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
	)	

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO EXTEND DISCOVERY AND MODIFY THE SCHEDULING ORDER

Complaint Counsel oppose Respondent Aspen Technology, Inc.'s ("AspenTech") November 12, 2003, motion to extend the time for discovery and to delay the hearing date.[1] The deadlines for discovery and subsequent events established in the Scheduling Order issued by Your Honor, as contemplated in the parties' Joint Motion to Enter Protective Order and Scheduling Order, already provide both sides with more than sufficient time to develop their evidence.[2] Respondent has failed to carry its burden of demonstrating the existence of "good cause" to amend the Scheduling Order. Indeed, the record reflects that the purported justification for delay was clearly foreseeable at the time the Scheduling Order was entered and is solely attributable to Respondent's own lack of diligence. In any event, there is ample time remaining in the current discovery period to accommodate even Respondent's newly asserted discovery

[1] "Respondent Aspen Technology, Inc.'s Motion to Extend Discovery and Modify the Scheduling Order Dated September 16, 2003" dated November 12, 2003 ("Resp. Mot.").

[2] The Scheduling Order as issued is extremely generous in that it extends fact discovery two months beyond what Your Honor initially believed was necessary.

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.

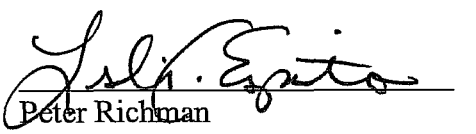
In sum, Respondent's alleged justifications do not withstand scrutiny. Nor has Respondent established at this point that the remaining discovery period of approximately three months will be insufficient. AspenTech's own lack of diligence has been the primary factor underlying most of the discovery issues 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
Lesli C. Esposito
Mary N. Lehner

Counsel Supporting the Complaint

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

Dated: November 24, 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

ATTACHMENT A

REDACTED - SUBJECT TO PROTECTIVE ORDER

ATTACHMENT B

CHAN KENDRICK, et al., Plaintiffs, v. DR. LOUIS SULLIVAN, Defendant, and A WOMAN'S CHOICE, INC., et al.,Defendant-Intervenors.
Civil Action No. 83-3175 (CRR)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1992 U.S. Dist. LEXIS 6715

May 15, 1992, Decided
May 15, 1992, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant filed a motion asking the court to deem admitted hundreds of its requests for admissions filed pursuant to Fed. R. Civ. P. 36(a) on the ground that plaintiffs' responses thereto were inadequate.

OVERVIEW: The case was on remand from the United States Supreme Court and involved the constitutionality of the Adolescent Family Life Act, *42 U.S.C.S. § 300z* et seq. Defendants filed a motion asking the court to deem admitted its requests for admissions because plaintiffs' responses were inadequate. The court found that the review of the documentary evidence in plaintiffs' possession was sufficient to constitute a reasonable inquiry. The court therefore held that plaintiffs' claim that they had inadequate information to respond was proper. The court found that plaintiffs' approach to responding to defendant's requests for admissions was acceptable. The court stated that although some responses had technical deficiencies, the court was satisfied that plaintiffs used their best efforts to provide complete and forthcoming responses to defendants' multitudinous requests for admissions. The court denied defendant's motion.

OUTCOME: The court denied defendant's motion to deem defendant's requests for admissions admitted, or, in the alternative, to compel more complete answers, except that the court granted the motion with respect to request number 85 of defendant's 21st set of requests for admissions.

CORE TERMS: admit, reasonable inquiry, deposition, credibility, admitting, hostile, deem, declaration, site, third parties, religious, deposition testimony, responding party, responding, answering, deemed admitted, conclusive, grantee, documentary evidence, twenty-first, eighty-five, addressing, disciplines, sectarian, personnel, tactic, adverse witness, underlying fact, third party, technically

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure: Discovery Methods: Requests for Admission
[HN1] Under Fed. R. Civ. P. 36(a), any matter for which an admission is sought is admitted unless the responding party makes a timely response. Moreover, if the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. Fed. R. Civ. P. 36(a). The rule further provides that an answer to a request for admission shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny

only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. 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 the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. Fed. R. Civ. P. 36(a).

Civil Procedure: Discovery Methods: Requests for Admission
[HN2] Qualification of responses is permissible under Fed. R. Civ. P. 36 where a request contains assertions which are only partially correct, but hair-splitting, disingenuous distinctions are inappropriate.

