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 EXTEND DISCOVERY AND MODIFY THE SCHEDULING ORDER DATED SEPTEMBER 16, 2003

Pursuant to the Scheduling Order entered on September 16, 2003 ("Scheduling Order"), and Rule 3.21(c)(2) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.21(c)(2), Respondent Aspen Technology, Inc. ("AspenTech") respectfully moves the Court to extend the time permitted for discovery under the Scheduling Order by at least two months and to modify the dates set forth in the Scheduling Order accordingly. AspenTech makes this request because it has become apparent that discovery in this case – including discovery in the U.S. and abroad relating to approximately 90 potential witnesses – will require significantly more time than anticipated. Granting an extension now will allow the parties to schedule depositions and address third-party discovery issues in an orderly manner.

AspenTech has consulted Complaint Counsel and AspenTech understands that Complaint Counsel oppose the extension sought in this motion.

BASIS FOR EXTENSION

The Scheduling Order currently requires that discovery be concluded by February 17, 2004. Although AspenTech is diligently working with an aim to complete discovery as

expeditiously as possible, it is clear that the parties will not be able to conclude discovery within this timeframe.

There are now approximately 90 witnesses who have been listed by the parties. Most of these witnesses are third parties and many of them are located abroad. AspenTech has begun the process of issuing subpoenas for documents and depositions to the witnesses listed by Complaint Counsel, and some depositions have been scheduled during the coming months.[1] However, very few responsive documents have been received from third parties and it appears likely that AspenTech will be required to request enforcement action against at least some third parties to compel the production of documents. Moreover, for witnesses located abroad, the parties will have to follow procedures prescribed under foreign law to obtain testimony for use at trial. All of this is likely to be very time-consuming. Even if the parties were able to schedule every potential witness for deposition immediately, they would have to conduct one deposition per day for virtually every calendar day between now and the close of discovery to meet the current deadline. This is not possible.

In addition to third-party discovery, the parties are engaged in significant discovery directed to each other, especially document requests from Complaint Counsel calling for the production of enormous volumes of documents by AspenTech. This document discovery is time-consuming and extremely burdensome on AspenTech, which compounds the difficulty of completing third-party discovery. Thus, despite AspenTech's diligence, it is not likely to be able to complete discovery within the current timeframe. "[G]ood cause is demonstrated if a party seeking to extend a deadline demonstrates that a deadline cannot reasonably be met despite the

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[1] AspenTech has to date served 23 subpoenas (*duces tecum* and *ad testificandum*) on individuals and corporations identified on Complaint Counsel's Preliminary Witness List. AspenTech continues to discuss document production and deposition schedules with these potential witnesses and anticipates serving additional subpoenas.

diligence of the party seeking the extension." *In re Chicago Bridge & Iron Company N.V.*, 2002 FTC LEXIS 69, *5 (October 23, 2002) (citing *Bradford v. Dana Corp.*, 249 F.3d 807, 809 (8th Cir. 2001); *Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998).

Complaint Counsel should not be heard to object to an extension of discovery as the need for more time is largely a result of Complaint Counsel's approach in this case:

- Although AspenTech previously produced over 600 boxes of documents to Complaint Counsel in the course of the pre-complaint investigation, Complaint Counsel issued broad document requests after the complaint was filed, calling for the production of hundreds of thousands of additional documents. Many of these documents have been collected and produced to Complaint Counsel but a significant portion of this document production remains to be completed.

- In their initial disclosures and during an initial conference between the parties shortly after the complaint was filed, Complaint Counsel told AspenTech that they would produce documents identified in their initial disclosures as soon as a protective order was entered by the Court. That protective order was entered on September 16, 2003, but Complaint Counsel did not produce the documents. Instead, AspenTech was forced to issue a formal document request and still has not received any documents from Complaint Counsel. Although Complaint Counsel has recently assured AspenTech that their document production is forthcoming, this delay has to date prevented AspenTech from learning what evidence Complaint Counsel have in their possession.

