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

IN THE MATTER OF	)	PUBLIC RECORD VERSION
ASPEN TECHNOLOGY, INC.,	)	
Respondent.	)	Docket No. 9310

RESPONDENT ASPEN TECHNOLOGY, INC.'S MOTION TO COMPEL ADMISSIONS BY COMPLAINT COUNSEL IN RESPONSE TO ASPENTECH'S FIRST REQUEST FOR ADMISSIONS

Pursuant to Rule 3.38(a) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.38(a), Respondent Aspen Technology, Inc. ("AspenTech") respectfully moves the Court to order that the matters raised in AspenTech's First Request for Admissions be deemed admitted. AspenTech conferred with Complaint Counsel on November 10, 2003, in an effort to resolve the issues raised in this motion but was unable to do so. A statement to that effect, in accordance with Rule 3.22(f) of the Commission's Rules of Practice, 16 C.F.R. § 3.22(f), is attached as Exhibit A.

BACKGROUND

An important issue in this case is whether, before AspenTech acquired Hyprotech, customers treated the products of the two companies as ready substitutes for each other. Complaint Counsel contend that customers did so and used competition between the products to obtain lower prices. AspenTech, on the other hand, believes that most customers selected products based on their features – which differed significantly between the two companies – and disputes that there was significant price competition between the two companies pre-transaction.

AspenTech's view is supported by the experience of numerous customers. To demonstrate this point, AspenTech received written statements from 64 customers confirming certain basic facts about customers' product use: that the customers used one product or the other, that they did not consider the products to be substitutable for their purposes, etc. Forty of these written statements were provided to the Commission's investigative staff (now Complaint Counsel) on March 7, 2003, and a second set of 24 statements was provided the following month, on April 24, 2003.

On October 21, 2003, pursuant to Rule 3.32, 16 C.F.R. § 3.32, AspenTech served on Complaint Counsel a set of 753 requests for admission, asking Complaint Counsel to admit the authenticity of the customer statements and admit the factual points set forth in each statement.[1] Complaint Counsel have had a number of months to review the customer statements, which contain simple facts that can easily be confirmed, and have interviewed many if not all of the customers about their statements.[2] Thus, AspenTech's request for admissions offered an efficient way to reduce the issues for discovery and trial. The alternative is to call dozens of customer witnesses – many of whom are located outside the United States – to elicit brief, uncontroverted testimony from each one.

Complaint Counsel served their response on November 4, 2003. Complaint Counsel asserted only one objection: "Complaint Counsel object to the requests for admission to the extent that they are vague, ambiguous, or compound." Complaint Counsel did not, however, identify any request that they believed to be vague, ambiguous, or compound. Complaint Counsel then gave the same response to each request, asserting that they "do not possess sufficient information to form a belief as to the truth or falsity of this statement, nor is this

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[1] A copy of AspenTech's request for admissions is attached hereto as Exhibit B.

[2] See Declaration of Mark W. Nelson, attached hereto as Exhibit C.

information readily obtainable from persons and documents within Complaint Counsel's control, therefore Complaint Counsel can neither admit nor deny this request."

On November 10, 2003, AspenTech conferred with Complaint Counsel and pointed out that their response was not in compliance with Rule 3.32. AspenTech explained to Complaint Counsel that, before asserting lack of knowledge in response to each request, Complaint Counsel were required to make a reasonable inquiry and to certify in their response that they had made such an inquiry. *See* Rule 3.32(b). The points set forth in AspenTech's admission requests can be verified simply by reviewing the materials Complaint Counsel have had in their possession for the past eight months and/or by asking AspenTech's customers – whom Complaint Counsel have interviewed – to verify the facts about their product use. Complaint Counsel maintained, however, that they had no duty to verify information about product usage by AspenTech's customers.

On November 10, just hours after conferring with AspenTech, Complaint Counsel served a revised response to AspenTech's request for admissions.[3] Complaint Counsel added an introductory paragraph and, in an apparent attempt to come into compliance with Rule 3.32, added a sentence to their stock answer to all 753 requests: "Complaint Counsel have made reasonable inquiry and the information known or readily obtainable by Complaint Counsel is insufficient to fashion a response." We do not believe that Complaint Counsel actually conducted any further inquiry in the hours before they filed this revised response; only that they added a sentence saying they had made a reasonable inquiry.

Because Complaint Counsel's revised response is in plain violation of Rule 3.32, AspenTech brings this motion.

