

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

IN THE MATTER OF)

ASPEN TECHNOLOGY, INC.,)

Respondent.)

Docket No. 9310

**RESPONDENT ASPEN TECHNOLOGY, INC.'S
MOTION TO AMEND THE SCHEDULING ORDER**

Despite extraordinary efforts at great expense to the company, Respondent Aspen Technology, Inc. cannot effectively meet the deadlines in the September 16, 2003 Scheduling Order, as amended on January 28, 2004 (the "Scheduling Order"). In particular, Respondent needs additional time to cull the hundreds of thousands of documents produced in this proceeding by it and third parties and to allow its experts to prepare their reports based on this extensive discovery. Respondent's proposal is to extend by four weeks the deadlines for Respondent to furnish its expert reports and proposed exhibit list, as well as all subsequent deadlines, which would place the commencement of the hearing on May 26, 2004.

Respondent originally had not proposed extending Complaint Counsel's deadlines, as Complaint Counsel had indicated that they opposed any extension of time for either party, and stated that they did not need additional time. In this motion, however, Respondent proposes a one-week extension of Complaint Counsel's deadline for its expert report in response to Complaint Counsel's subsequent suggestion that they too could use some additional time to complete their expert report. Respondent firmly believes that the issues in this case are better joined, however, if its expert can respond to Complaint Counsel's case. Respondent has

repeatedly sought information as to Complaint Counsel's theory of the appropriate relevant market under the FTC's Merger Guidelines. Complaint Counsel have refused to explain their theory until completion of their expert's report. To make the most effective use of the extension requested, it is critical for Complaint Counsel to reveal their case so that we can respond. Respondent proposes no extension for Complaint Counsel's proposed exhibit list because Complaint Counsel have indicated that they are prepared to meet the deadlines under the current Scheduling Order. Here too, greater time between Complaint Counsel's and Respondent's deadlines would allow Respondent to narrow its exhibits and witnesses for a more streamlined hearing.

Respondent has made every effort to avoid unnecessary delay and to ensure that the proceeding has been conducted expeditiously. *See* FTC Rule 3.1, 16 C.F.R. 3.1. To date, the parties have obtained a single two-week extension of the Scheduling Order to allow more time for discovery. Discovery in this case has been extensive and time-consuming. Respondent produced over 700 boxes of documents to Complaint Counsel in response to a subpoena issued during the pre-complaint investigation and discovery requests issued in the course of this proceeding. More than 60 subpoenas *duces tecum* have been issued to third parties, resulting in thousands of additional documents being produced, and over 40 depositions of Respondent's employees and third parties have been conducted, with 17 occurring during the last month of the discovery period alone. Respondent's subpoena to HTRI and the witness recently added by Complaint Counsel to testify about alleged effects on thermal design software has just been issued, after the Court granted Respondent's request to obtain this discovery, and there are other

discovery matters to be completed (including the depositions upon written questions of Japanese witnesses).

Respondent does not seek to reopen discovery or to obtain additional discovery beyond that provided for under the current Scheduling Order. On the contrary, an extension is requested so that Respondent can come to grips with the discovery already produced. Under the current schedule, Respondent must identify its proposed exhibits for trial by March 15, and its experts must prepare their report by March 19 based on an extensive record, much of which has become available only in last several weeks.

The process of identifying potential exhibits from the hundreds of thousands of documents produced, preparing them for trial, and authenticating them will take significantly more time than the short period between the end of discovery and the current deadline to identify exhibits. Although Respondent has been working diligently to complete this task in a timely manner, were Respondent to attempt to meet the March 15 deadline, we anticipate that it would require the identification of a far greater number of potential exhibits than would be necessary under the proposed extended schedule.

Complaint Counsel have indicated that they oppose any further extensions of the deadlines in this case and do not need extra time. They had more than a year, however, to prepare their affirmative case before the Complaint was filed. In contrast, Respondent has had to prepare its defense in approximately one-third of the time that Complaint Counsel has had to date to prepare its case. Respondent's task has been made even more difficult and has to be completed in even less time than the original schedule allowed because Complaint Counsel revealed almost none of its evidence in response to Respondent's discovery requests until

January 13, 2004, when, in response to Respondent's Second Set of Interrogatories, it provided a non-exhaustive list of documents supporting various contentions in the Complaint. As noted in Respondent's recent Motion For Extension of Discovery Deadline to Allow For Discovery of a New Theory of Competitive Harm, Complaint Counsel also recently added a new theory of competitive harm to its case relating to thermal design software. Given the very limited information from Complaint Counsel regarding their affirmative case, Respondent has been unable to focus its defense to meet Complaint Counsel's case in an efficient way. Respondent expects that an extension of time, including an expanded time period for Respondent to review Complaint Counsel's expert report and proposed exhibit list, will allow the parties to develop an orderly, and narrowed, presentation of witnesses and evidence at the hearing.