- Complaint Counsel have made no effort to assist AspenTech in obtaining documents from the witnesses Complaint Counsel listed or to schedule their depositions. AspenTech has been required, therefore, to subpoena each witness for documents and deposition. The process of issuing these subpoenas and obtaining documents and deposition dates has been extremely time-consuming, and AspenTech is only now starting to obtain some documents from the government's witnesses.[2]

- A large number of AspenTech customers did not view AspenTech's products as competitive with Hyprotech's products before the transaction that is the subject of this case. AspenTech obtained written statements from 64 of these customers and provided them to Complaint Counsel several months before the complaint was filed. After the complaint was filed, in an effort to narrow the issues and lessen the burden on AspenTech and the Court, AspenTech served a set of requests for admission asking Complaint Counsel to admit the authenticity of

[2] In many instances, we were informed by these third-parties that they were not aware they had been listed as witnesses. Thus, the process of obtaining their documents and scheduling them for depositions had to be initiated by AspenTech without any assistance from Complaint Counsel.

these customer statements and admit the basic facts set forth in each statement (what products the customer uses, what products the customer can use, etc.). Complaint Counsel have declined to admit even a single fact as to any of these 64 customers.[3] As a result, AspenTech is compelled to list all 64 customers as witnesses. Many of them are located outside the United States and their testimony will have to be obtained through depositions under the procedures of various foreign countries.

Complaint Counsel seeks relief in this case that could be devastating to AspenTech and to its customers. AspenTech should be afforded a full and fair opportunity to complete discovery in an orderly fashion and present a complete defense at trial. Due process requires that parties be "entitled to appropriate discovery in time to reasonably and adequately prepare themselves, and their defenses, before facing the charges in the administrative 'trial.'" *Standard Oil Co. v. FTC*, 475 F. Supp. 1261, 1275 (N.D. Ind. 1979) (citing *Morgan v. United States*, 304 U.S. 1, (1938)). Accordingly, the Court should extend the discovery period by at least two months.[4]

Finally, it should be noted that no prior extensions have been granted, the case has been pending for only about three months, and the extension requested herein will not prevent the Court from rendering an initial decision in a timely manner. *See* Rule 3.21(c)(2) (Court "shall consider any extensions already granted, the length of the proceedings to date, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner").

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3 Complaint Counsel's response to AspenTech's requests for admission – asserting that Complaint Counsel has no duty to make inquiry or confirm basic facts about customers' product use – is inadequate and will likely be the subject of a motion to compel.

4 In a recent adjudicative proceeding also involving complicated issues and the need for extensive discovery, the Court granted respondent's request for a two-month extension of the discovery period prescribed by the initial scheduling order. *See* Order on Respondent MSC.Software Corporation's Motion to Extend Trial Date, *In re MSC. Software Corporation*, Docket No. 9299 (March 5, 2002) (Attached as Exhibit A).

CONCLUSION

The outcome of this case is a matter of critical importance to AspenTech, its employees, and its customers. For the reasons stated above, AspenTech respectfully moves the Court to extend the time permitted for discovery under the Scheduling Order by at least two months and to modify the dates set forth in the Scheduling Order accordingly.

Date: November 12, 2003

Respectfully submitted by:

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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 EXTEND DISCOVERY AND MODIFY THE SCHEDULING ORDER DATED SEPTEMBER 16, 2003

On November 12, 2003, Respondent Aspen Technology, Inc. ("AspenTech") filed its Motion to Extend Discovery and Modify the Scheduling Order Dated September 16, 2003.

Pursuant to Rule 3.21(c)(2) of the Commission's Rules of Practice, 16 C.F.R. § 3.21(c)(2), the Court finds that AspenTech has shown good cause for the extension sought and, in consideration of the absence of any previous extensions granted in the proceedings, and the relatively short length of the proceedings to date, the motion is hereby GRANTED.

IT IS HEREBY ORDERED THAT the close of discovery in this matter is scheduled for April 19, 2004, and all dates in the Scheduling Order Dated September 16, 2003, that relate to discovery, including expert witnesses, or that occur subsequent to discovery, are modified accordingly.

