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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO COMPEL RESPONSES TO INTERROGATORIES

Respondent's colorful language in its Motion to Compel Responses to Interrogatories ("Motion to Compel") disguises the relevant issues. Far from "stonewalling" or engaging in "concealment" or "manifestly unfair" discovery tactics, Complaint Counsel have properly refused to answer two interrogatories that call for what is, by Respondent's own admission, classic attorney work product. The interrogatories also seek information protected by the informant's privilege and are overbroad. Complaint Counsel's failure to answer over a proper objection reflects no more than a sound application of settled principles of law.

The interrogatories' overbreadth is evident from Respondent's own characterization. Respondent claims that its first interrogatory seeks "a description of what was discussed with *third parties* who have communicated with Complaint Counsel." (Motion to Compel at 1, fn. 2 (emphasis added)). In fact, the interrogatory actually served is far broader, seeking "*each person* with whom you have communicated regarding this matter." (Motion to Compel at 3, (emphasis added)).

Even as narrowed at the last minute, the first interrogatory is improper. Respondent claims not to seek attorneys' "notes of interviews," but Complaint Counsel are unable to provide Respondent with anything more than what Respondent has already received without handing

over just that. Complaint Counsel have provided Respondent with all non-privileged responsive communications between Complaint Counsel and third parties. Anything more improperly invades both the work product and informant's privileges.

By its second interrogatory, Respondent seeks every piece of information that Complaint Counsel have ever discovered relating to Respondent's acquisition since the beginning of the Commission's investigation of the merger. This request is overbroad, improperly seeks work product, and is also, at best, premature.

Background

The centerpiece of Respondent's claim of "manifestly unfair" tactics is its assertion that Complaint Counsel "concealed the fact that it had . . . obtained a [witness] statement from [REDACTED]." (Motion to Compel at 3). In fact, Complaint Counsel responded to the Request For Production on November 14, 2003, the same day it received the statement at issue. Complaint Counsel never concealed from Respondent the witness statement from [REDACTED][1] and designated the statement to be produced to Respondent along with other documents similarly designated for supplemental production.[2] Complaint Counsel advised Respondent orally of this intended supplementation before learning of Respondent's accusation of "conceal[ment]," and confirmed this commitment in writing shortly after learning of the accusation, in order to be certain its position was clear.[3] And on December 11, 2003, Complaint Counsel supplemented its

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[1] On November 17, 2003, Complaint Counsel informed [REDACTED] that although the witness statement would be provided to Respondent through supplemental discovery, Complaint Counsel had no objection to [REDACTED] providing a copy of the statement to Respondent. *See* November 17, 2003 E-mail from Peter Richman to [REDACTED] attached hereto as Exhibit A.

[2] Respondent confuses lack of pre-acquisition competition with a defense to post-acquisition effects. For example, the [REDACTED] clarifying statement provided to Complaint Counsel states unambiguously [
REDACTED - SUBJECT TO PROTECTIVE ORDER
]. [REDACTED] produced by [REDACTED] is a polymer, the simulation of which is not an overlap alleged in the Complaint.

[3] See December 2, 2003, Letter From Mary Lehner to Mark Nelson, attached hereto as exhibit B.

document production.[4] By the initial and supplemental productions, as well as other papers served in this matter, Respondent has received and will continue to receive all non-privileged responsive communications between Complaint Counsel and third parties.

I. *Respondent's First Interrogatory Seeks Privileged Information And Is Too Broad.*

We start with the information Respondent claims in its brief to be seeking – descriptions of third party witness interviews.[5] Of course, if the interview has matured into a witness statement, the statement has been provided. If the interview had matured by October 9, 2003,[6] into an intent by Complaint Counsel to call the party as a witness, then the party has been named and the anticipated testimony described in Complaint Counsel's preliminary witness list. So all that is being denied is a description of interviews held with third parties who did not give statements and whose name has not yet been listed on Complaint Counsel's witness list. It is impossible for Complaint Counsel to produce a "description" of these interviews without providing what Respondent acknowledges would be work product – the notes of its attorneys. To "describe" them, someone would have to write down what was said, that person would be a lawyer (or investigator or paralegal working under lawyer supervision), and Respondent would end up with the very materials Respondent admits it is not entitled to. The description of third party interviews is the exact type of information protected by the work product doctrine.

At least two United States District Courts interpreting analogous rule 33 of the Federal Rules of Civil Procedure have explicitly rejected the position advocated by Respondent here. In

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[4] See December 11, 2003, Letter From Lesli Esposito to Mark Nelson, attached hereto as exhibit C.

[5] Respondent claims that it seeks "only a description of what was discussed with third-parties who have communicated with Complaint Counsel." (Motion to Compel at 1, fn 2)

[6] The date Complaint Counsel's preliminary witness list was due. *See* Scheduling Order dated September 16, 2003.