Civil Procedure: Trials: Bench Trials
[HN3] Great deference is given to the trial judge's credibility findings under Fed. R. Civ. P. 52(a), because only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. Moreover, a trial judge need not accept even uncontradicted and unimpeached testimony if it is from an interested party or is inherently improbable.

Civil Procedure: Discovery Methods: Requests for Admission
[HN4] In order to use lack of knowledge as a reason for neither admitting or denying a request, a party must assert both that it has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to fashion a response. Fed. R. Civ. P. 36(a). The determination of what constitutes a "reasonable inquiry" is committed to the sound discretion of the trial court.

Civil Procedure: Discovery Methods: Requests for Admission
[HN5] An order deeming matters admitted is a severe sanction.

JUDGES: [*1] RICHEY

OPINIONBY: CHARLES R. RICHEY

OPINION: MEMORANDUM OPINION OF CHARLES R. RICHEY UNITED STATES DISTRICT JUDGE

I. Introduction

Before the Court is the defendant's Motion to Deem Defendant's Requests for Admissions Admitted, or, in the Alternative, to Compel More Complete Answers ("Def.'s Mot."), supporting and opposing memoranda, and exhibits. The defendant asks this Court to deem admitted hundreds of its requests for admissions on the ground that the plaintiffs' responses thereto are inadequate.

This is long-standing, complex case challenging the constitutionality of the Adolescent Family Life Act ("AFLA"), *42 U.S.C. § 300z* et seq.. The AFLA involves a national program which permits the funding of religious organizations for counseling and teaching adolescents on matters related to premarital sexual relations and teenage pregnancy, and plaintiffs contend that it violates the Establishment Clause of the First Amendment. This case, on remand from the Supreme Court, is slated for trial in July of 1992 on the issue of whether the statute violates the Establishment Clause as it is applied. The myriad grantee programs, have conducted depositions all over the country, and have served thousands[*2] of requests for admissions upon each other pursuant to Fed. R. Civ. P. 36(a).

The Court has carefully considered the submissions of the parties, the applicable law, and the entire record herein, and concludes that the interests of justice would not be served by granting the defendant the relief sought. Accordingly, defendant's motion shall be denied.

II. Analysis

[HN1] Under Rule 36(a), any matter for which an admission is sought is admitted unless the responding party makes a timely response. Moreover, "if the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served." Fed. R. Civ. P. 36(a). The rule further provides that an answer to a request for admission

shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. [*3] 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 the information known or readily obtainable by the party is insufficient to enable the party to admit or deny.

Fed. R. Civ. P. 36(a).

Given the tremendous number of responses with which the defendant takes issue, it is impossible to consider them individually; thus the Court addresses them here in general terms. Indeed, even defendant did not attempt to plead the motion with such particularity. Rather, the defendant has grouped his problems with the plaintiffs' responses into four general categories, and then provides a "summary chart" listing which questions are deficient under which categories. These categories are: (1) "less than full admissions"; (2) "improper denials"; (3) "improper claims of lack of information"; and (4) "improper objections". The Court agrees with the plaintiffs that the categories are vague, confusing, and overlapping. Therefore rather than addressing each category separately it shall attempt to reach the underlying substance of defendant's complaints.

A large portion of defendant's requests for admissions are based on deposition [*4] testimony and declarations of witnesses from programs which receive AFLA grants. These witnesses have interests which are adverse to the plaintiffs' interests, as plaintiffs challenge a source of the witnesses' funding. It is plaintiffs' responses to a number of factual assertions based on deposition testimony of these hostile witnesses which lies at the heart of this dispute. Plaintiffs essentially refuse to take the testimony and declarations of these witnesses at face value, even if plaintiffs have no contradictory evidence under their control. Plaintiffs use two primary approaches to respond to requests for admissions based upon such testimony. First, rather than admitting the factual proposition, plaintiffs often admit that the particular individual testified to the relevant factual proposition. Second, plaintiffs at times will state that they lack sufficient information to respond to a request based on an adverse witness's testimony or declaration. The defendant contends that these tactics are inappropriate and that unless plaintiffs have evidence to discredit the sworn testimony on which the request for admission is based, the factual proposition should be admitted. The Court [*5] finds that under the circumstances, both approaches are acceptable.

