and reconcile it with that in the other File Keepers information, I was informed that her computer has not been functioning properly and that the File Keepers data is unretrievable.



10. In light of the overall operations and maintenance difficulties with the File Keepers system since its first use at MSC, it would be quite difficult and time consuming to search the offsite boxes for documents on various subject matters that I understand are covered by the document requests. Moreover, I believe that the large majority of the archived documents are offsite due to their outdated nature and are financial in nature.

I declare, under penalty of perjury, that the above statements are true and correct.

This 15<sup>th</sup> day of February, 2002  
Pasadena, California

  
\_\_\_\_\_  
Connie Stokes

Subscribed and sworn to me at the

City/County of Los ANGELES, State of California this 15<sup>th</sup> day of February, 2002.

Signature Angela Yang

My commission expires: JUNE 6, 2004



## **Attachment A**

## PROCEDURES FOR USING FILE KEEPERS (Cont.)

6. Attempt to coordinate box retrievals within the department so that all boxes are delivered at one time. File Keepers charges a flat fee for each delivery, plus a charge for the number of boxes delivered.
- B. The File Keepers employee who answers the phone will ask you additional information:
1. Your name (they must have it on file before you are allowed to retrieve or store documents with them)
  2. The MSC code number; your reply will be "1768".
- III. Permanent Removal
- A. For material to be destroyed, list these boxes on the "Permanent Removal" form.
1. Use the same procedure as in I.A.3.a. to fill out form with the exception of "Authorized Requestor"

## IV. Box Coding

- A. There are two types of box coding; one is a two-letter plus four numbers code and one is a two-letter plus years code:
1. Following is the existing two-letter code list:
    - ✓ AES = AES
    - AD = Audits
    - AG = A/R Aging
    - AP = Accounts Payable
    - AR = Accounts Receivable
    - AT = Aries Technology
    - CA = Contracts Administration
    - CO = Commission Reports
    - CP = Contracts Processing
    - CR = Cash Receipts
    - ✓ CSAR = CSAR
    - CT = Contracts
    - EC = Engineering Contracts
    - EX = Executive Offices
    - FA = Financial Analyst
    - FN = Finance - General
    - FX = Fixed Assets
    - GL = General Ledger
    - IS = MIS
    - LR = Labor Reports
    - MARC = MARC
    - NI = Numerical Invoices
    - PA = PDA
    - PC = Project Cost
    - PD = Paid Receipts
    - ~~PDA = PDA Engineering~~
    - PN = Personnel
    - PO = Purchase Orders (MSC)
    - PR = Payroll
    - PS = Profit Sharing
    - RP = Reports
    - RR = Detail Revenue Reports
    - SA = Sales
    - SD = Shipping Dept.
    - SH = Shippers
    - SO = Sales Orders - Aries
    - SP = Special Projects
    - SR = Sales Reports
    - ST = Sales Taxes
    - TX = Taxes

**E**

# KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

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Marimichael O. Skubel  
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(202) 879-5034  
Marimichael\_Skubel@dc.kirkland.com

January 25, 2002

## Via Facsimile

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

Subject: MSC Software Inc.

Dear Ms. Mills:

As we discussed yesterday afternoon, I am writing to memorialize our discussion regarding the status of and issues pertaining to MSC's document production in response to Complaint Counsel's First Request for the Production of Documents.

## Data

At this time, counsel for MSC is in the process of exploring all possible avenues for the production of data responsive to Specification 22, such that the logistical dilemmas that the response to the last subpoena presented can be avoided. (see 1/24/02 letter from M. Skubel to K. Mills). MSC does plan to respond to this request, and will inform Complaint Counsel as soon as new information is learned.