Massachusetts v. First Nat. Supermarkets, Inc., the court held that interrogatories asking for the names and addresses of all persons interviewed by an adverse party's attorney are protected by the work product doctrine. 112 F.R.D. 149, 153 (D. Mass. 1986). Even more directly on point is *United States v. Urban Health Network, Inc.*, which rejected a motion to compel interrogatories asking for the names and dates of persons interviewed by the government during its investigation. No. 91-5976, 1993 U.S. Dist. Lexis, at *12 (E.D. Pa. July 19, 1993) (exhibit G). Respondent's interrogatory seeks identical information and is improper for the same reason.

Interrogatory number one also requires Complaint Counsel to divulge information that is protected by the informant's privilege. The parties appear to be in agreement about the law, with the dispute stemming only from Respondent's misapprehension as to alleged "concealment." (Motion to Compel at 3). Complaint Counsel agree that providing Respondent with an informant's identity waives Complaint Counsel's subsequent ability to invoke informant's privilege and Complaint Counsel further agree that they are required to provide Respondent with written statements produced by trial witnesses.[7] (*See* Motion to Compel at 4 for Respondent's apparent statement of this exact position).

The material issue here, however, is that interrogatory number one requires disclosure of names and notes of discussions with informants whose identity is concealed from Respondent, as well as those informants who will not testify on Complaint Counsel's behalf at trial. *See*

[7] The very authority cited by Respondent demonstrates that Complaint Counsel have complied fully with the Commission's policies reflecting Jencks Act principles. The Jencks Act itself does not apply to Commission investigations, but the Commission has adopted its principles "as a matter of policy." *See In re USLIFE Credit Corp.*, 91 F.T.C. 984, 1037 (1978). Without providing a pinpoint citation, Respondent characterizes *USLIFE* as "ordering production of Jencks statements before the hearing." (Motion to Compel at 5). In *USLIFE*, the ALJ struck witness testimony because Complaint Counsel had failed to retain copies of notes of its interviews with 7 trial witnesses. *Id.* at 1039. The Commission reversed, however, noting that Commission policy required production of "certain prior statements by witnesses *after they have testified*." *Id.* (emphasis added). The Commission also concluded that the attorney notes at issue could not be said "to constitute the witness' own words" because they had not been signed by the witness or recorded by stenographic means. *Id.* at 1039-41; *see also Star Office Supply Co.*, 77 F.T.C. 383, 450-54 (1970). Here, we are at the discovery stage, far from the time of actual testimony. All documents that reflect "the witness' own words" have been turned over, leaving nothing more than the attorney notes found by *USLIFE* not to implicate Jencks.

generally In re Harper & Row, Publishers, Inc., 1990 FTC LEXIS 213, *8-9 (1990) (Informant's privilege allows the government to withhold the identity of persons who either provide information about violations of law or who provide assistance that is necessary for the government to enforce the laws.) (exhibit H). In short, Respondent has been, or will be provided (through timely supplementation) the material as to which the parties agree a claim of informant's privilege does not apply.

Respondent's assertion that Complaint Counsel did not give Respondent a privilege schedule is incorrect. Complaint Counsel included a privilege schedule with its first document production listing every document that Complaint Counsel withheld from production on the basis of informant's privilege.[8] Complaint Counsel are not withholding any additional documents based on informant's privilege and will supplement the schedule if this changes.

Further, interrogatory number one is plainly too broad and would be over-burdensome for Complaint Counsel to answer. This interrogatory calls on Complaint Counsel to list *every single person* Complaint Counsel have ever spoken to on *any issue* connected to Respondent's acquisition. The interrogatory requires Complaint Counsel to indiscriminately provide a complete description of their entire investigation regardless of its relevance to the issues.

The purpose of interrogatories is to narrow the issues and determine what evidence will be required at trial. *In re TK-7 Corp.*, 1990 FTC LEXIS 20, *1-2 (1990) (exhibit I). Courts have deemed interrogatories asking an adversary to provide all persons interviewed by a party to be improper. *In re Flowers Indus., Inc.*, 1981 FTC LEXIS 110, *4 (1981) ("In antitrust cases a party is not generally permitted to discover the identity of every person interviewed by the other party.") (exhibit J); *Unita Oil Refining Co. v. Continental Oil Co.*, 226 F.Supp. 495, 505-06

[8] In regard to work product privilege, Respondent solicited an agreement with Complaint Counsel stating that both parties were not required to disclose on the privilege schedule internal documents withheld on the basis of work product. *See* October 21, [sic] 2004, Letter from Lesli Esposito to Tanya Dunne, hereto attached as exhibit D.

