

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of _____
MSC SOFTWARE CORPORATION, _____
a corporation. _____

Docket No. 9299

**RESPONDENT MSC SOFTWARE CORPORATION'S
MOTION FOR PROTECTIVE ORDER**

Pursuant to Section 3.31 (c)(1) and (d) of the Federal Trade Commission's Rules of Practice, 16 C.F. R. § 3.31 (c)(1)(d),¹ MSC Software ("MSC") hereby moves for a protective order precluding Complaint Counsel from taking the deposition of Dr. R. Swami Narayanaswami, the founder and former Chief Executive Officer of Computerized Structural Analysis and Research Corporation

¹ Commission's Rules of Practice § 3.31(c)(1) states:

The frequency or extent of the use of the discovery methods otherwise permitted under these rules shall be limited by the Administrative Law Judge if he determines that: (i) [the] discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) [t]he party seeking the discovery has had ample opportunity by discovery in the action to obtain the information sought, or (iii) [t]he burden and expense of the proposed discovery outweigh its likely benefit.

Rule of Practice § 3.31(d) further states:

The Administrative Law Judge may deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.

("CSAR"). This deposition is duplicative, burdensome, oppressive, and expensive. Moreover, the burden and expense is particularly inappropriate to impose on a non-party.

On April 26, 2002, Complaint Counsel noticed the multiple-day deposition of Dr. Naraynaswami, who has already been questioned under oath at length by Complaint Counsel.² Since Dr. Naraynaswami's investigation hearing on August 30, 2000, Dr. Naraynaswami's involvement and knowledge base of the FEA solver industry has remain unchanged. His company has long been purchased; he no longer has any involvement with MSC or any customers with regard to FEA software; and there have been no new documents created relating to either Dr. Naraynaswami or CSAR. As such, there is no reason for a second deposition of Dr. Naraynaswami, and therefore, it can only serve to impose unfair expense and burden on both Dr. Naraynaswami and MSC.

Forcing Dr. Naraynaswami to appear and MSC to defend its interests in a deposition that will serve only to rehash old information, at this stage in the litigation, and *for more than one day* is unduly burdensome, cumulative, and will be added, unnecessary expense to both MSC and Dr. Naraynaswami. This deposition is obviously not critical to Complaint Counsel's case. Furthermore, given Dr. Naraynaswami's status as a non-party to this litigation, he is entitled to special consideration when weighing the burdens and benefits of proposed discovery. *See Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998) ("[C]oncern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs [regarding discovery requests]"); *Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980) (restrictions on discovery "may be broader when a nonparty is the target of discovery");

² The investigational hearing at which Dr. Naraynaswami testified under oath lasted a full day and resulted in a 270 page transcript.

Laxalt v. McClatchy, 116 F.R.D. 455, 458 (D. Nev. 1986) (“nonparties to litigation enjoy greater protection from discovery than normal parties”).

Allowing Complaint Counsel to proceed with this deposition of Dr. Naraynaswami would be unduly burdensome and expensive to MSC as well. With only two months remaining prior to the start of trial, and only 28 days remaining in the discovery period, MSC must focus its resources on matters that are *non-duplicative, non-burdensome*, and designed to assist MSC in the preparation of its affirmative case before this Court. MSC cannot spend its last thirty days of discovery defending against Complaint Counsel’s *thirty month* investigation and litigation of this case.

For the reasons stated above, MSC respectfully requests that Your Honor grant this motion for a protective order precluding this deposition.

Respectfully submitted,



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Counsel for Respondent
MSC Software Corporation

Dated: May 1, 2002

CERTIFICATE OF SERVICE

This is to certify that on May 1, 2002, I caused a copy of Respondent MSC Software Corporation's Motion for Protective Order to be served by hand-delivery to the following person:

The Honorable D. Michael Chappell
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A handwritten signature in black ink, appearing to read 'David Shotlander', written over a horizontal line.

David Shotlander