## Backup Tapes

To reiterate our discussion, the costs and labor necessary to review MSC's backup tapes are prohibitively burdensome. As counsel for MSC has informed Complaint Counsel, because of policies implemented since spring of 2000, MSC is currently in possession of thousands of backup tapes both on site and in storage, delivery of which could take up to one week. Each tape would need to be restored and indexed in order to ascertain the contents of the tape. Then, if a tape contains backed-up documents of a person who could have material responsive to the requests, such documents would need to be reviewed. Because of MSC's use of a "jukebox" system to loop the backup tapes, there is no organized approach to locating MSC personnel's documents on a tape. Thus, although only a certain number of persons backup files would need

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to be reviewed, all tapes would require restoration and indexing<sup>1</sup> in order to find those persons' files. Additionally, the tape drives are used heavily during the afternoon and evening hours to create back-up data sets. During these hours it is possible that it would take several hours for a tape drive to become available for a requested restoration.

It is MSC's belief that the value gleaned from this financially draining and labor intensive exercise of searching the backup tapes is minimal. Given that MSC does not enforce any document purge policy, the majority of the documents that were backed up will also be gathered as a part of the electronic and hard document production. Furthermore, because of the Send Mail system that MSC uses, in which electronic messages are only on the server for the amount of time that it takes to either send or receive mail, there are essentially no electronic messages captured in the backup tapes (other than those messages in the process of being sent or received at the time of the backup). For such reasons, we believe there is no need to review the backup tapes.

### E-Mail

E-mail cannot be gathered from a central site or server. As mentioned above, the application currently used by MSC does not maintain e-mail messages on a server, rather they are maintained on the local drive of the file's owner. To collect e-mail from MSC employees will require that each individual's computer be accessed and files copied locally. Depending on the size of the files, an individual's e-mail is expected to take approximately one hour to copy. The difficulty in completing this task is compounded by the frequency with which individuals travel with their computers.

### Production Date

Complaint Counsel expressed some concern at the fact that the above issues and delays are just now being realized and/or expressed to Complaint Counsel. Counsel for MSC is somewhat surprised at this statement, because throughout its discussions with Complaint Counsel MSC has been forthright as to the status of its document production. Throughout the month of December, Complaint Counsel and MSC were engaged in negotiations designed to narrow and focus the breadth of the document request. Given the potential for these discussions to limit significantly the scope of the production, MSC did not begin to search its files until after the apparent stalemate in negotiations.

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<sup>1</sup> Recall that the conservative estimate for such a task is approximately eleven hours, which, when billing MSC employees' time at \$100 per hour, results in \$1100 per tape. This cost would be doubled if an outside vendor were to perform the review and restoration, for vendors typically charge \$200-\$225 per hour for such work.

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Moreover, on December 19, 2001, in a letter from MSC to Complaint Counsel addressing negotiations designed to limit the volume of contracts produced by a) the value of the contract and b) the year of the contract, MSC expressed that "[w]e would like to begin the contract/customer search as soon as possible." Such language clearly alerted Complaint Counsel to the fact that particular portion of the document request had not been initiated. Undeniably, a portion of such search would have been avoided in the event that the parties arrived at an agreement. In fact, this ultimately happened. It was not necessary for MSC to undertake the costly and time consuming task of collecting, reviewing, and producing documents that could have ultimately been eliminated from the document request.

Similarly, in a letter dated December 18, 2001, Complaint Counsel attempted to negotiate the language of the document requests with respect to contracts, foreign offices, financial documents, and limitations to specifications 9 and 15. MSC could not know the ultimate universe of requested documents until the close of negotiations or know the volume of the documents that were going to be gathered until the search was underway. Accordingly, in the December 18<sup>th</sup> letter, MSC said "[a]ssuming these modifications are accepted, *MSC would begin production the week of January 3, 2002, and estimates that it could complete its production by February 8, 2002.*" At all times, Complaint Counsel was on notice that MSC would not begin its document production effort until after the first of the year and that its production schedule, based on incomplete information, was an estimate.

