



CERTIFICATE OF SERVICE

This is to certify that on February 1, 2002, I caused a copy of the attached Correction to

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# KIRKLAND & ELLIS

PARTNERSHIPS INCLUDING PROFESSIONAL CORPORATIONS

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January 7, 2002

## VIA FACSIMILE

P. Abbott McCartney, Esq.  
Karen Mills, Esq.  
Federal Trade Commission  
601 Pennsylvania Avenue, N.W.  
Washington, D.C. 20005

Re: MSC Software, Docket No. 9299

Dear Abbott and Karen;

Complaint Counsel's Objections to MSC Software's First Set of Requests for the Production of Documents and Things – particularly when viewed in light of Complaint Counsel's deficient Initial Disclosures and Interrogatory Responses – raise troubling questions about Complaint Counsel's candor and willingness to comply with the FTC's commitment and delegation to provide MSC with a fair hearing consistent with its due process rights governing discovery.

As already outlined in our December 28, 2001 letter regarding the substantial deficiencies in Complaint Counsel's "responses" to MSC's First Set of Interrogatories, it is quite clear Complaint Counsel intends to conceal crucial information from MSC in an effort to hide deficiencies in its case, secrete exculpatory information away from public view, and preclude MSC from effectively preparing its defense.

MSC still does *not* have documents and information that should have been disclosed as part of Complaint Counsel's Initial Disclosures in *November*, even as Complaint Counsel pursues its aggressive, one-sided discovery. Also troubling is Complaint Counsel's *unilateral* decision to withhold production of documents and information that should have been disclosed as part of Complaint

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*December 17*, when it submitted its Preliminary Witness List to MSC, to *even begin* the process of providing the interviewees with a copy of the Protective Order (attached as *Exhibit 1* to the *December 17, 2001*).

[REDACTED]

1

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



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Counsel must now withdraw any objection to both MSC's First Set of Interrogatories and MSC's First Set of Document Requests based on the informant's privilege.

If Complaint Counsel has withheld documents on this ground, please state the bases for the claimed privilege and all facts relied upon in support of that claim(s), including the document date, author(s), recipient(s), subject matter, its present location, and the request to which the document is responsive and explain whether the privileged material can be redacted (and if not, why not) as required by Instruction No. 15.

*General Objection No. 4: To the extent that this objection is based on the informant's privilege,*

with regard to documents prepared by, or in conjunction with, third parties, it is not well founded.

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*General Objection No. 7:* This objection appears to be duplicative in scope to General Objection No. 3. If Complaint Counsel has a separate basis for making this objection, please state

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privilege and, therefore, the objection is not well founded. Please state whether materials have been withheld from MSC based on this privilege and provide a statement of the claim of privilege, immunity, exemption, or the bases for the claimed privilege and all facts relied upon in support of that claim(s), including the document date, author(s), recipient(s), subject matter, its present location, and the request to which the document is responsive and explain whether the privileged material can be redacted (and if not, why not) as required by Instruction No. 15.

*General Objection No. 8:* Please state whether materials have been withheld from MSC based on this privilege and provide a statement of the claim of privilege, immunity, exemption, or the bases for the claimed privilege and all facts relied upon in support of that claim(s), including the

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

public or private. If any such documents exist, produce them immediately.



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documents. Regrettably, MSC has necessarily been impeded in its ability to prepare for these depositions and has been compelled, in the interested of fairness, to cancel a number of these depositions.

Significantly, Complaint Counsel does *not* raise this "objection" in response to Request No.

3 subject to the "full transcripts (including electronic versions) of the [redacted] depositions."