(D.C. Utah 1964) (holding that an interrogatory asking an adverse party to furnish the names of all persons that provided or were asked to provide statements encroached on the pattern of investigation and *was not a proper subject for discovery*) (emphasis added).

In re Flowers is instructive on this issue. There, an interrogatory required Complaint Counsel to "identify each and every person, not previously identified in response to these Interrogatories, who has or may have knowledge as to the facts and contentions set out in your Complaint and in your response to these Interrogatories." *In re Flowers*, 1981 FTC LEXIS 110, at *4. The Court refused to compel an answer to the interrogatory, finding that it went "too far" and was over-broad. *Id.* at *3-4. The Court quoted *United States v. Loew's, Inc.*, a case interpreting the analogous Rule 33 of the Federal Rules of Civil Procedure, which held that an interrogatory asking the names of every person connected to the case would:

> ...impose an impossible burden on the Government. It would require, for example, that the names of every person who worked upon the case in the anti-trust division, including the lawyers, stenographers, investigators, etc. would have to be furnished, because they all might have received some information about the evidence.

Id. at *4 (*quoting United States v. Loew's, Inc.*, 23 F.R.D. 178, 180 (S.D.N.Y. 1959)). Here, Respondent's interrogatory is more broad than in *In re Flowers* because it calls for every person that Complaint Counsel have ever communicated with about the acquisition. Such an interrogatory fails to narrow the relevant issues and does nothing to determine the relevant evidence for trial. Respondent does not cite any authority condoning such an expansive request. On the contrary, Respondent's authority directly supports Complaint Counsel's position that interrogatory number one is inappropriate. (Motion to Compel at 8, citing *In re Flowers*).

II. *Respondent's Contention Interrogatory Is Too Broad And Is Premature.*

Respondent's interrogatory number two is equally overbroad because it asks Complaint Counsel to detail every piece of evidence in Complaint Counsel's possession showing that the acquisition has some effect on competition. This interrogatory fails to satisfy the primary goal of discovery, which is to determine the key issues for trial. *In re TK-7 Corp.*, 1990 FTC LEXIS 20, *1-2. Instead, it asks Complaint Counsel to provide every piece of information that may relate to the acquisition's affect on competition, regardless of the document's relevance to the contested issues.

To be sure, there is plenty of material that would be responsive to this interrogatory. Some of the relevant documents, including those already provided to Respondent during investigational hearings, state that the acquisition would allow Respondent to [REDACTED - SUBJECT TO PROTECTIVE ORDER][9] and that the acquisition would [REDACTED].[10] But in light of the volume of responsive information, to provide a full and complete response would overwhelm Complaint Counsel. The very point of its ongoing trial preparation is to compile and present at trial all of the non-cumulative evidence that would be responsive. To do so before trial in an interrogatory response would be even more daunting in light of Complaint Counsel's duty to supplement, as depositions are proceeding daily.

Courts recognize that a party cannot be required to "write basically a portrait of their trial." *Roberts v. Heim*, 130 F.R.D. 424, 427 (N.D. Cal. 1989); *see generally Hickman v. Taylor*,

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[9] [REDACTED - SUBJECT TO PROTECTIVE ORDER], hereto attached as exhibit E.

[10] [REDACTED - SUBJECT TO PROTECTIVE ORDER], hereto attached as exhibit F.

329 U.S. 495, 508 (1947) (holding that an attorney can prepare a litigation strategy without intrusion from adversaries). Although Rule 3.35 (b)(2) authorizes an interrogatory to ask for the facts supporting a specific contention, an interrogatory asking for all facts supporting the entire claim is impermissible. *Id.* at 427 (distinguishing between proper and improper use of contention interrogatories); *see also Mort v. A/S D/S Svendborg*, 41 F.R.D. 225, 226 (E.D. Pa. 1966) (sustaining an objection to an interrogatory that called for all "information the defendant possessed relating to the accident").

Respondent's reliance on *Sargent-Welch Scientific Co. v. Ventron Corp.* and *In re Flowers*, is misplaced. 59 F.R.D. 500 (N.D. Ill. 1973); 1981 FTC LEXIS 110 (1981). In both of those cases, the parties propounded multiple interrogatories that inquired about specific allegations within their adversary's complaint.[11] Here, Respondent has issued one general contention interrogatory that seeks the detailed factual basis for Complaint Counsel's entire case-in-chief. Respondent's use of *Convergent Business Systems, Inc. v. Diamond Reporting, Inc.* is also unavailing because there the party filed 29 specific contention interrogatories that sought facts supporting *particular allegations* in the complaint. No. 88-2329, 1989 U.S. Dist. Westlaw 92038, *1 (E.D.N.Y. Aug. 3, 1989) (emphasis added). As Respondent's authority states, contention interrogatories serve as a "road map of where the case is headed." *In re Flowers*, 1981 FTC LEXIS 110, at *2. Respondent's all-encompassing interrogatory, however, seeks more than a road map; it requires a detailed blueprint of Complaint Counsel's case.

