FEDERAL TRADE COMMISSION
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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

PUBLIC VERSION

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

RESPONDENT MSC.SOFTWARE CORPORATION'S REQUEST FOR LEAVE TO FILE SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL (ADDRESSING COMPLAINT COUNSEL'S EXPERT REPORT SUPPLEMENT)

After the filing of MSC's Motion to Compel, Complaint Counsel filed a Supplemental Memorandum in Opposition based upon and attaching its expert report from Dr. John Hilke, in an attempt to moot MSC's Motion to Compel. Complaint Counsel's expert report does nothing of the sort and, indeed, provides additional justification for MSC's Motion to Compel.

The introduction of this entirely new material and its failure to remedy the inadequacies that still exist in Complaint Counsel's interrogatory responses must be squarely addressed by MSC. In order to properly speak to both the new report, as well as the arguments raised in the Supplemental Memo, MSC Software respectfully requests leave to file this Supplemental Memorandum in Support of its Motion to Compel.

As an additional matter, in its Opposition Brief on this issue, Complaint Counsel miscites clear and unambiguous case law in an effort to justify its actions. Purporting to rely upon an opinion of ALJ Timony, Complaint Counsel turns that case on its head and claims its outcome was opposite from his actual holding. MSC also clarifies that significant misrepresentation in its attached memorandum.

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Dated: February 25, 2002

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As it did with its "revised" interrogatory responses, Complaint Counsel again attempts to moot MSC's motion to compel – this time because of Complaint Counsel's so-called "expert" report. Again, Complaint Counsel is wrong. Dr. Hilke's expert report not only fails to resolve the issues raised in MSC's motion to compel, it further reinforces and supports MSC's motion. Dr. Hilke's expert report manifestly confirms that Complaint Counsel has been playing games – and is still doing so.

Complaint Counsel also takes significant liberties with clear and unambiguous case law and FTC Rules in its efforts to convince Your Honor that its discovery positions are legitimate. While Complaint Counsel's level of protestation should raise additional red flags about the quantity and type of information being withheld, Complaint Counsel's mischaracterization of case law in an effort to justify its position is seriously troubling and must be addressed by MSC.

Both Complaint Counsel and its FTC-employee mouthpiece Dr. Hilke continue to fail to satisfy Complaint Counsel's discovery obligations by:

- refusing to identify the metes and bounds of the alleged market at issue;

- refusing to bind Complaint Counsel to any position by failing to acknowledge areas where Complaint Counsel has no evidence (instead using qualifying language to avoid narrowing the issues for trial);

- withholding and concealing relevant and responsive material deemed exculpatory by Complaint Counsel and instead making selected and tactical disclosures only when it suits Complaint Counsel's needs;

- refusing to identify many individuals with whom the FTC communicated during its eighteen-month, pre-filing investigation of MSC;

- refusing to provide a privilege log or otherwise justify its blanket – and in Complaint Counsel's view, unreviewable by anyone including Your Honor – privilege assertions;

- refusing to allow MSC personnel to rebut the statements made in Complaint Counsel's interrogatory responses by improperly marking them "Restricted Confidential" for attorneys eyes only.

All of these issues remain ripe for resolution and should be resolved by the entry of an order compelling Complaint Counsel to provide complete and meaningful responses to MSC's interrogatories and document requests.

I. COMPLAINT COUNSEL'S EXPERT REPORT REINFORCES MSC'S RIGHT TO GET ANSWERS TO ITS INTERROGATORIES AND THE DOCUMENTS IT HAS REQUESTED.

Complaint Counsel's expert report does not eliminate the need for this almost-month-old motion[1] – indeed, Dr. Hilke's report reinforces MSC's position that Complaint Counsel's responses were – and remain – inadequate. While Complaint Counsel has repeatedly refused to provide specific information to MSC in its interrogatory responses over the past two months, Dr. Hilke's report makes clear that Complaint Counsel had (or could have) identified the specific information it was relying on for the allegations in the Complaint long ago and simply decided to withhold that information.

[1] Indeed, MSC held off filing this motion from January 7, 2002 until January 25, 2002 because of Complaint Counsel's promise of a supplement to remedy the same deficiencies still at issue in this motion. Complaint Counsel's "promise" was nothing more than another tactical delay.

Significantly, Dr. Hilke's report – following Complaint Counsel's lead continues to refuse to identify the metes and bounds of the alleged market at issue.

A. For Any Information Contained in Dr. Hilke's Report, Complaint Counsel Was Sandbagging MSC In Its Interrogatory Responses.

