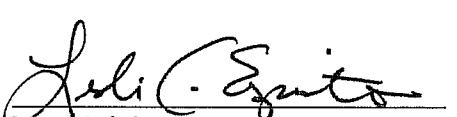
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
	)	**PUBLIC RECORD VERSION**
ASPEN TECHNOLOGY, INC.,	)	
	)	
Respondent.	)	Docket No. 9310

ERRATA SHEET TO
THE PUBLIC RECORD VERSION OF
COMPLAINT COUNSEL'S OPPOSITION
TO RESPONDENT'S MOTION TO EXTEND
DISCOVERY AND MODIFY THE SCHEDULING ORDER

Complaint Counsel hereby file an errata sheet to the Public Record Version of Complaint Counsel's Opposition to Respondent's Motion to Extend Discovery and Modify the Scheduling Order ("Public Record Version"). In the Public Record Version, Complaint Counsel inadvertently failed to delete an in-text code on pages two through nine which declared those pages "Confidential." Complaint Counsel hereby submit a new version of pages two through nine which no longer contains a header declaring confidentiality, thus correcting the error.

Respectfully Submitted,



Peter Richman
Lesli C. Esposito
Mary N. Lehner

Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C.

Dated: November 26, 2003

needs. Finally, and moreover, the public interest strongly militates against the substantial extension sought by Respondent. As a result, AspenTech's motion should be denied.

ARGUMENT

Pursuant to Rule 3.21(c)(2) of the Federal Trade Commission's Rules of Practice ("FTC Rules"), a party seeking an extension must demonstrate "good cause" why modifications to the scheduling order are necessary, taking into account, *inter alia*, "the need to conclude the evidentiary hearing and render an initial decision in a timely manner." 16 C.F.R. § 3.21(c)(2). AspenTech contends that an extension is necessary because approximately 90 witnesses have been listed by the parties – 75 by AspenTech itself -- and the discovery associated with such a large number of witnesses, many of whom are located abroad, will require additional time. Respondent further argues that the need for more time is at least partially attributable "to Complaint Counsel's approach in this case." Resp. Mot. at 3. The record demonstrates that neither of these arguments is supportable, and hence that Respondent has not carried its burden of showing good cause sufficient to warrant any extension of time, much less the two months sought by its motion.

Respondent contends, in essence, that it has only recently become aware of the large number of fact witnesses from whom discovery must be sought, thus necessitating the requested two-month extension. This contention is seriously misleading. Complaint Counsel listed only

15 fact witnesses on its preliminary list;[3] the remaining 75 witnesses (consisting of approximately a dozen AspenTech employees and over 60 third-parties) are witnesses whose testimony is required solely by Respondent and of whom Respondent must certainly have been aware at the time the Scheduling Order was entered. Because Respondent's need for these witnesses was thus at least clearly foreseeable, if not actually known, at the time the Scheduling Order was entered, Respondent cannot now be heard to justify its requested extension based upon the existence of its own foreseeable witnesses.[4]

Furthermore, it is far from clear that Respondent will need compulsory discovery from all of these fact witnesses. Putting aside the dozen or so AspenTech employees from whom Respondent needs no discovery, the overwhelming majority (about 64) of the remaining fact witnesses are third-parties from whom AspenTech previously obtained written statements. *See* Resp. Mot. at 3. Respondent fails to explain how it was able to gather voluntary statements from these 64 fact witnesses, many of whom are foreign customers, but is somehow unable to persuade the same potential witnesses to provide voluntary discovery. Indeed, if any extension is

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[3] Complaint Counsel's preliminary witness list named 10 specific witnesses from nine companies, and identified five other companies that would provide testimony through witnesses to be named as soon as each such witness was designated by his/her company. In these five instances where Complaint Counsel named a company rather than a specific witness, it did so to provide Respondent with additional time to seek document discovery from those companies. Complaint Counsel have already voluntarily notified Respondent of the identity of witnesses for four of these five companies, and the fifth will be forthcoming as soon as the appropriate individual is identified.