Plaintiff's first responsive tactic, namely admitting that a witness testified to a particular fact rather than admitting the underlying fact, is best described as a giving a qualified response. [HN2] Qualification of responses is permissible under the rule where a request contains assertions which are only partially correct, but hair-splitting, disingenuous distinctions are inappropriate. *Thalheim v. Eberheim, 124 F.R.D. 34, 35*

(D. Conn. 1988) (citations omitted). The Court does not find plaintiffs' distinction between admitting an underlying fact and admitting that an adverse witness so testified either hair-splitting or disingenuous. The plaintiffs rest the distinction on the well established proposition that only the factfinder (here, the Court) can make conclusive, binding credibility determinations. They claim that defendant's attempt to compel their admissions is, in fact, an attempt to force plaintiffs to accept testimony, taken from interested third parties who are hostile to plaintiffs, as conclusive. Plaintiffs contend that this would undercut the discretion awarded the trial court to determine[*6] the weight and credibility of the evidence. See *Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855 (1982)*.

The Court agrees that to assume that the deposition testimony or declarations of hostile witnesses are conclusive would be to unfairly limit plaintiffs' case and the Court's ability to make credibility determinations at trial. [HN3] Great deference is given to the trial judge's credibility findings under Fed. R. Civ. P. 52(a), because "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said". *Anderson v. Bessemer City, 470 U.S. 564, 575 (1985)*. Moreover, a trial judge need not accept "even uncontradicted and unimpeached testimony if it is from an interested party or is inherently improbable." 9 Wright & Miller, Federal Practice and Procedure, § 2586 (1971).

A purpose of the Rule 36(a) is to narrow the scope of issues to be litigated and to thereby expedite the litigation process. See, e.g., *Rabil v. Swafford, 128 F.R.D. 1 (D.D.C. 1989); Equal Employment Opportunity Comm'n v. Baby Products Co., 89 F.R.D. 129, 130 (E.D. Mich. 1981)*.[*7] Although this is an extremely important function, especially in unwieldy cases such as this one, the Court shall not construe it to subsume the judicial function contained in Rule 52(a) to weigh and evaluate testimony.

The plaintiffs' second tactic in responding to the requests based on the testimony or declarations of adverse witnesses is to assert that they lack sufficient information to respond. [HN4] In order to use lack of knowledge as a reason for neither admitting or denying a request, a party must assert both that it has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to fashion a response. Fed. R. Civ. P. 36(a); *Thalheim v. Eberheim, 124 F.R.D. 34, 37 (D. Conn. 1988)*. The determination of what constitutes a "reasonable inquiry" is committed to the sound discretion of the trial court. Dubin at 474; Asea at 1245. One court defined the duty to make "reasonable inquiry" as including investigation of the respondent's officers, administrators, agents, and employees who may have information which may lead to a response. Relevant documents and regulations also must be reviewed. *Diederich v. Dep't of Army, 132 F.R.D. 614, 619 (S.D.N.Y. 1990)*.[*8]

Plaintiffs describe their method of responding to the requests for admissions as follows:

(a) If there existed documentary evidence to contradict the witness' testimony, plaintiffs denied the request and quoted, as well as cited, the relevant document; (b) If the documentary evidence supported the witness' testimony upon which a request was based, plaintiffs admitted such request; and (c) If after reviewing all of the documentation in their possession, plaintiffs found neither corroboration nor contradiction of a request based solely on a hostile witness' testimony, plaintiffs noted the testimony, but neither admitted nor denied the request.

Pl. Opp. at 2-3 (footnotes omitted).

Plaintiffs also stated on the cover page of their responses to all but the first six sets of requests for admissions that

In answering these admissions plaintiffs have reviewed all the information and documentation in their possession. In some instances plaintiffs were unable to fully admit or deny, but maintain that they made a reasonable inquiry before answering each admission.

Pl. Opp. at 3, n. 3; see also, e.g., Pl. Response to Def. Seventh Request for Admissions, filed April 10, 1992 at 1. [*9] Plaintiffs also indicate that while this passage was "inadvertently omitted" from the first six sets of requests, the same inquiry was undertaken in developing responses to those requests. Pl. Opp. at 3, n. 3.

The Court finds that the review of the documentary evidence in plaintiffs' possession was sufficient to constitute a reasonable inquiry. Therefore their claim that they had inadequate information to respond was proper. Although they are unable to contradict various factual assertions, the information they seek is in the hands of the defendant or adverse third parties. Moreover, some of the information relates to questions regarding the witness's state of mind which is not easily controverted. The plaintiffs have exhaustively reviewed the information under their control. This effort constitutes compliance with the rule.