Even if interrogatory number two is a permissible contention interrogatory, Respondent's

[11] For example, in *Sargent-Welch*, one of the interrogatories sought the factual basis for Plaintiff's allegation that Defendant had maintained market power; another inquired into the factual basis of exclusive dealing practices. 59 F.R.D. at 503, fn. 1. In *In re Flowers*, Respondent moved to compel answers to 21 interrogatories that sought a factual basis for specific contentions. 1981 FTC LEXIS 110, at *1-2.

use of it is premature. The Commission Rules of Practice provide "the Administrative Law Judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time." Rule 3.35(b)(2). The Advisory Notes accompanying the identically worded rule 33(c) of the Federal Rules of Civil Procedure recognize that contention interrogatories are often "best resolved after much or all of the other discovery has been completed." Fed. R. Civ. P. 33(c) (found in subdivision (b) of advisory committee note to 1970 amendment).

Federal courts interpreting analogous rule 33(c) of the Federal Rules of Civil Procedure have concluded that contention interrogatories are more appropriate at the end of the discovery period. *See McCarthy v. Paine Webber Group, Inc.*, 168 F.R.D. 448, 450 (D. Conn. 1996) (denying motion to compel responses to interrogatories because substantial discovery remained to be completed); *Nestle Food Corp. v. Aetna Casualty and Surety Co.*, 135 F.R.D. 101 (D.N.J. 1990) (contention interrogatories are more appropriate after a substantial amount of discovery has been conducted). Respondent filed its contention interrogatory barely one month into the discovery period and before many of the documents had been read or any depositions taken.

The party filing contention interrogatories before discovery is complete has the burden of showing why early answers are required. *Fischer & Porter Co. v. Tolson*, 143 F.R.D. 93, 96 (E.D. Pa. 1992). To meet this burden, the party must show that answers to its "well-tailored questions" clarify issues in the case or narrow the scope of its dispute. *Id.* at 96 (*quoting In re Convergent Technologies Securities Litigation*, 108 F.R.D. 328, 340 (N.D. Cal. 1985)). Respondent's interrogatory is not well-tailored and fails to clarify the issues or narrow the scope of the dispute because it asks for every piece of information within Complaint Counsel's possession.

Conclusion

For the foregoing reasons, Respondent's Motion to Compel should be denied.

Respectfully Submitted,

/s/

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Peter Richman
John S. Martin
Lesli C. Esposito
Mary N. Lehner

Counsel Supporting the Complaint

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

Dated: December 12, 2003

Attachments

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
MOTION TO COMPEL RESPONSES TO INTERROGATORIES

ATTACHMENT A - WITHHELD SUBJECT TO PROTECTIVE ORDER

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
MOTION TO COMPEL RESPONSES TO INTERROGATORIES

ATTACHMENT B

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
MOTION TO COMPEL RESPONSES TO INTERROGATORIES

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.	)	

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
MOTION TO COMPEL RESPONSES TO INTERROGATORIES

ATTACHMENT D

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
MOTION TO COMPEL RESPONSES TO INTERROGATORIES

ATTACHMENT E - WITHHELD SUBJECT TO PROTECTIVE ORDER

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
MOTION TO COMPEL RESPONSES TO INTERROGATORIES

ATTACHMENT F - WITHHELD SUBJECT TO PROTECTIVE ORDER

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
MOTION TO COMPEL RESPONSES TO INTERROGATORIES

ATTACHMENT G

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
MOTION TO COMPEL RESPONSES TO INTERROGATORIES

ATTACHMENT H

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
MOTION TO COMPEL RESPONSES TO INTERROGATORIES

ATTACHMENT I

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
MOTION TO COMPEL RESPONSES TO INTERROGATORIES

ATTACHMENT J

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
MOTION TO COMPEL RESPONSES TO INTERROGATORIES

On December 1, 2003, Respondent Aspen Technology, Inc. ("AspenTech") filed its Motion to Compel Responses by Complaint Counsel in Response to AspenTech's First Set of Interrogatories. Complaint Counsel filed its response and opposition on December 11, 2003.

Complaint Counsel's Objections and Responses to Respondent Aspen Technology Inc.'s First Set of Interrogatories meets the requirements of Commission Rule 3.35. Accordingly, the Motion is **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 Response to Respondent's Motion to Compel Responses to Interrogatories 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 by hand delivery:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-159
Washington, DC 20580

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/s/

_____

Evelyn J. Boynton
Merger Analyst
Federal Trade Commission

Dated: December 12, 2003