[3] A copy of Complaint Counsel's revised response is attached hereto as Exhibit D.

BASIS FOR MOTION

Rule 3.32(b) provides in relevant part (emphasis added):

> The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. ... An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that it has made reasonable inquiry and that the information known to or readily obtainable by the party is insufficient to enable it to admit or deny.

This rule was based on Rule 36 of the Federal Rules of Civil Procedure[4] and was adopted for the purpose of "shortening adjudicative proceedings by enabling the parties to more precisely define the actual issues." 43 Fed. Reg. 56,862 (FTC Dec. 4, 1978). Parties should use requests for admission "to reach agreements as to facts which are not in dispute." *Trans Union Corp.*, Dkt. 9255, 1993 FTC LEXIS 116, at *2 (May 24, 1993). Moreover, "just because a case is in the early stage of discovery does not mean that a party can merely deny requests and amend the responses later after discovery has occurred if, by 'reasonable inquiry', the party could have obtained the information needed to admit or deny the request." *A&V Fishing, Inc. v. The Home Insurance Company*, 145 F.R.D. 285, 288 (D. Mass. 1993). What constitutes a "reasonable inquiry" must be determined on a case-by-case basis.

Complaint Counsel's response violates Rule 3.32(b). Rather than "set forth in detail" the reasons why Complaint Counsel cannot admit or deny any of AspenTech's 753 requests, Complaint Counsel simply provide the same boilerplate answer to each request. *See Al-Jundi v. Rockefeller*, 91 F.R.D. 590, 594 (W.D.N.Y. 1981) ("answer must state specifically what efforts have been made or why reasonable efforts would be unavailing to obtain the requisite knowledge"). Notwithstanding Complaint Counsel's statement that they have made a reasonable

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[4] Although the Federal Rules of Civil Procedure are not applicable to FTC proceedings, the rules and related caselaw may be consulted for guidance in interpreting the FTC Rules. In re L.G. Balfour Company, 61 F.T.C. 1491 (1962); In re Ash Grove Cement Co., 77 F.T.C. 1660 (1970).

inquiry, Complaint Counsel provide no information regarding the type of inquiry they made and why it was insufficient to allow them to admit or deny each request.

> A response is not necessarily adequate if it merely states that the party to whom the request was directed made a reasonable inquiry and the information necessary to admit or deny the matter is not readily obtainable by the party. The response fails if the evidence does not show that the party did in fact make a reasonable inquiry.

7-36 Moore's Federal Practice 3d, Civil § 36.11[5][d]; *see In re Sweeten*, 56 B.R. 675, 678 (Bankr. E.D. Pa. 1986); *see also Asea, Inc. v. Southern Pacific Transportation Company*, 669 F.2d 1242, 1246 (9th Cir. 1981) ("permitting a party to avoid admitting or denying a proper request for admission simply by tracking the language of Rule 36(a) would encourage additional abuse of the discovery process").

It appears that Complaint Counsel take the position that they have no duty to admit or deny admission requests that relate to customer statements about product usage because information about product usage is largely in the hands of the customers themselves. On this basis, Complaint Counsel apparently believe that they can provide a blanket response to all 753 admission requests, declining to admit or deny each and every point regardless of whether Complaint Counsel have in fact spoken to the customers, verified the authenticity of their statements, and verified the facts set forth in those statements. Complaint Counsel's position is in blatant disregard of the requirements of Rule 3.32 and imposes unnecessary burdens on AspenTech and the Court.

Complaint Counsel must be able to admit or deny *at least some* if not most of AspenTech's requests. Complaint Counsel have investigated the AspenTech/Hyprotech transaction and the industry for the past year and a half. Among other things, they have received over 600 boxes of business documents from AspenTech and have spoken to numerous AspenTech customers. In fact, AspenTech understands that Complaint Counsel have contacted

many of the 64 customers who provided statements and specifically discussed their statements with them.[5] It is inconceivable that Complaint Counsel do not possess sufficient information to admit or deny a single fact relating to any of the 64 customer statements.