Dr. Hilke's report confirms – for the limited issues addressed by Hilke – that Complaint Counsel has had readily accessible information in its possession that was called for and should have been provided in Complaint Counsel's interrogatory responses due on December 12, 2001.

In both its original and "revised" interrogatory responses, Complaint Counsel failed to identify specific information supporting the allegations in the Complaint, instead taking the position that Complaint Counsel "was not MSC's paralegal" and that it was no more equipped to provide that information than MSC was to divine it on its own.[2] Under Rule 3.35, a party is obligated to either provide a full written response or specifically identify the documents from where that information may be determined. (*See* Motion to Compel at 4-8.) As described previously by MSC, Complaint Counsel instead chose to do neither and simply said to MSC, "look in those boxes and figure it out for yourself." Now it appears that at the same time Complaint Counsel was refusing to identify specific documents in its interrogatory responses, Complaint Counsel was assembling and providing specific documents to Dr. Hilke for use in preparing his report.

Complaint Counsel's tactics have effectively stalled MSC's discovery efforts and prejudiced MSC's ability to formulate its defense. Moreover, Complaint Counsel's apparent unwillingness to

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[2] As discussed *infra*, Complaint Counsel takes this position at the same time that it refuses to allow MSC personnel to review its interrogatory responses. Accordingly, MSC continues to request that Your Honor order Complaint Counsel to remove that designation from their interrogatory responses or otherwise grant MSC personnel access to those responses.

provide any sort of detail in its sworn and binding interrogatory responses demonstrate its desire to avoid committing itself to any position or otherwise narrow the issues for trial – a tactic contrary to the rules of discovery and manifestly unfair to MSC, especially under the present schedule.

Accordingly, Complaint Counsel must be compelled to provide complete interrogatory responses once and for all.

B. Dr. Hilke's Report Makes Clear That Complaint Counsel Continues To Withhold Third-Party Information – And Make Tactical Disclosures Whenever It Sees Fit.

As Your Honor will recall – almost four months ago on October 24, 2001 – MSC by letter sought investigatory statements containing information provided to the FTC by third parties. The early identification and disclosure of those statements was an early focus of MSC for obvious reasons – MSC could then target its defensive discovery efforts to those Complaint Counsel treated as being in possession of information relating to the claims in its Complaint, as opposed to having to conduct a reverse fishing expedition to recreate that information. Only months after MSC's initial request did Complaint Counsel provide ***even some*** verbatim statements in January – but then only selected ones that it found useful to its case. For the next month, Complaint Counsel refused to either identify if any other statements existed or provide them to MSC.

At the same time that Complaint Counsel was refusing to provide other verbatim statements to MSC, it apparently was sharing those 'withheld' statements with its expert, Dr. Hilke. Indeed, Dr. Hilke relies on two such statements in his expert report – from witnesses whose statements the existence and substance of which were withheld from MSC by Complaint Counsel. Considering that the two witnesses at issue are from NASA – an agency the FTC claims to be a "victim" of anticompetitive effects – Complaint Counsel's tactical delay and later unveiling of these statements

is particularly troubling.[3] Yet even today, MSC has still not been provided with all of the statements relied upon by Dr. Hilke in Complaint Counsel's own expert report.

Further evidence that Complaint Counsel is withholding information is Dr. Hilke's citation to several documents as exhibits to an investigatory Bath Iron Works transcript – the first hint given to MSC that any such transcript even exists. When counsel for MSC attempted to figure out what these exhibits were, we were unable to do so – because Complaint Counsel has never turned over to MSC the very Bath Iron Works transcript that was not only provided to Dr. Hilke, but was used by Complaint Counsel to identify the exhibits in his report.

Tellingly, when MSC called Complaint Counsel to find out why MSC had not been provided with the Bath Iron Works transcript , Complaint Counsel – per its standard modus operandi – refused to answer. Mr. McCartney would only state: ***"I can neither confirm nor deny that [such a transcript exists]."***

Similarly, when MSC specifically asked Complaint Counsel how many investigatory transcripts or statements it was withholding, Mr. McCartney again took the position that Complaint Counsel can do whatever it pleases in support of its case without any privilege log or judicial review – stating that "***the number of statements is not relevant to our claim of privilege and will not be released***." (McCartney e-mail of 2/15/02 attached hereto as Exhibit A).