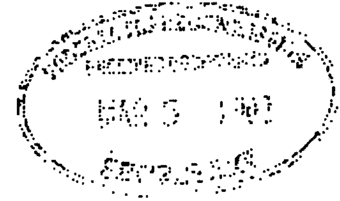
ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date:

EXHIBIT A

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of MSC.SOFTWARE CORPORATION, a corporation.	))))))	Docket No. 9299

ORDER ON RESPONDENT MSC.SOFTWARE CORPORATION'S MOTION TO EXTEND TRIAL DATE

I.

On February 11, 2002, Respondent MSC.Software Corporation ("MSC") filed a motion to extend the trial date. Complaint Counsel filed an opposition on February 21, 2002. Oral arguments of the parties were heard on February 25, 2002. For the reasons set forth below, MSC's motion is GRANTED IN PART and DENIED IN PART.

II.

MSC's motion seeks an immediate two month extension of the discovery period, the hearing date, and the filing date for the initial decision. MSC's motion also seeks either a six month extension of the discovery period or certification for appeal to the Commission the constitutionality of the application of Commission Rule 3.51(a) to these proceedings.

MSC asserts that there is not enough time remaining before the deadline for the close of fact discovery to conduct adequate discovery it believes that it needs to defend itself in this proceeding. MSC argues that this is an exceedingly complex field, necessitating comprehensive discovery, and that MSC has been hampered in its abilities to discover useful information by discovery tactics employed by Complaint Counsel. MSC asserts that it is prejudiced by the expedited discovery schedule. MSC believes that, as a minimum, a two month extension should be granted immediately, as a stop-gap measure, to allow this matter to proceed in an orderly fashion until the larger question, whether Rule 3.51(a) is unconstitutional as applied in this case, can be resolved.

Commission Rule 3.51(a) states that the Administrative Law Judge shall file an initial decision within one year of the issuance of the administrative complaint, except that the Administrative Law Judge may, upon a finding of extraordinary circumstances, extend the one-year deadline for a period of up to sixty days. 16 C.F.R. § 3.51(a). Such extension, upon its

expiration, may be continued for additional consecutive periods of up to sixty days, provided that each additional period is based upon a finding by the Administrative Law Judge that extraordinary circumstances are still present. *Id.*

MSC asserts that Rule 3.51 is unconstitutional as applied to the facts of this case because the case is too complicated to be tried in one year and that extending the trial schedule in successive two-month extensions is not sufficient to cure the defect, because MSC would be forced to "perennially cut . . . corners in discovery and compromis[e] its defense out of fear that no other extensions will be granted." The relief MSC seeks is a six month extension of the discovery period and hearing date. MSC recognizes that such a request is not consistent with Rule 3.51, but argues that Rule 3.51 is unconstitutional as applied in this case. Accordingly, MSC asks that if it is not granted the six month extension, MSC requests that the Administrative Law Judge certify to the full Commission the issue of whether 3.51(a) is unconstitutional, as applied to this case.

Complaint Counsel opposes all aspects of the relief requested in MSC's motion. Complaint Counsel asserts that this case should proceed in order to promptly restore the competition lost through Respondent's acquisitions of its two rivals. Complaint Counsel argues that Respondent has not established "extraordinary circumstances" to justify a delay in the trial. Complaint Counsel further asserts that there is no valid constitutional challenge to Rule 3.51(a) and no basis for any interlocutory review by the Commission.

III.

The current Scheduling Order, entered into on November 13, 2001, sets March 29, 2002 for the close of fact discovery and May 21, 2002 for the start of the hearing. It contemplates that an initial decision will be filed by October 9, 2002, one year from the filing of the Complaint. Although the parties have already had five months of discovery, MSC has demonstrated that it needs more time to conduct fact discovery. However, MSC has not demonstrated extraordinary circumstances at this time for delaying the filing of the initial decision. A revised Scheduling Order, issued herewith, grants an extension of two months for the close of discovery and an extension of six to eight weeks for most other dates remaining in the Scheduling Order, including the commencement of the hearing. In addition, it allows the parties to file Supplemental Expert Reports, if such supplementation is necessary. However, the Revised Scheduling Order does not contemplate an extension for the issuance of the initial decision, which is still scheduled to be issued by October 9, 2002, within one year from the filing of the Complaint. In this respect, MSC's motion for extension of two months is GRANTED IN PART and DENIED IN PART.