An Administrative Law Judge has discretion in regulating the course of adjudicative proceedings in a manner that expedites proceedings. 61 Fed. Reg. 50640, 50641 (Sept. 26, 1996). Although Respondent is requesting a four week extension of certain deadlines, including the commencement of the hearing, as noted, it expects that the additional time will allow both parties to take measures to shorten the hearing itself. The Scheduling Order may be modified upon a showing of "good cause." FTC Rule 3.21, 16 C.F.R. 3.21. Respondent submits that the extensive discovery in this case, Respondent's need for additional time to prepare its defense, and the anticipated narrowing of witnesses and evidence to be presented at the hearing constitutes good cause.

For the reasons set forth above, Respondent submits that they have demonstrated good cause to amend the scheduling order. A proposed revised scheduling order has been attached.

Date: March 4, 2004

Respectfully submitted by:



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**UNITED STATES OF AMERICA
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IN THE MATTER OF)
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) Docket No. 9310

[PROPOSED] SECOND REVISED SCHEDULING ORDER

On March 4, 2004, Respondent Aspen Technology, Inc. filed a motion to amend the scheduling order. Respondent has demonstrated good cause for revising the scheduling order. The motion is **GRANTED**.

The Scheduling Order is revised as follows:

March 12, 2004	Complaint Counsel provides expert witness reports
March 12, 2004	Complaint Counsel provides final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative or summary exhibits), and a brief summary of the testimony of each witness. Complaint Counsel serves on Administrative Law Judge final witness and exhibit lists, including designated testimony to be presented by deposition, and a brief summary of the expected testimony of each witness.
March 20, 2004	Close of discovery for limited purpose of taking deposition by written questions of four Japanese witnesses.
March 25, 2004	Close of discovery for limited purpose of obtaining discovery from HTRI on heat transfer software.
April 12, 2004	Respondent's Counsel provides final proposed witness and exhibit list, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative or summary exhibits), and a brief summary of the testimony of each witness.

Respondent's Counsel serves on Administrative Law Judge final witness and exhibit lists, including designated testimony to be presented by deposition, and a brief summary of the expected testimony of each witness.

April 13, 2004

Parties that intend to offer into evidence at the hearing confidential materials of an opposing party or non-party must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).

April 16, 2004

Respondent's Counsel provides expert witness reports.

April 21, 2004

Deadline for filing motions for summary decision.

April 23, 2004

Identify rebuttal expert(s) and provide rebuttal expert report(s).

Any such reports are to be limited to rebuttal of matters set forth in the opposing party's expert reports. If material outside the scope of fair rebuttal is presented, the opposing party will have the right to seek appropriate relief (such as striking rebuttal expert reports or seeking leave to submit sur-rebuttal expert reports).

Deadline for filing motions for *in camera* treatment of proposed trial exhibits.

Deadline for filing motions *in limine* and motions to strike.

May 5, 2004

Complaint Counsel files pretrial brief, not to exceed 50 pages.

May 7, 2004

Deadline for depositions of experts (including rebuttal experts).

Exchange and serve courtesy copy on Administrative Law Judge objections to final proposed witness lists and exhibit lists.

Exchange objections to the designated testimony to be presented by deposition and counter designations.

May 12, 2004

Exchange proposed stipulations of law, facts, and authenticity.

Deadline for filing responses to motions for summary decision.

May 21, 2004

File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be filed as agreed by the parties.

May 21, 2004

Respondent's Counsel files pretrial brief, not to exceed 50 pages.

May 24, 2004

Final prehearing conference to be held at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C. The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity and any designated deposition testimony. Counsel may present any objections to the final proposed witness lists and exhibits, including the designated testimony to be presented by deposition. Trial exhibits will be admitted or excluded to the extent practicable.

May 26, 2004

Deadline for Complaint Counsel to file reply pretrial brief, not to exceed 15 pages.

Commencement of Hearing, to begin at 10: 00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: March 8, 2004

CERTIFICATE OF SERVICE

I, Mark W. Nelson, hereby certify that on March 4, 2004, I caused a true and correct copy of the attached *Respondent Aspen Technology, Inc.'s Motion to Amend the Scheduling Order* to be served upon the following persons:

By hand delivery:

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

By hand delivery and e-mail:

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Mark W. Nelson