This is ***not*** the way a good faith party can behave in civil litigation, much less when that party is the government seeking to dismantle an American corporation. Complaint Counsel's hide-the-ball

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[3] Complaint Counsel also elected not to disclose either of those witnesses in its Initial Disclosures, its Preliminary Witness List, or in response to a specific MSC interrogatory.

tactics must be put to a stop and Complaint Counsel must be compelled to turn over all responsive materials at once.

C. Complaint Counsel And Dr. Hilke Continue To Avoid The Key Issue Of Market Definition.

With less than one month of discovery remaining on the current schedule, Complaint Counsel (and now its expert Dr. Hilke) has yet to define the contours of the market alleged months ago in its Complaint. A comparison of Dr. Hilke's report with Complaint Counsel's interrogatory responses confirms that, in fact, no further detail has actually been supplied.

[redacted]

Both Complaint Counsel's and Hilke's statements are vague, circular and non-responsive, saying only that "[redacted]" These so-called "definitions" do nothing to narrow discovery or the issues for trial.

It is essential that Complaint Counsel specify with particularity the nature of the market it has alleged in the complaint.[6] Under *R.R. Donnelley*, Complaint Counsel is obligated to explain what

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[4] Complaint Counsel's Response to MSC Interrogatories at 11.

[5] Expert Report of Dr. John Hilke ("Hilke Report") at 3.

[6] As made clear in Dr. Hilke's report, Complaint Counsel intends to define a price discrimination market, making the need for particularity in this regard key. *See* Hilke Report at 6 [redacted]

(continued...)

"features" and "functionalities" distinguish MSC.Nastran from other FEA solvers. In *R.R. Donnelley*, Complaint Counsel defined the market first as "high volume publication gravure printing, which is approximated by four-color gravure printing jobs with at least five million copies, at least sixteen pages, and fewer than four four-color versions (or the equivalent in one-color versions)," and then went on to define the "core" of this market as "gravure printing jobs with more than 32 pages, more than 10 million copies, and fewer than four versions." 120 F.T.C. 36, 156-57 (1995). Complaint Counsel must provide the same level of detail to test – rather than assume – whether the acquisitions truly gave MSC the ability to exercise market power.

In reality, Complaint Counsel has simply performed an end-run around the Scheduling Order. Complaint Counsel has elected not to submit a technical expert report – claiming it will not call its technical expert during its case-in-chief. Had it adhered to the deadline for Complaint Counsel expert disclosures under the Scheduling Order, Complaint Counsel's technical expert would have presumably shed light on what functionalities and features differentiate the products in the alleged markets, something Complaint Counsel is required to do.

This same vagueness and unwillingness to properly define the market required MSC to move to compel in the first place and continues to require an order compelling Complaint Counsel to meaningfully respond consistent with the precision required in *R.R. Donnelley*.

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[6] (...continued)

[redacted] As the Commission explained, Complaint Counsel "must be mindful of the analytical hazards of defining markets by reference to possible price discrimination." *R.R. Donnelley*, 120 F.T.C. at 159; *see also In re Midcon Corp.*, 112 F.T.C. 93, 168 (1989) ("In considering possible markets [under a price discrimination] theory, there is a danger of implicitly assuming the conclusion.").

II. COMPLAINT COUNSEL IS OBLIGATED TO RESPOND TO MSC'S CONTENTION INTERROGATORIES.

In trying to avoid its obligation to respond to MSC's narrowly-tailored contention interrogatories, Complaint Counsel ignores the controlling case law cited by MSC and selectively quotes from only two cases – both of which actually encourage contention interrogatories and support MSC's motion to compel. In *In re Convergent Techs. Secs. Litig.*, the court was faced with more than ***1,000*** interrogatories – as opposed to the 18 propounded by MSC. 108 F.R.D. 328, 335-36 (N.D. Cal. 1985). Similarly inapposite is *Fisher & Porter Co. v. Tolson*, 143 F.R.D. 93 (E.D. Pa. 1992), which says only that "some discovery" must take place prior to answering contention interrogatories, something Complaint Counsel disingenuously argues is not the case here. *Id.* at 95. But Complaint Counsel ignores the fact that it conducted extensive discovery – for over 18 months[7] – prior to receiving the contention interrogatories at issue here.

