

ORIGINAL



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

In the Matter of

GEMTRONICS, INC.,
a corporation, and

WILLIAM H. ISELY,
individually and as the owner
of Gemtronics, Inc.

PUBLIC

DOCKET NO. 9330

EXPEDITED MOTION OF COMPLAINT COUNSEL
FOR REVISED SCHEDULING ORDER

Pursuant to the Federal Trade Commission's Rule of Practice 3.21(c)(2), Complaint Counsel hereby respectfully moves for an enlargement of time for the submission of Motions for Summary Decision up to and including March 16, 2009, and to modify the Scheduling Order by extending the remaining deadlines and hearing date by twenty (20) days. Respondents have told Complaint Counsel that they will not oppose Complaint Counsel's Motion. Recent developments in this matter, as set forth in detail below, have caused fact discovery to be pushed over two weeks beyond the original deadline for the conclusion of discovery of January 21, 2009, and have also caused the parties to not have access to vital information necessary to properly support their Motions for Summary Decision in a timely manner. Accordingly, Complaint Counsel moves the Court to extend the deadline for filing Motions for Summary Decision until March 16, 2009, and similarly extend the other deadlines by the same amount of time as set forth in the attached proposed Revised Scheduling Order.

I. This Court Has Discretion To Extend Scheduling Order Deadlines Upon A Showing of “Good Cause”

FTC Rule of Practice 3.21(c)(2) states that the “Administrative Law Judge may grant a motion to extend any deadline or time specified in [the] scheduling order only upon a showing of good cause.” 16 C.F.R. 3.21(c)(2). In determining whether to grant the motion for enlargement of time, the “Administrative Law Judge 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.” *Id.*

Good cause is demonstrated if a party seeking to extend a deadline demonstrates that a deadline cannot reasonably be met despite the diligence of the party seeking the extension. *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); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992); Fed. R. Civ. P. 16 Advisory Committee Notes (1983 amendment). Complaint Counsel presents its reasons for seeking this extension herewith:

1. Pursuant to the Court’s Order Granting Complaint Counsel’s Motion to Compel issued on January 28, 2009, Respondents produced their initial and only Answers to Interrogatories to Complaint Counsel on February 3, 2009, the evening before the deposition of Respondent Isely, and virtually two weeks after the close of fact discovery on January 21, 2009.
2. The deposition of Respondent Isely was taken the following day on February 4, 2009. However, as a result of a horseback riding accident suffered by the court reporter, the transcript of Respondent Isely’s deposition was not made available to Complaint Counsel by For The Record, Inc. until Friday, February 13, 2009 – now over three weeks after the

close of discovery.¹

3. The Court ruled on February 12, 2009, on Respondents' Motion to Amend the Scheduling Order, seeking, *inter alia*, to extend discovery.
4. While, to date, Complaint Counsel has complied with the dates set forth in the Scheduling Order, Complaint Counsel has been severely hampered and substantially disadvantaged in its efforts to move this case forward not only as a result of Respondents' continued postponements of discovery, but also by events out of the control of either party.
5. These events have produced the effect of delaying fact discovery and the progression of this matter by several weeks and, as a result, have caused Complaint Counsel to need that additional time in order to submit its Motion for Summary Decision, as well as to comply with the remainder of the Scheduling Order deadlines.
6. Respondents have confirmed to Complaint Counsel that they will not oppose Complaint Counsel's Motion. The parties also agree that the requested twenty-day extension will not materially alter the positions of the parties.
7. The proposed extension should not materially impact the overall time constraints in this matter.² The proposed Revised Scheduling Order contemplates a trial date of May 20, 2009.

Thus, Complaint Counsel has demonstrated good cause for, and respectfully requests, a

¹ Further, Respondents' Counsel informed Complaint Counsel today, February 16, 2009, that he had yet to received his copy of the deposition transcript.

² Rule 3.51 states that the Court's initial decision must ordinarily be filed no later than one year after the issuance of the administrative complaint. Here, the Court's decision would need to be rendered by September 18, 2009.

Modification of the Scheduling Order providing for a twenty-day extension of time for the filing of Motions for Summary Decision and to alter the remainder of Scheduling Order accordingly.

II. Proposed Modification to Scheduling Order

A proposed Revised Scheduling Order is attached which, beginning with Motions for Summary Decision, extends the areas of the pretrial process, leading to commencement of the trial on May 18, 2009, just twenty days after the date presently contemplated by the Scheduling Order. In preparing the proposed Revised Scheduling Order, Complaint Counsel mirrored the structure of the existing order.