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

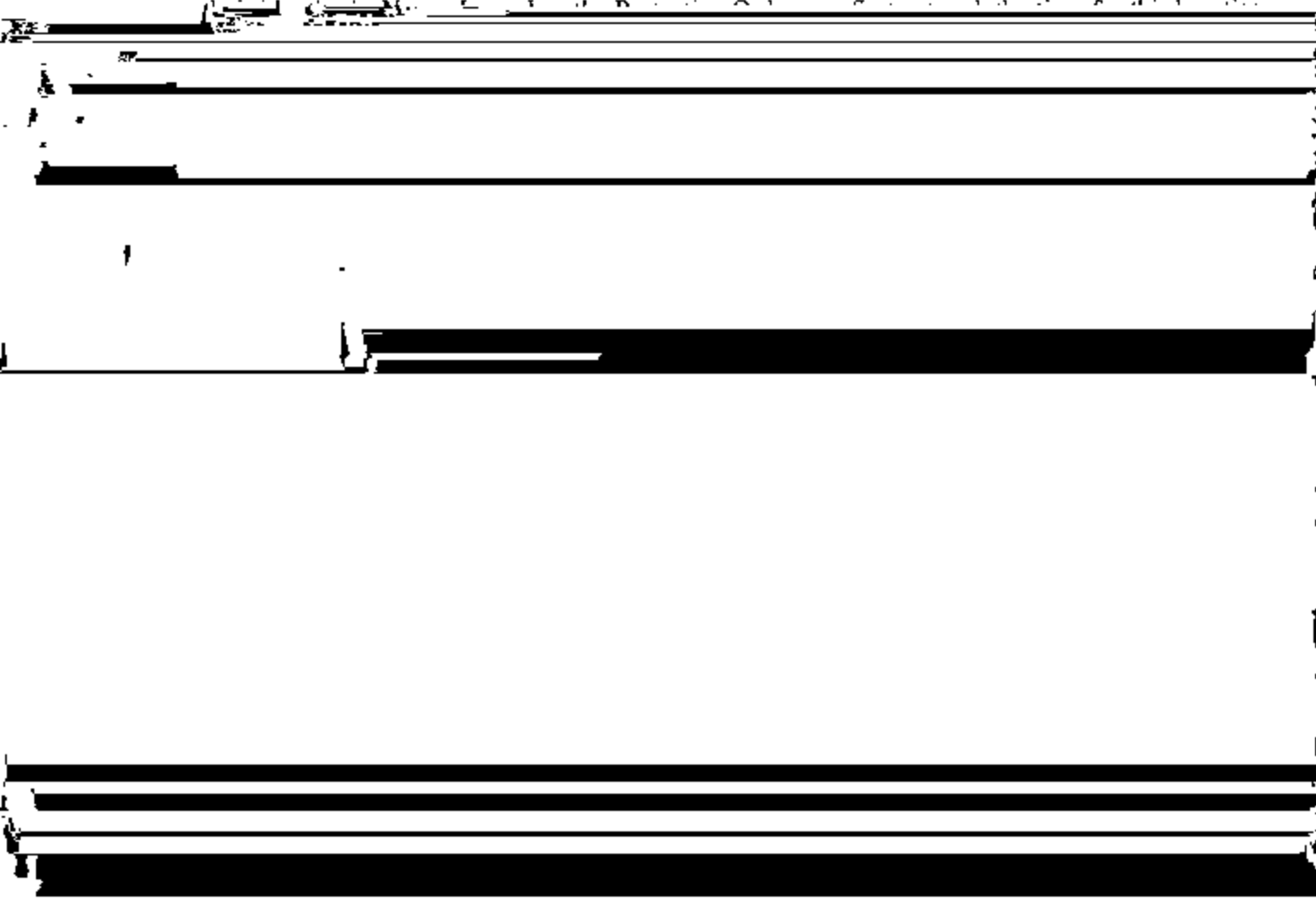
[REDACTED]

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would show the lack of merit to Complaint Counsel's case. Complaint Counsel has arrogated to itself the right to decide which discovery it will provide and what it will hide. Complaint Counsel may not *unilaterally* limit its production of verbatim statements – and other responsive information – to those witnesses it has chosen to call at trial because Complaint Counsel believes that those witnesses will be most damaging to MSC. If Complaint Counsel has other verbatim statements – as this objection strongly suggests – produce them immediately.

This "objection" raises an additional point. The assertion that third parties must have time to seek an appropriate protective order suggests that Complaint Counsel has controlled the timing of notification to such third parties in a way that maximizes the delay in disclosing this important information to MSC. Had third parties been given notice of Complaint Counsel's intent to disclose



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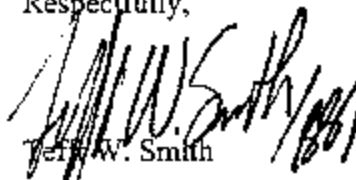
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We request that Complaint Counsel immediately confirm that it will promptly provide full and complete responses to these requests so that MSC may proceed with its discovery and prepare

[REDACTED]

recourse but to ask for Judge Chappell's intervention.

Respectfully,

  
Jeff W. Smith