Complaint Counsel's own cases encourage the use of contention interrogatories. In *In re Convergent*, the court stated that, "the benefits that can flow from clarifying and narrowing the issues in litigation *early* in the pretrial period are potentially significant" and that "contention interrogatories might contribute meaningfully toward these objectives." 108 F.R.D. at 337. Significantly, in *Convergent*, the Court ***required*** the production of witness information and requested documents. *Id.* at 349. Similarly, the court in *Fischer & Porter* ruled that plaintiffs had to respond to defendants' interrogatories that sought "the basic facts relating to the plaintiffs' complaints," as well as

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[7] In reality, a review of the calendar shows that Complaint Counsel had ***twenty-two months*** before filing to obtain discovery. Add that to the three months of one-way discovery taken by Complaint Counsel as a result of its stonewalling, and Complaint Counsel has had more than ***25 months*** of discovery. Yet Complaint Counsel nevertheless attempts to convince this Court that it cannot answer simple interrogatories seeking identification of the facts underlying the allegations made in its own Complaint.

"interrogatories seeking the identity of witnesses and . . . documents or other tangible evidence." *Fischer & Porter*, 143 F.R.D. at 95-96.[8]

The unique circumstances here – where Complaint Counsel has had 22 months of compulsory investigatory power – make Complaint Counsel's recalcitrance all the more egregious and improper. Notably, in *Rusty Jones, Inc. v. Beatrice Co.*, the Court granted a motion to compel proper answers to interrogatories seeking the bases for allegations in the complaint where for "several months before filing the case, Rusty Jones had access to thousands of pages of Beatrice documents." No. 89 C 7381, 1990 WL 139145, at *2 (N.D. Ill. Sept. 14, 1990). This made as much sense there as it does here, since Complaint Counsel pursuant to Rule 11 "certainly investigated the case before filing their complaint in order to have some factual basis upon which to base its allegations." *Id.*

There is no just reason to allow Complaint Counsel to further delay its responses to MSC's contention interrogatories. Complaint Counsel must properly define the relevant market with specificity consistent with *R.R. Donnelley*. Moreover, Complaint Counsel must specify all evidence of post-merger anti-competitive effects upon which it intends to rely. (*See* Motion to Compel Supplement at 5 (***where Complaint Counsel "does not know the answer*** to any portion of the questions asked, ***it must so state under oath*** in response to the particular interrogatory." *Princeton Mgmt. Corp. v. Assimakopoulos*, 1992 WL 84552, at *1 (S.D.N.Y. Apr. 10, 1992)).

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[8] Contention interrogatories are particularly well suited to narrow the issues for discovery. *See, e.g., In re Aetna, Inc. Secs. Litig.*, No. Civ. A. MDL 1219, 1999 WL 354527, at *2 (E.D. Pa. May 26, 1999) ("contention interrogatories are a common discovery tool used to discover the facts underlying contentions set forth in pleadings"); *Smiley v. City of Philadelphia*, No. Civ. A. 95-0804, 1996 WL 75899, at *1 (E.D. Pa. Feb. 22, 1996) (contention interrogatories are "authorized by the Federal Rules of Civil Procedure and [are] one of several useful methods of defining, clarifying, and narrowing the issues in litigation").

III. COMPLAINT COUNSEL MAY NOT WITHHOLD EXCULPATORY EVIDENCE.

Simply put, justice and expedition require that Complaint Counsel disclose all relevant information in its possession – including exculpatory evidence – now.

In its attempt to selectively avoid providing MSC with information it deems helpful to MSC, Complaint Counsel cites numerous cases which hold that the *Brady* rule does not apply in the administrative proceeding context. (Complaint Counsel's Opposition Brief at 15). However, the alleged inapplicability of *Brady* is irrelevant Complaint Counsel is required to provide all information in its possession that is responsive to MSC's interrogatories and document requests. *See In re The Am. Med. Ass'n.*, No. 9064, 1976 FTC LEXIS 422, at *3-4 (F.T.C. Mar. 31, 1976) ("[r]espondent is entitled to discover relevant and non-privileged facts, or relevant probative evidence that may be used at trial, or information reasonably calculated to lead to discovery of admissible evidence"). Whether the information is exculpatory or not is immaterial to the point at hand.[9] Complaint Counsel's position is tantamount to a defendant deciding that it does not have to produce harmful documents that are responsive and relevant, simply because they are harmful to its position. This behavior is not acceptable for any party, plaintiff or defendant. But it is especially not appropriate conduct for the government.