III. Conclusion

For the foregoing reasons, Complaint Counsel believes that it has demonstrated good cause to amend the scheduling order and respectfully request the Court to GRANT the proposed Revised Scheduling Order.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'B. Bolton', is written over a horizontal line.

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COMPLAINT COUNSEL

Dated: February 16, 2009

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[Proposed] REVISED SCHEDULING ORDER

On February 16, 2009, Complaint Counsel filed an unopposed Expedited Motion for Revised Scheduling Order. The motion is GRANTED. The Revised Scheduling Order is as follows:

- March 16, 2009 - Deadline for filing motions for summary decision.
- March 16, 2009 - Complaint Counsel provides to Respondents' counsel its final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative or summary exhibits), and a brief summary of the testimony of each witness.
- Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists and a brief summary of the testimony of each witness.
- March 23, 2009 - Respondents' Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative or summary exhibits), and a brief summary of the testimony of each witness.
- Respondents' Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists and a brief summary of the testimony of each witness.
- March 25, 2009 - Parties that intend to offer confidential materials of an opposing

party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).

- March 30, 2009 - Deadline for filing responses to motions for summary decision.
- April 6, 2009 - Deadline for filing motions *in limine* and motions to strike.
- April 9, 2009 - Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
- April 15, 2009 - Deadline for filing responses to motions *in limine* and motions to strike.
- April 15, 2009 - Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
- April 20, 2009 - Complaint Counsel files pretrial brief, to include proposed findings of fact and conclusions of law. To the extent possible, findings of fact shall be supported by document citations and/or deposition citations. Conclusions of law shall be supported by legal authority.
- April 22, 2009 - Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists. Exchange objections to the designated testimony to be presented by deposition and counter designations.
- April 27, 2009 - Exchange proposed stipulations of law, facts, and authenticity.
- May 4, 2009 - Respondents' Counsel files pretrial brief, to include proposed findings of fact and conclusions of law. To the extent possible, findings of fact shall be supported by document citations and/or deposition citations. Conclusions of law shall be supported by legal authority.
- May 5, 2009 - File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be offered as agreed by the parties.
- May 15, 2009 - Final prehearing conference to begin at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity and any designated deposition testimony. Counsel

may present any objections to the final proposed witness lists and exhibits, including the designated testimony to be presented by deposition. Trial exhibits will be admitted or excluded to the extent practicable.

May 18, 2009 - Commencement of hearing to begin at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580. (The date of the commencement of the hearing and other deadlines listed above are contingent upon scheduling constraints in other dockets. Should the dates change, the parties will be notified as soon as practicable.)

The "Additional Provisions" set forth in the Scheduling Order entered on October 28, 2009, remain unchanged.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: February ____, 2009

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Public Document

STATEMENT OF COMPLAINT COUNSEL

Pursuant to Additional Provision No. 5 of the Court's Scheduling Order of October 28, 2008, I hereby represent, as counsel for the moving party, that I have conferred with Matthew Van Horn, Counsel for Respondents Gemtronics, Inc. and William H. Isely. Specifically, over a period of days, Complaint Counsel and Respondents' Counsel have conferred by telephone, facsimile transmission, and email. Our most recent contact was a telephone conversation on February 16, 2009, wherein Respondents represented to me that, while they would not participate in a joint motion, they would also not oppose an Expedited Motion For Revised Scheduling Order by Complaint Counsel. Accordingly, I have, in good faith, attempted to seek an agreement between the parties, but I have been unable to reach such an agreement.

Dated: February 16, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed and served the attached:

1. **EXPEDITED MOTION OF COMPLAINT COUNSEL FOR REVISED SCHEDULING ORDER**
2. **[Proposed] REVISED SCHEDULING ORDER**
3. **STATEMENT OF COMPLAINT COUNSEL**

The original and one (1) paper copy via overnight delivery and one (1) electronic copy via email to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room H-159
Washington, D.C. 20580
email: secretary@ftc.gov

One (1) email copy and two (2) paper copies served by overnight mail delivery to:

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., N.W. Room H-112
Washington, D.C. 20580
email: ojl@ftc.gov

One (1) electronic copy via email and one (1) paper copy via overnight delivery to:

Matthew I. Van Horn
16 W. Martin Street, Suite 700
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Dated: February 16, 2009



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