[4] Respondent began contacting these fact witnesses as early as October 2002. Statements from these witnesses were submitted to the Commission in March and April 2003. Respondent's counsel told this Court on September 16 that "there are over 60 customers who have filed statements" with the Commission. Initial Pretrial Conference at 20. Respondent's belated realization that it may need to seek discovery of its own witnesses is inexcusable.

necessary in order to obtain discovery from these fact witnesses, such a request should be made by Complaint Counsel, not by Respondent.[5]

Respondent also claims it needs additional time because the parties are engaged in significant discovery directed to one another, "especially document requests from Complaint Counsel calling for the production of enormous volumes of documents by AspenTech." Resp. Mot. at 2. During the investigation, Commission staff significantly scaled back document requests made to AspenTech in an effort to be responsive to AspenTech's concerns about the costs of compliance. Consequently, AspenTech was on notice at the time the complaint was issued (and thus at the time of the Scheduling Order) that Complaint Counsel would undoubtedly be seeking additional documents. Moreover, despite Respondent's allegations about the "breadth" of Complaint Counsel's requests, the fact remains that Respondent has apparently largely completed its response to Complaint Counsel's recent document requests and has, to date, produced approximately 63 additional boxes of documents.[6] Clearly, then, Respondent's obligation to respond to Complaint Counsel's document requests does not provide a basis for a two-month extension.

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[5] Complaint Counsel will make every effort to obtain whatever discovery is necessary from these witnesses in a timely fashion and within the parameters of the current schedule. If and when it becomes clear to Complaint Counsel that this is impossible, Complaint Counsel will seek the shortest possible extension at that point. It is simply premature for Complaint Counsel – let alone Respondent – to seek an extension for these witnesses at this point in time.

[6] Respondent has thus far produced 11 boxes of paper documents and the equivalent of about 52 boxes of electronic document images (156,000 pages at 3,000 pages per box).

Respondent's attempt to justify an extension based upon Complaint Counsel's alleged conduct is similarly lacking in merit. In addition to Respondent's complaints about Complaint Counsel's document requests, which have already been shown to be meritless, Respondent also points to an alleged delay in obtaining from Complaint Counsel third-party documents collected by the Commission during the pre-complaint investigation. As Respondent correctly observes, the production of such documents was initially delayed by the need to obtain an appropriate protective order. Nonetheless, Complaint Counsel notified AspenTech counsel at counsel's first meeting that Complaint Counsel had virtually no third-party discovery materials. After the entry of a protective order, Respondent issued a document request returnable on November 17. To ensure that relevant discovery materials were provided expeditiously, Complaint Counsel produced the requested documents (consisting of only a single Redweld folder of third-party documents) on November 14, three days before the scheduled return date.

Respondent further asserts that Complaint Counsel failed in its obligation to compel its third-party witnesses voluntarily to provide information and documents to AspenTech, and to assist AspenTech in scheduling depositions of these witnesses. Complaint Counsel are unaware of any such obligations, nor does Complaint Counsel have the practical ability to require independent witnesses to cooperate voluntarily with AspenTech.

Respondent also seeks to blame Complaint Counsel for Respondent's belated need to list as witnesses the 64 customers who provided written statements. According to Respondent, it must obtain discovery from these witnesses only because Complaint Counsel refused to admit the

essential facts set forth in each customer's written statement. Contrary to Respondent's understanding, however, the law does not require Complaint Counsel to affirm or deny such untested hearsay statements when Complaint Counsel do not have access to the information that would allow Complaint Counsel to do so. *See, e.g., T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co., Inc.*, 174 F.R.D. 38, 43-44 (S.D.N.Y. 1997) (reasonable inquiry confined to review of information that is within the responding party's control). Nor does the law require Complaint Counsel to seek information to test such hearsay statements when the witnesses' interests are not aligned with Complaint Counsel. *See, e.g., Kendrick v. Sullivan*, No. 83-3175, 1992 U.S. Dist. Lexis 6715, at *9-*16 (D.D.C. May 15, 1992) (review of documentary evidence in responding party's possession sufficient to constitute reasonable inquiry; proper not to admit or deny requests for admission where information was in the hands of adverse third parties or dealt with witnesses' state of mind). Consequently, the blame for Respondent's failure to take into account its alleged discovery needs with respect to its own witnesses lies squarely on Respondent's own shoulders, not Complaint Counsel's.

In assessing Respondent's request for an extension, this Court should also give consideration to Respondent's lack of diligence to date. Respondent's inexcusable delay in listing its 64 customer witnesses has already been discussed at some length. In addition, since October 9, 2003, Respondent has been free to issue discovery requests to any witness or

company. Yet Respondent's 23 subpoenas[7] have been issued to only eight of the 14 companies identified by Complaint Counsel in its October 9 witness list.