### Proposed Production

After our conversation yesterday afternoon, counsel for MSC brainstormed on potential solutions aimed at hastening the completion of MSC's document production. As explained in our January 24, 2002, letter to Complaint Counsel, a significant amount of time and manpower is expended in the mastery of this complicated subject matter, and in the review of the collected documents to determine responsiveness, privilege, and the level of confidentiality. We propose to continue to review the documents for responsiveness and privilege, but to make a universal "Restricted Confidential" designation for the remainder of the production. This would eliminate an entire portion of the review, thereby facilitating a quicker review and production of documents to Complaint Counsel. As we have not yet begun to institute this new review process, we cannot certify a completion date for the production, however, we are certain that this change in review procedure will hasten the ultimate completion of the production.

Additionally, as discussed on yesterday's call, Complaint Counsel has attached a listing of a) all MSC personnel, to date, who have been searched for documents responsive to Complaint Counsel's First Request for the Production of Documents and b) all persons or offices from which MSC is expecting to receive documents. (Persons listed in Attachment B are all

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sales related personnel.) It would be mutually beneficial if Complaint Counsel would review the list and prioritize this listing for an order of production. MSC already notes Complaint Counsel's request to make the deponents' documents and the Board minutes first priority and to the extent that counsel for MSC has these documents, it has been done.

MSC also proposes that Complaint Counsel limit the number of persons from whom electronic documents and e-mail shall be gathered. This will expedite and make more manageable the electronic and e-mail portion of the MSC document production. As noted above, we have attached a listing of MSC personnel searched or identified as potentially having documents responsive to these document requests

We believe that these proposals will help to streamline MSC's production efforts. Please do not hesitate to contact me should you have any questions or further discussions regarding this production.

Respectfully,



Marimichael O. Skubel

Attachments



## MSC Interviewee List

Last Name	First Name	Title
Alarcon	Priscilla	Sales Administrator
Barclay	Richard	Account Manager, Aerospace Corp. Accounts
Blakely	Kenneth	Executive Vice President
Bloomberg	John	Sales Representative
Brar	Deepak	Director of Technology
Brennan	Doug	Director, Professional Solutions
Bush	Richard	Director, Marketing Communication
Button	Ronda S.	Supervisor, Marketing Coordination
Casario	Alan K.	Product Manager
Chainyk	Mike	Development Engineer
Choi	Carlson	Manager, Internet Technologies - Marketing Communications
Conrardy	Jackie	North America Western Region Admin
Costa	Cindy	Sales Administrator
Crippe	Chris	Account Executive
Crooks	Matthew G.	Manager, Financial Planning & Analysis
Davis	Chuck	Corporate Controller
Di Lullo	John	Vice President, General Manager
Dimas	David	Director, Training and Support
Figer, Jr.	Charles	Engineering Support Manager
Fischer	Michael	Senior Manager - Technical Documentation
Fumo	John	Senior Applications Engineer - Aerospace Corporate Accounts
Garcia	Lina	Sales Associate
Gharib	Jamshid	Development Project Manager - Automotive Acoustics
Gockel	Mike	Nastran Development
Greco	Louis	Chief Financial Officer
Grossen	Michael L.	Engineering Support Manager - Western Region Operations
Haberman	David T.	Business Development Manager, Training & Support
Hart	Bruce A.	Director, Central Region
Hikita	Hal	Business Unit Manager - Fatigue
Ho	Wai	Director, Business Processes
Hoff	Claus C.	Development Engineer - Finite Element Specialist
Halcomb	John R.	Senior Technical Consultant
Ibrahim	Omar M.	Director, Nastran Product Development
Isaak	Kenneth H.	Senior Software Engineer
Javadi	Mahmud	Quality Assurance Engineer
Johnson	Erwin H.	Project Manager
Johnson	Larry L.	Chief Architect
Kansakar	Rajendra K.	Engineering Software Specialist
Kanhasamy	Kuna	Senior Software Specialist
Karapetan	Michael S.	MSC.Patran America's Business Unit Leader
Kelly	Benjamin	Training Administrator
Kenyon	Mark	Director, Aerospace Business
Kilroy	Kevin L.	Director, Development Infrastructure
Kobayashi	Makiko	Marketing Specialist, Global Sales Operations
Koko	Boma	Senior Director, Simulation Data Management
Krishnasamy	Guna	Manager, Meshing Technology
Kurtfink	Robert	Senior Account Manager
Layfield	Dale	MSC.Nastran Toolkit Project Manager
Li	Jason	Director, Global Sales Operations
Louwers	Robert E.	Senior Account Manager - Aerospace Accounts
Lum	Hubert	Division Controller
Maher	William R.	Account Manager
Martinez	Alfonso	Manager, PMD
Mastromocco	David T.	Senior Consulting Engineer
Mattica	Karen	Training Specialist