The Court has found no cases involving the specific question of whether, once plaintiffs have had the opportunity to cross-examine adverse witnesses at depositions, they should be required to admit the witnesses' sworn testimony. The Diederich court held that reasonable inquiry does not extend to third parties absent sworn deposition testimony of the third [*10] party. *132 F.R.D. at 620* (emphasis added); *Dubin v. E.F. Hutton Group, Inc., 125 F.R.D. 372, 374-75 (S.D.N.Y. 1989)*. The case that comes closest to addressing the precise issue faced by this Court is *Dulansky v. Iowa-Illinois Gas & Electric Co., 92 F. Supp. 118 (S.D. Ia. 1950)*. There, the court declined to require a responding party to inquire of a hostile third party in order to answer a request for admission. To require the responding party to rely on the hostile witness would deprive it of the right to examine the witness in depositions and as an adverse witness at trial. Id. While in the instant case plaintiffs have had the benefit of cross-examination of many of these third parties at sworn depositions, they have not, similarly to the responding party in Dulansky, had the opportunity of examination at trial. The Court believes that the principle expressed in Dulansky and Diederich should be extended to cover the situation faced here, because it believes, for reasons previously stated, that plaintiffs are entitled to have the credibility of hostile witnesses assessed at trial.

Defendants also attack plaintiffs' [*11] objection to certain requests which address whether a grantee project has taught or promoted religion or had religious content on the ground that the admission calls for a legal conclusion. Defendant argues that this objection is specious because Rule 36(a) specifically authorizes the application of law to fact. Moreover, defendant argues, plaintiffs "rarely, if ever" objected in depositions to the question of whether a grantee project taught or promoted religion or had religious content. Therefore, defendant argues, plaintiffs waived the objection.

The Court is not persuaded that the plaintiffs waived their right to refuse to admit certain matters by the fact that they agreed to make objections to deposition questions. The two matters appear distinct. While plaintiffs may not have had a problem with certain witnesses expressing their opinions regarding the religious content of a program or institution at a deposition, this failure to object does not mean that plaintiffs should be forced to

admit that the witness's conclusion is correct, any more than plaintiffs should be forced to accept the witness's more factual assertions.

The defendants also have more formal, technical complaints[*12] about plaintiffs' responses. Defendant argues that plaintiffs repeatedly deny requests based on inadequate information, which is not a proper response under Rule 36. Technically, the rule contemplates lack of information as a possible reason for failure to admit or deny rather than a basis for denial. Fed. R. Civ. P. 36(a); *Thalheim v. Eberheim, 124 F.R.D. 34, 37 (D. Conn. 1988)*. Similarly, defendants complain that plaintiffs admit portions of a response without addressing the remainder of it, or that they fail to assert that a reasonable inquiry has been made.

Perhaps defendant is correct that plaintiffs' responses to the requests for admissions are, at times, technically deficient. Yet these defects are relatively minor and do not confuse the issues. The Court finds that the plaintiffs made a diligent, good faith effort to inform the defendant of what facts they could fairly admit and what facts they could not concede. Therefore, defendant was not mislead or prejudiced by any technical defects. Under other circumstances the Court might order plaintiffs to amend certain responses to be in more literal compliance with Rule 36(a). However, in this case, given [*13]the number of requests for admissions and the imminent trial date, requiring amendment of the responses would not serve the interests of justice. The defendant has been informed of plaintiffs' position on the issues raised. The Court has determined that the general approach taken by the plaintiffs in responding to the requests is permissible. Therefore, amendment would serve no useful purpose. The exercise would not significantly narrow the issues or increase defendant's understanding of the issues at stake. Rather, it would occupy time that could, in the Court's opinion, be more productively used for stipulation conferences and other pretrial preparation.