It should also be pointed out that the lengthy extension sought by Respondent, if granted, would be almost certain to delay the initial decision beyond the one-year period provided by FTC Rule 3.51(a). An extension of the initial decision beyond the one-year period may be granted *only* upon a finding of "extraordinary circumstances." Respondent has not even purported to make such a showing.[8]

Finally, the public interest militates strongly against granting such a lengthy delay. With each passing day, the harm suffered by the public (in the form of higher prices) continues to accrue, and the Commission's ability to provide meaningful structural relief (in the form of divestiture) is significantly lessened. AspenTech itself acknowledges that it will benefit from delay, having instructed its employees to tell customers who question the potential outcome of the case that [

REDACTED - SUBJECT TO PROTECTIVE ORDER

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[7] Respondent served two subpoenas *duces tecum* and one subpoena *ad testificandum* on each of eight Complaint Counsel witnesses, with the exception of one company, for which a single subpoena *duces tecum* and a single subpoena *ad testificandum* issued.

[8] Respondent attaches Judge Chappell's Order on Respondent MSC.Software Corporation's Motion to Extend Trial Date, *In re MSC.Software Corporation*, Docket No. 9299 (March 5, 2002), in support of its proposed two-month extension. Although Judge Chappell granted MSC.Software's request for an extension to the discovery period, his order on its face *rejected* an extension of the hearing date, stating: "In amending Rule 3.51 to its current form, the Commission recognized that 'unnecessary delay in adjudications can have a negative impact on the Commission's adjudicatory program . . . .' Rules of Practice Amendments, 61 Fed. Reg. 50640, 50640 (Federal Trade Commission Sept. 26, 1996).

]. Clearly, AspenTech expects that the speed of consolidation eventually will undermine the Commission's ability to obtain meaningful relief.

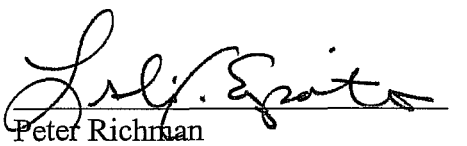
In sum, Respondent's alleged justifications do not withstand scrutiny. Nor has Respondent established at this point that the remaining discovery period of approximately three months will be insufficient. AspenTech's own lack of diligence has been the primary factor underlying most of the discovery issues asserted by Respondent. Finally, the public interest weighs heavily against the requested extension. For all of these reasons, Respondent has failed to carry its burden of establishing good cause for the requested extension, and its motion should be denied.

CONCLUSION

We respectfully request that the Court deny AspenTech's motion for a two-month extension. In making this request, Complaint Counsel are cognizant of the fact that Your Honor recently granted an extension in *California Pacific Medical Group* ("*Brown and Tolland*"), Dkt. 9306, extending the hearing date in that case to April 20 in San Francisco and thus creating a potential conflict with the currently scheduled hearing date in the present case. We submit that the *Brown and Tolland* extension should not be dispositive of the present motion, and that scheduling issues in each of the two matters should be determined entirely independent of the other. *Brown and Tolland* may not actually proceed to trial on April 20 for a variety of possible reasons. It is premature at this time to determine the likelihood that a conflict may actually exist

several months from now. Should a conflict persist at that time, one of the two cases could be assigned to another Administrative Law Judge for trial, or other possible options could be considered at the appropriate time. Accordingly, we respectfully submit that Respondent's motion should be denied.

Respectfully Submitted,



Peter Richman
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Mary N. Lehner

Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C.

Dated: November 26, 2003

Attachments:

A. REDACTED - SUBJECT TO PROTECTIVE ORDER
B. *Kendrick v. Sullivan*, No. 83-3175, 1992 U.S. Dist. Lexis 6715 (D.D.C. May 15, 1992)
C. Proposed Order

CERTIFICATE OF SERVICE

I, Evelyn J. Boynton, hereby certify that I caused a copy of the attached Errata Sheet To the Public Record Version Of Complaint Counsel's Opposition to Respondent's Motion to Extend Discovery and Modify the Scheduling Order to be delivered this day:

Two copies by hand delivery to:

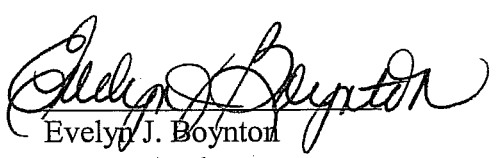
Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
Room H-112
600 Pennsylvania Ave., N.W.
Washington, DC 20580

By hand delivery to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-159
Washington, DC 20580

By electronic mail and by first-class mail to:

Mark W. Nelson
George S. Cary
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
mnelson@cgsh.com
gcary@cgsh.com



Evelyn J. Boynton
Merger Analyst
Federal Trade Commission

Dated: November 26, 2003