## MSC Interviewee List

Last Name	First Name	Title
Mattson	Harold E.	Senior Director, Business Management & Analysis
McLaughlin	Janet M.	Project Administrator
Mendoza	Peter J.	Manager, Business Development - Dytran Product Line
Moore	James	Software Developer
Mowrey	John W.	Vice President, Professional Services and Automotive Business
Murphy	James R.	Senior Director
Murphy	Rick	Senior Vice President, Global Sales Operations
Nageswaran	Shan	Senior Director - New Technology Development
Ncill	Douglas J.	Manager, Aerospace Applications Business Unit
Oien	Julia	Sales Representative
Orozco	Daniel R.	Director, Corporate Administration
Perez	Gloria	Sales Administrator - Finance
Perna	Frank	Chief Executive Officer
Peterson	Edward W.	Manager, Code Management and MSC/Patran Operations
Privett	Cory	Porting Manager for Nastran
Pun	Adarsh	Senior Product Manager
Raymundo	Don	Administrative Supervisor
Raymond	Antoine	Senior Manager, Strategic Alliances
Raymond	Mike	Senior Software Engineer - DMAP Development
Roach	Douglas K.	Automotive Business Manager
Robertson	Alastair	Product Marketing Manager
Rosato	Carol A.	Quality Assurance Program Manager
Rose	Ted	Manager of MSC, Nastran Training and Support
Sadaghi	Reza	Senior Director - Multi-Physics and Manufacturing Technologies
Schiermeier	John E.	Senior Development Engineer
Scharitz	Peter	Manager, DMP Projects
Schultz	Jeff	Marketing Communications
Sheridan	Lynn M.	Contracts Manager
Smithson	Tyler	MSC, Nastran America's Business Unit Manager
Stanton	Ed	Chief Technical Officer
Stass	Bob	Account Manager
Sun	Jian	Senior Software Developer
Stone	Tweed	Program Manager Level 2
Swette	Robert F.	Business Unit Leader for Desktop Products
Teague	Chris	Product Release Manager
Thornton	Brian E.	Senior Account Manager
Torres	Bill L.	Senior Account Manager
Towles	Linda	Manager, Marketing Programs
Truesdell	George	Senior Software Engineer, Results Visualization
Walkerstein	Dave	Senior Manager, MSC, Nastran Engineering
Wass	William E.	Sales Representative
Williams	Charles	Western Region Channel Manager
Wilson	Charles T.	Director, MSC, Nastran Senior Development Staff
Woo	Brian L.	Manager, Purchasing