Contrary to Complaint Counsel's suggestion, there is no rule relieving Complaint Counsel of their obligations under Rule 3.32 simply because information about product usage is largely in the hands of the customers. Indeed, courts have imposed a duty on parties responding to admission requests to make inquiries of third parties in various contexts. *See, e.g., In Re Gulf Oil/Cities Service Tender Offer Litigation*, Nos. 82 Civ. 5253 (MBM), 87 Civ. 8982 (MBM), 1990 U.S. Dist. LEXIS 5009, at *14 (S.D.N.Y. 1990) ("[i]f the information is readily available from a non-party and is not in genuine dispute, then the policies underlying Rule 36 dictate that a litigant be compelled to inquire of the non-party and provide a responsive answer"); *Uniden America Corp. v. Ericsson, Inc.*, 181 F.R.D. 302, 304 (finding that a responding party must make inquiry of a third person when there is some identity of interest); *Al Jundi v. Rockefeller*, 91 F.R.D. at 594. Thus, "[t]he responding party cannot object to a request for admission by means of a blanket assertion that to answer the request would be excessively burdensome because the responding party would have to contact third persons to prepare responses." 7-36 Moore's at § 36.11[5][d].

> Because Rule 36 admission requests serve the highly desirable purpose of eliminating the need for proof of issues upon trial, there is strong disincentive to finding an undue burden where the requested party can make the necessary inquiries without extraordinary expense or effort – i.e., if consultation with the third party is "readily obtainable," in the words of Rule 36(a). Blanket assertions that it is excessively burdensome to have recourse to third persons in preparing responses to admission requests, as made by some of the movants here, are not acceptable.

Al-Jundi v. Rockefeller, 91 F.R.D. at 594.

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[5] *See* Declaration of Mark Nelson at ¶¶ 3-5.

In the present case, Complaint Counsel *have* contacted the customers who gave statements. Verifying the authenticity and accuracy of these statements was a simple matter of asking the right questions. Rule 3.32's "reasonable inquiry" requirement obliged Complaint Counsel to ask those questions and make good faith judgments about which facts they could admit and which facts they could deny. This is easy for Complaint Counsel to do. Contacting customers and discussing their use of products is a principal method by which the Commission staff gather information in all of their investigations. Complaint Counsel's position that they cannot be expected to ask customers about their statements and verify basic information about product usage is simply not credible.[6]

Complaint Counsel's reliance on *Kendrick v. Sullivan*, No. 83-3175 (CRR), 1992 U.S. Dist. LEXIS 6715 (D.D.C. 1992) is misplaced. In contrast to Complaint Counsel here, the responding party in *Kendrick* "made a diligent, good faith effort to inform the defendant of what facts they could fairly admit and what facts they could not concede." *Id.* at *12. In some instances, the responding party denied statements that had been made by hostile witnesses. Not surprisingly, the court held that the responding party – which had made a reasonable inquiry – was not obligated to accept these statements as true.

We do not contend that Complaint Counsel are obligated to accept every factual assertion contained in the customer statements. However, as discussed above, Complaint Counsel are obligated under Rule 3.32 to review these statements, as well as other relevant evidence in their possession, make reasonable inquiries of the customers, and make a good faith determination about which points they can admit and which points they can deny.

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[6] Unlike private parties, Complaint Counsel can be particularly confident in the responses they receive during customer interviews because providing untruthful information is punishable under 18 U.S.C. § 1001.

Complaint Counsel's contention that these 64 AspenTech customers are "hostile" to Complaint Counsel is also not credible. The purpose of this proceeding is to determine if AspenTech entered into a transaction that substantially reduced competition to the detriment of these customers. Complaint Counsel are supposed to be representing the interests of the very customers Complaint Counsel call "hostile." AspenTech is aware of no information to suggest that these customers have shown hostility to Complaint Counsel, have refused to answer any questions Complaint Counsel might have about their product usage, or have otherwise refused to cooperate. If Complaint Counsel do have a basis to assert that particular customers are "hostile" and therefore cannot be relied upon, Complaint Counsel have an obligation to set forth the basis for this contention "in detail" for each such customer, as required by Rule 3.32(b).

RELIEF SOUGHT

Rule 3.38(a)(1) provides that "if the Administrative Law Judge determines that an answer or other response by the objecting party does not comply with the requirements of these rules, he may order either that the matter is admitted or that an amended answer or response be served." 16 C.F.R. §3.38(a)(1). In adopting this rule, the Commission stated that it "intends its Administrative Law Judges vigorously to enforce the provisions of §3.38." 43 Fed. Reg. 56,862 (FTC Dec. 4, 1978). Because Complaint Counsel have failed to conduct a reasonable inquiry or provide a meaningful response to AspenTech's requests for admission, even after AspenTech pointed out the deficiency of their response, and have thereby improperly imposed on AspenTech the burden of listing 64 customer witnesses to provide largely uncontroverted testimony at trial, AspenTech respectfully submits that it would be appropriate to order all of its requests to be deemed admitted. *See, e.g., Asea, Inc. v. Southern Pacific Transportation Company*, 669 F.2d at 1247 ("[t]he general power of the district court to control the discovery process allows for the severe sanction of ordering a matter admitted when it has been