IV.

The plain language of Commission Rule 3.51(a) does not allow the additional relief requested by MSC, a six month extension of the discovery period, the hearing date, and the filing date for the initial decision. Commission Rule 3.51(a) requires an initial decision to be filed

within one year of the filing of the complaint. An extension of up to sixty days may be granted upon a finding of extraordinary circumstances. "Such extension, *upon its expiration*, may be continued for additional consecutive periods of up to sixty (60) days, provided that each additional period is based upon a finding by the Administrative Law Judge that extraordinary circumstances are still present." 16 C.F.R. § 3.51(a) (emphasis added). The plain language of Rule 3.51 does not permit a six month extension.

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). "The agency's longstanding policy has been that, to the extent practicable and consistent with requirements of law, adjudicative proceedings shall be conducted expeditiously and that both the Administrative Law Judge and litigants shall make every effort to avoid delay at each stage of a proceeding." *Id.* "In the Commission's view, a one-year deadline for the initial decision is a realistic time frame for most adjudicative proceedings. . . ." *Id.* at 50642.

Because MSC's request for a six month extension would violate the plain language of Rule 3.51 and the express purpose of the rule, MSC's request for a six month extension is DENIED.

V.

MSC's request for interlocutory appeal fails to comport with Commission Rule 3.23(b). Commission Rule 3.23(b) allows review *of a ruling* by the Administrative Law Judge upon a determination by the Administrative Law Judge: (1) that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion; *and* (2) that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation; *or* (3) subsequent review will be an inadequate remedy. 16 C.F.R. § 3.23(b). Applications for review may be filed within five days after notice of the Administrative Law Judge's determination and shall not exceed fifteen pages, exclusive of attachments. 16 C.F.R. § 3.23(b). Apparently anticipating an adverse ruling on its motion for an extension of six months, MSC has filed a request for interlocutory review. This request is improper. A preemptive request for interlocutory review of a ruling is not allowed.

Moreover, Commission precedent makes it clear that the Commission disfavors interlocutory appeals, especially those seeking review of matters committed to the discretion of the Administrative Law Judge. <u>See</u> *In re Gillette Co.*, 98 F.T.C. 875, 875 (Dec. 1, 1981); *In re Bristol Myers Co.*, 90 F.T.C. 273, 273 (Oct. 7, 1977) (interlocutory appeals disfavored as intrusions on the orderly and expeditious conduct of the adjudicative process). The Commission has vested broad discretion in its Administrative Law Judges in controlling the conduct of adjudicatory proceedings. *In re Kellogg Co.*, 1978 FTC LEXIS 532, *3-4 (Feb. 3, 1978) (denying motion for interlocutory appeal of order requesting modification of scheduling order).

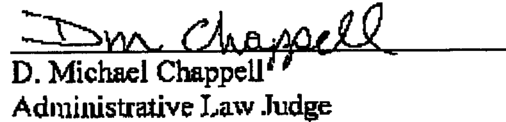
See also In re Maremont Corp., 77 FTC 1654, 1970 FTC LEXIS 260, *13 (Oct. 22, 1977) (denying motion for leave to file interlocutory appeal from order scheduling hearings).

Accordingly, MSC's request for full Commission review of the issue of whether Rule 3.51 is unconstitutional as applied to the facts of this case is DENIED.

VI.

For the above stated reasons, MSC's motion to extend the trial date is GRANTED IN PART and DENIED IN PART. A Revised Scheduling Order is issued herewith.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: March 5, 2002

CERTIFICATE OF SERVICE

I, Sean D. Corey, hereby certify that on November 12, 2003, I caused a true and correct copy of the attached *Respondent Aspen Technology, Inc.'s Motion to Extend Discovery and Modify the Scheduling Order Dated September 16, 2003* 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
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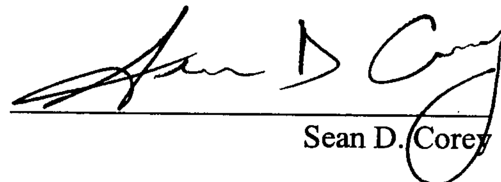

Sean D. Corey