## **Attachment B**

**Ron Dyer**  
**Dave Bear**  
**Keane Barthenbeier**  
**Joe Baldwin**  
**Bob Louwers**  
**Tom Cully**  
**Don Bienick**  
**Daryl Patrishkoff**  
**Dale Delgado**  
**Tom Bastanza**  
**Paul Spangier**  
**Paulo Sauer**  
**Greg Flaute**  
**David Stogsdill**  
**Mike Malmsten**  
**Bruce Perkins**  
**Sue Werner (inside)**  
**Jason Simon**  
**Salvatore Glnella**  
**Mark Whitmore**  
**Jim Buckley**  
**John Steere**  
**Jon Long**  
**Roy Hayne**  
**Alan Harvey**  
**Aaron Graves**  
**Edward Bullock**  
**Craig Berger**  
**Annelise Tran**  
**Brian Davis**  
**David Stout**  
**Alley Catyb**  
**Bill Kester**  
**Philip Roberts**  
**Marinos Stylianou**  
**Gerry Pugliese**  
**Vincent Bement**  
**Will Hicklen**  
**Mark Kerrigan**  
**Peter Hajjar**  
**Asia-Pacific offices**  
**Eurpocan offices**  
**South American offices**

**F**

February 15, 2002

Ms. Lisa Horton  
Kirkland & Ellis, LLP  
655 15<sup>th</sup> Street, NW  
Washington, DC 20005

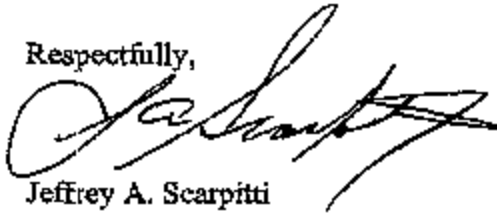
RE: Forensic Recovery Services

Dear Ms. Horton:

Per our conversations, Merrill Corporation can provide on-site data recovery services to you and your client. Although we cannot give a total budget estimate without knowing the full scope for required production, our hourly rate for the recovery of backup data will be \$235 plus costs

I look forward to working with you on this project and assisting in any manner possible. Please do not hesitate to contact me as questions arise.

Respectfully,



Jeffrey A. Scarpitti  
Senior Consultant  
Merrill Corporation- Document Management Services

**G**

Ms. Lisa Horton  
Kirkland & Ellis, LLP  
655 15<sup>th</sup> Street, NW  
Washington, DC 20005

Dear Ms. Horton:

Per our conversations, Merrill Corporation has analyzed the electronic documents you require to produce on behalf of your client, MSC Software. After reviewing the data that was collected and provided to Merrill, we have reached the following conclusions based on the documents gathered from a sampling of seven MSC sources. Please note that two of the 7 document custodians produced an inordinate amount of data which require further analysis, thus for purposes of estimating the overall project scope, we have treated these two custodians as anomalies. Upon further review and verification of the responsiveness of those inordinately large files, the costs of the final projections could increase.


Our estimates allow us to conclude that, on average, each document custodian will produce approximately 1.4 gigabytes of electronic documents. This amount multiplied by the 193 document custodians remaining (we used an estimated total of 200 sources) to be produced results in an estimated 270.2 gigabytes of data. Using an industry standard assumption that each gigabyte of data will produce approximately 60,000 pages of documents, the resulting page volume will reach approximately 16,212,000 pages. At a cost of \$0.18 per page for conversion, the conversion budget will be \$2,918,160.

Assuming that approximately 40% of the converted documents will found to be relevant based upon your data query, a resulting 6,484,400 pages will need to be printed for production to the FTC. At a cost of \$0.105 per page, this portion of the project budget will be approximately \$680,904. The estimated time for Consulting and Search Services performed by Merrill is at a minimum 40 hours resulting in a cost \$3,400. We are unable to ascertain the exact costs of shipping both electronic media and printed documents. We will provide this budget as soon as it becomes available.

To summarize, our assumption based upon our experience and industry standards leads us to estimate an overall project budget of \$3,602,464 for the production of electronic documents collected as a part of FTC v. MSC Software.

I look forward to working with you on this project and assisting in any manner possible.  
Please do not hesitate to contact me as questions arise.

Respectfully,

 by DRF

Jeffrey A. Scaritti  
Senior Consultant

Merrill Corporation- Document Management Services