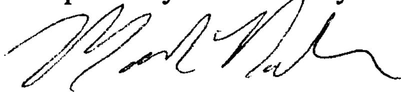
demonstrated that a party has intentionally disregarded the obligations imposed by Rule 36(a)"); *Brown v. Arlen Management Corp.*, 663 F.2d 575, 580 (5th Cir. 1981) (deeming of admission "well within the purview" of court's authority where inquiry to obtain information had not been reasonable).

CONCLUSION

AspenTech's requests for admission sought to reduce the issues in this case and lessen the burden on AspenTech and the Court. Complaint Counsel's response ignores the requirements of Rule 3.32 and seeks to impose the maximum burden on AspenTech to prove through dozens of customer witnesses basic facts about customer usage of the company's products. Complaint Counsel's refusal to admit or deny a single fact – even though they have had the customer statements for many months, have spoken to many or all of the customers, and have had plenty of opportunity to verify the statements and identify those points that are genuinely in dispute – is abusive and should not be tolerated by the Court. The appropriate remedy is to deem AspenTech's requests as admitted.

Date: November 18, 2003

Respectfully submitted by:



George S. Cary
David I. Gelfand
Mark W. Nelson
Jeremy J. Calsyn
Tanya N. Dunne

CLEARY, GOTTLIEB, STEEN & HAMILTON
2000 Pennsylvania Avenue, NW
Washington, D.C. 20006
Tel: 202-974-1500

COUNSEL FOR ASPEN TECHNOLOGY, INC.

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

IN THE MATTER OF	)	
ASPEN TECHNOLOGY, INC.,	)	Docket No. 9310
Respondent.	)	

ORDER GRANTING RESPONDENT ASPEN TECHNOLOGY, INC.'S MOTION TO COMPEL ADMISSIONS BY COMPLAINT COUNSEL IN RESPONSE TO ASPENTECH'S FIRST REQUEST FOR ADMISSIONS

On November 18, 2003, Respondent Aspen Technology, Inc. ("AspenTech") filed its Motion to Compel Admissions by Complaint Counsel in Response to AspenTech's First Request for Admissions.

Pursuant to Rule 3.38(a)(1) of the Commission's Rules of Practice, 16 C.F.R. § 3.38(a)(1), the Court finds that Complaint Counsel's Revised Responses and Objections to AspenTech's First Request for Admissions do not comply with the requirements of the Commission's Rules of Practice, and the motion is hereby GRANTED.

IT IS HEREBY ORDERED THAT the matters that are the subject of AspenTech's First Request for Admissions are hereby admitted.

ORDERED:

____
Stephen J. McGuire
Chief Administrative Law Judge

Date:

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 COMPEL ADMISSIONS BY COMPLAINT COUNSEL
IN RESPONSE TO ASPENTECH'S FIRST REQUEST FOR ADMISSIONS

EXHIBIT A

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

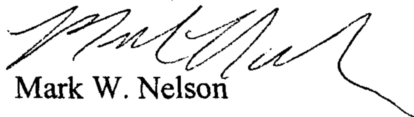
IN THE MATTER OF	)	STATEMENT PURSUANT TO 16 C.F.R. § 3.22(f)
ASPEN TECHNOLOGY, INC.,	)	
Respondent.	)	Docket No. 9310

I, Mark W. Nelson, on behalf of Cleary Gottlieb Steen & Hamilton ("Cleary Gottlieb") as counsel for Aspen Technology, Inc. ("AspenTech"), hereby represent that Cleary Gottlieb has conferred with Complaint Counsel in an effort in good faith to resolve by agreement the issues raised by AspenTech's Motion to Compel Admissions by Complaint Counsel in Response to AspenTech's First Request for Admissions and have been unable to reach such an agreement.

Cleary Gottlieb met with Complaint Counsel on November 10, 2003 by conference call to discuss these issues. However, the parties were unable to resolve the concerns raised by Cleary Gottlieb, and the parties were at an impasse with respect to these issues. During this call, David I. Gelfand and I were present for Cleary Gottlieb. Peter Richman, Mary Lehner, and others were present for Complaint Counsel.

