

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

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

**COMPLAINT COUNSEL’S RESPONSE TO RESPONDENT’S
MOTION FOR EXTENSION OF DISCOVERY DEADLINE TO ALLOW FOR
DISCOVERY OF A NEW THEORY OF COMPETITIVE HARM**

Complaint Counsel oppose Respondent’s Motion for Extension of Discovery Deadline to Allow for Discovery of a New Theory of Competitive Harm (“Motion for Extension”), but do not oppose an extension¹ of discovery for the limited purpose of obtaining documents from Heat Transfer Research, Inc. (“HTRI”) and deposition testimony from Fernando Aguirre, HTRI’s Vice President for Business Development. Complaint Counsel’s addition of HTRI and Mr. Aguirre addresses theories already pleaded in the Complaint and, contrary to Respondent’s assertion, does not introduce a new theory of competitive harm. Therefore, as contemplated by the Scheduling Order, Respondent is not prejudiced by the addition of Mr. Aguirre if granted “a reasonable amount of time to subpoena documents for and depose any witness added to the witness list pursuant to this paragraph, even if the discovery takes place during the hearing.”²

¹ In a telephone conversation, Respondent’s Counsel requested 30 days for additional discovery and although Complaint Counsel do not object to this amount, Respondent has asked for more than 30 days in Respondent’s motion.

² September 16, 2003, Scheduling Order, as modified on January 28, 2004 (“Scheduling Order”), additional provisions ¶ 9.

ARGUMENT

On February 3, 2004, [REDACTED], Chief Executive Officer of HTRI, telephoned Complaint Counsel for the first time to provide information regarding Respondent's acquisition.³ On February 9, 2004, HTRI agreed to provide a witness to testify to facts relevant to this case. On February 10, 2004, Complaint Counsel informed Respondent by telephone and letter that Complaint Counsel were adding a witness from HTRI and on February 19, 2004, Complaint Counsel designated a specific witness.⁴ Additionally, Complaint Counsel modified Mr. Aguirre's likely testimony, narrowing it significantly after discussion with Respondent's Counsel, to ensure that Mr. Aguirre's likely testimony would not implicate a new theory of anticompetitive harm.

HTRI, Hyprotech, Inc., and Aspen Technology, Inc. ("AspenTech") provided thermal design software and Hyprotech and HTRI were the two leading providers of thermal design software.⁵ HTRI currently interfaces its thermal design software with both AspenTech's Aspen Plus flowsheet software and Hyprotech's HYSYS flowsheet software. HTRI interfaced with AspenTech and Hyprotech software due to customer demand and the flowsheet vendors' allowing an interface between the flowsheet software and HTRI's thermal component. This arrangement stimulated the research and development of thermal design technology as well as other technologies, in turn improving the ability of flowsheet software to accurately model

³ [REDACTED - SUBJECT TO PROTECTIVE ORDER]

⁴ Complaint Counsel designated Mr. Aguirre on February 19, 2004. February 19, 2004, Letter From Peter Richman to Mark Nelson, attached hereto as Attachment B.

⁵ [REDACTED - SUBJECT TO PROTECTIVE ORDER]

thermal reactions.

The anticompetitive harm to which Mr. Aguirre will testify is not a novel theory, notwithstanding Respondent's insistence. Like any customer or third party software vendor who needs to interface an add-on application with AspenTech or Hyprotech continuous process engineering software, HTRI must be able to effectively link its thermal design software to Aspen Plus and HYSYS in order to serve its customers. As Mr. Aguirre will likely testify, competition between Hyprotech and AspenTech created incentives for each to allow access by third parties to each company's continuous process engineering software. With the acquisition of Hyprotech, the number of flowsheet software providers decreased from two strong competitors and one weak competitor, Simulation Sciences, Inc. ("SimSci"), to a strong AspenTech and a relatively smaller and weaker SimSci. Because it no longer faces competition from Hyprotech, AspenTech has both incentive and ability to limit access to its flowsheet simulation software. Thus, Complaint Counsel's concern, the innovation and development of the flowsheet software itself, remains as stated in the Complaint and is not a new theory of anticompetitive harm.⁶

CONCLUSION

Respondent has failed to show good cause to expand discovery beyond seeking documents from HTRI and deposition testimony from Mr. Aguirre as contemplated in the Scheduling Order. Complaint Counsel have introduced a new witness to support its original theory of competitive harm, not an entirely new theory of competitive harm. For this reason,

⁶ The theory that the acquisition eliminates or delays the development and enhancement of flowsheet software was first presented by Complaint Counsel in paragraph 29 (d) of the August 7, 2003, Complaint.

discovery should be extended only regarding HTRI and Mr. Aguirre, and Respondent's Motion for Leave and Extension should be denied to the extent that it requests additional relief.

Respectfully Submitted,

Vadim Brusser

Peter Richman
Lesli C. Esposito
Mary N. Lehner
Vadim Brusser

Counsel Supporting the Complaint

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

Dated: March 2, 2004

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ATTACHMENT A

REDACTED - SUBJECT TO PROTECTIVE ORDER

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ATTACHMENT B



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

Peter Richman

Direct: (202) 326-2563
Fax: (202) 326-3383

February 19, 2004

By e-mail

Mark Nelson
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1801

Re: In the Matter of Aspen Technology, Inc.
D. 9310

Dear Mark:

As we discussed this morning with you and David Gelfand, and in accordance with my February 10, 2004, letter notifying you of our intent to list a witness from HTRI, we have interviewed an individual from HTRI and can now designate the witness. Additionally, please note that we have clarified the witness' likely testimony. I also attach the statement from HTRI explaining their interest in the matter. Pursuant to the Scheduling Order entered September 16, 2003, as revised January 28, 2004, Complaint Counsel hereby revise their Revised Witness List:

Fernando Aguirre, Vice President Business Development, Heat Transfer Research, Inc. ("HTRI")

Mr. Aguirre will testify about HTRI, its thermal design research, and its software products. He will testify about HTRI's concerns regarding the transaction's effect on HTRI's continued ability to interface its thermal design software with AspenTech and Hyprotech process engineering simulation software and the subsequent effect on HTRI's ability to conduct thermal design research and software development.

As I stated in my February 10, letter, we want to provide as much time as possible for any discovery you choose to undertake. Given our discussions, we will not oppose a motion to

Letter to Mark Nelson, Esq.
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extend discovery until March 17, 2004, for the limited purpose of preparing for this witness. As we discussed, we do not believe any discovery broader than documents and deposition testimony from HTRI is necessary. Please let me know if you have any questions.

Sincerely,

/s/

Peter Richman

[REDACTED - SUBJECT TO PROTECTIVE ORDER]

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**ORDER DENYING RESPONDENT'S MOTION FOR
EXTENSION OF DISCOVERY DEADLINE TO ALLOW FOR
DISCOVERY OF A NEW THEORY OF COMPETITIVE HARM**

On February 25, 2004, Respondent filed a motion for leave and extension of time to allow for discovery related to heat transfer software. Respondent's motion for leave and extension is denied except for the limited purpose of obtaining documents from HTRI and deposition testimony from Mr. Aguirre. Respondent is granted an extension for this limited purpose until March 25, 2004.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I, Vadim M. Brusser, hereby certify that I caused a copy of the Public Version of the attached Complaint Counsel's Response to Respondent's Motion For Extension Of Discovery Deadline To Allow For Discovery Of A New Theory Of Competitive Harm 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 electronic mail and 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:

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



Vadim M. Brusser
Attorney
Federal Trade Commission

Dated: March 2, 2004