Neither will the Court grant defendant's request that matters be deemed admitted (with one exception, discussed below). [HN5] An order deeming matters admitted is a "severe sanction". *Asea, Inc. v. Southern Pacific Transportation Co., 669 F.2d 1242, 1247 (9th Cir. 1981)*. As stated above, in general plaintiffs' approach to responding to defendant's requests for admissions is acceptable. Although some responses have, technical deficiencies, the Court is satisfied that the plaintiffs used their best efforts to provide[*14] complete and forthcoming responses to the defendants' multitudinous requests for admissions. Under these circumstances, the Court declines, in its discretion, to penalize plaintiffs for some technical deviance from the literal requirements of the rule. See, e.g., *Asea, 669 F.2d at 1246* (noting that Rule 36(a), like discovery process in general, is "subject to an overriding limitation of good faith"). Allowing plaintiffs' responses to stand will not prejudice defendant's ability to prove his case, as he can offer the testimony relied upon in the requests for admission at trial. Moreover, this procedure will serve the interests of justice and promote a determination of the merits by allowing the Court an opportunity to weigh for itself the credibility of witnesses testifying to contested facts. Cf. Fed. R. Civ. P. 36(b); *Rabil v. Swafford, 128 F.R.D. 1, 2 (D.D.C. 1989)* (withdrawal of admissions permitted where the presentation of the merits will be served and the party who requested the admission will not be prejudiced).

The Court appreciates that the defendant has suffered legitimate difficulties in attempting to narrow the scope of this [*15] case. However, it believes that the remaining time left before trial would be better spent by the parties engaging in serious stipulation conferences to attempt to narrow the issues, rather than

burdening themselves and this Court with time-consuming motions on the intricacies and limits of the discovery rules. It is in the interest of both sides to use their best efforts to address these issues now so that they can use the limited time allotted them for trial most effectively.

Although the parties' briefs discuss these issues mostly in general terms, there is one specific instance in which the defendant has shown that the plaintiffs' response to a request for admission is inadequate. Question eighty-five of defendant's twenty-first set of requests for admissions reads:

85. Admit or deny that the OAPP site visit report prepared after a December 12, 1991 site visit to the Holeton AFT project characterized the sectarian personnel of the TIPP program as "professional people (who) know 'the boundaries' of their disciplines or areas of expertise.

Answer: Deny. This statement mischaracterizes the site visit report. The report did not characterize the sectarian personnel in these terms. [*16] Rather, the Report noted: "they claim that all of them are professional people who know the boundaries of their disciplines," and, "they asserted that as professionals, they know the boundaries."

In his reply, the defendant provides a copy of the relevant site visit report. It states that the sectarian personnel "are professional people and know 'the boundaries' of their disciplines or areas of expertise". Def. Reply, Att. A at 11, Quest. 10. The Court could not locate the passages cited by the plaintiffs and it appears that the request for admission accurately quotes the site visit report despite the plaintiffs' assertion to the contrary. Therefore, this particular request should be deemed admitted because the plaintiffs' answer is inaccurate.

III. Conclusion

For all of the reasons previously stated herein, the Court shall deny the defendant's Motion to Deem Defendant's Requests for Admissions Admitted, or, in the Alternative, to Compel More Complete Answers, except that the Court shall grant the Motion with respect to request number eighty-five of defendant's twenty-first set of requests for admissions, and shall deem said request admitted.

The Court shall issue [*17] an appropriate Order on this date consistent with this Memorandum Opinion.

May 15, 1992

CHARLES R. RICHEY,

UNITED STATES DISTRICT JUDGE

ORDER - MAY 15, 1992; Filed

In accordance with the Court's Memorandum Opinion in the above-captioned case, filed on this date, and for the reasons stated therein, it is, by the Court, this 15 day of May, 1992,

ORDERED that request number eighty-five of defendant's twenty-first set of requests for admissions shall be, and hereby is, deemed admitted, and it is

FURTHER ORDERED that in all other respects, defendant's Motion to Deem Defendant's Requests for Admissions Admitted, or, in the Alternative, to Compel More Complete Answers shall be, and hereby is, DENIED.

CHARLES R. RICHEY,

UNITED STATES DISTRICT JUDGE

ATTACHMENT C

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

In the Matter of	)	
ASPEN TECHNOLOGY, INC.,	)	Docket No. 9310
Respondent.	)	

ORDER DENYING 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 failed to show good cause for the extension sought. The motion is hereby DENIED.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I, Evelyn J. Boynton, hereby certify that I caused a copy of the attached Public 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:

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

By data disk and by hand delivery:

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:

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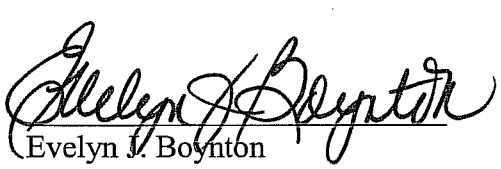

Evelyn J. Boynton
Merger Analyst
Federal Trade Commission

Dated: November 24, 2003