Date: November 18, 2003

Respectfully submitted by:



Mark W. Nelson

CLEARY, GOTTLIEB, STEEN & HAMILTON
2000 Pennsylvania Avenue, NW
Washington, D.C. 20006
Tel: 202-974-1500

COUNSEL FOR ASPEN TECHNOLOGY, INC.

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

IN THE MATTER OF	)	
	)	**PUBLIC RECORD VERSION**
ASPEN TECHNOLOGY, INC.,	)	
	)	
Respondent.	)	Docket No. 9310
	)	

RESPONDENT ASPEN TECHNOLOGY, INC.'S
MOTION TO COMPEL ADMISSIONS BY COMPLAINT COUNSEL
IN RESPONSE TO ASPENTECH'S FIRST REQUEST FOR ADMISSIONS

EXHIBIT B

[SUBJECT TO PROTECTIVE ORDER]

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 COMPEL ADMISSIONS BY COMPLAINT COUNSEL
IN RESPONSE TO ASPENTECH'S FIRST REQUEST FOR ADMISSIONS

EXHIBIT C

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

IN THE MATTER OF	)	
ASPEN TECHNOLOGY, INC.,	)	Docket No. 9310
Respondent.	)	

DECLARATION OF MARK W. NELSON

I, Mark W. Nelson, declare:

1. I am one of the attorneys representing Aspen Technology, Inc. ("AspenTech") in this case. I am submitting this declaration in support of AspenTech's Motion to Compel Admissions by Complaint Counsel in Response to AspenTech's First Request for Admissions. This declaration is based on my personal knowledge and information I have obtained from other attorneys within my firm who are representing AspenTech.

2. AspenTech's First Request for Admissions relates to 64 statements that AspenTech received from customers and submitted to the Commission's investigative staff (now Complaint Counsel) in March and April 2003.

3. During a conference with Complaint Counsel shortly after the Complaint was filed, Complaint Counsel informed us that they had been in contact with many of the 64 customers who provided statements and had interviewed those customers about their statements.

4. We have also received information from several of the customers that the Commission staff have contacted those customers and discussed their statements with them. According to these customers, the Commission staff verified that the customers had provided the

statements and interviewed the customers about the contents of the statements. The customers indicated that they answered the Commission staff's questions.

5. In at least one instance, the Commission staff provided the customer with a draft declaration intended to clarify several points about the customer's statement. This draft declaration acknowledged that the customer had provided a statement and sought to make several additional points. Nevertheless, in responding to AspenTech's First Request for Admissions, Complaint Counsel stated that they did not have sufficient information to admit or deny the authenticity of this customer's statement or any of the factual points set forth in this customer's statement. (Complaint Counsel provided the same response to all 753 of AspenTech's admission requests relating to all 64 of the customer statements.)

I declare under penalty of perjury that the foregoing is true and correct.

Executed: November 18, 2003.

Mark W. Nelson

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

IN THE MATTER OF	)	
	)	**PUBLIC RECORD VERSION**
ASPEN TECHNOLOGY, INC.,	)	
	)	
Respondent.	)	Docket No. 9310
	)	

RESPONDENT ASPEN TECHNOLOGY, INC.'S
MOTION TO COMPEL ADMISSIONS BY COMPLAINT COUNSEL
IN RESPONSE TO ASPENTECH'S FIRST REQUEST FOR ADMISSIONS

EXHIBIT D

[SUBJECT TO PROTECTIVE ORDER]

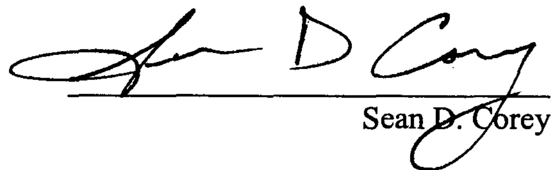
CERTIFICATE OF SERVICE

I, Sean D. Corey, hereby certify that on November 18, 2003, I caused a true and correct copy of the attached *Respondent Aspen Technology, Inc.'s Motion to Compel Admissions by Complaint Counsel in Response to AspenTech's First Request for Admissions* to be served upon the following persons by hand delivery and e-mail:

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

Donald S. Clark, Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Peter Richman
Phillip L. Broyles
Federal Trade Commission, N.W.
Room NJ-7172-A
601 New Jersey Avenue
Washington, D.C. 20001



Sean D. Corey