As we have frequently observed, the Supreme Court has recognized that the Government "is the representative not of an ordinary party . . ., but of a sovereignty . . . whose interest . . . is not that it shall win cases, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also FTC v. Warner Comms.*, No. CV84-1506-R (C.D. Cal. Mar. 23, 1984) ("If . . . the FTC is

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[9] Complaint Counsel even acknowledges that MSC's interrogatory does not limit the information it is seeking to "exculpatory evidence." (*See* Complaint Counsel's Opposition Brief at 15) (stating that MSC's interrogatory was not framed "as part of an effort to obtain disclosure of 'exculpatory evidence').

a law enforcement agency . . . it then necessarily has a duty not just to win cases but also to see that justice is done."). As such, the government-as-litigant bears an added burden not imposed upon a private party. This is especially true in the antitrust context where, "[t]he Government acknowledges, indeed asserts, that the role and responsibility of the antitrust prosecutor is analogous to that of the criminal prosecutor." *United States v. American Tel. & Tel. Co.*, 461 F. Supp. 1314, 1332 (D.D.C. 1978).[10] Thus, whether or not the *Brady* rule has been held to apply, the underlying due process principles mandate that a *Brady*-like rule be utilized in administrative proceedings.

The court in *Silverman v. Commodity Futures Trading Comm'n.* held that "the due process clause does insure the fundamental fairness of the administrative hearing." 549 F.2d 28, 33 (7th Cir. 1977); *see also Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979). Consequently, "discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process." *Id.* at 1286. In this case, where the remedies sought by the Government are commensurate with corporate capital punishment (including the divestiture of MSC's flagship project), where Complaint Counsel has provided MSC with minimal discovery, and where the discovery period is drastically shortened, the continued refusal by Complaint Counsel to provide the information requested regarding the information it has obtained from relevant third parties is patently prejudicial to MSC and amounts to a denial of due process.[11]

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[10] *See also Judge Hogan in Transcript of May 8, 1997 Hearing in Federal Trade Commission v. Staples, Inc. and Office Depot, Inc.* at 23-24 (attached as Exhibit B) ("I do think the antitrust area . . . is a specialized area by the Government in the sense that .. the role and responsibility of the antitrust prosecutor is analogous to that of a criminal prosecutor . . . . The principle [of applying *Brady* in the civil context] has some appeal theoretically . . . .").

[11] While MSC believes that *Brady* applies to this situation, we are mindful of Commission decisions on this issue. We submit that, as a matter of law and logic, those decisions are wrong. Under any circumstances, the application of *Brady* is not determinative of whether MSC is entitled to receive

(continued...)

As a result, MSC is entitled to all investigatory interviews, all information and materials provided by third parties, and the names of witnesses interviewed during the government's investigation – and not only the selected tactical disclosures made to date by Complaint Counsel.[12] *See In re Amer. Home Prods. Corp.*, No. 8918, 1976 FTC LEXIS 69, at *3 (F.T.C. Nov. 11, 1976) (ordering the FTC to provide the identities of non-testifying experts "in order to facilitate respondent's discovery of defensive or ***exculpatory*** evidence"); *In re Bristol-Myers Co.*, No. 8917, 1976 FTC LEXIS 400, at *4 (F.T.C. Apr. 13, 1976) (Court "directed complaint counsel to furnish respondents a list of the persons contacted by complaint counsel for the purposes of this case and not designated by complaint counsel as their expert witnesses, partly in the hope that the requirement may enable respondents to obtain leads to potentially exculpatory material").

Nevertheless, Complaint Counsel steadfastly refuses to produce selected responsive and relevant evidence it already possesses, as well as the identities and statements of those interviewed during the pre-filing investigation, which will likely lead to the discovery of further relevant and – based upon Complaint Counsel's selective disclosure of information supporting its case – likely exculpatory evidence. Without this information, the burden on MSC is great. Given the time constraints imposed on MSC in this case, Complaint Counsel's refusal to disclose this responsive, relevant information is especially egregious. MSC will be forced to re-interview every customer and depose every potential player in the vague markets Complaint Counsel asserted in its complaint – an

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[11] (...continued)
the information sought in this section. However, if the Court should deny this part of MSC's Motion to Compel based on the apparent inapplicability of *Brady*, then MSC respectfully requests that this issue be certified to the full Commission for appeal.

[12] As discussed *infra* in the next section, Complaint Counsel cannot hide these materials through improper privileges assertions; much less can it do so without even providing a privilege log.

impossible task under the current timetable. Moreover, Complaint Counsel -- as evident from the Hilke report – continues to demonstrate its willingness to disclose select information piecemeal only when it suits its interests, despite clear outstanding discovery obligations to the contrary. As such, Complaint Counsel should be compelled to produce this information immediately.

IV. COMPLAINT COUNSEL HAS NOT PROPERLY ASSERTED ITS PRIVILEGES.

Complaint Counsel appears to believe that simply shouting "privileged" is enough to both render a variety of materials immune from discovery and satisfy Complaint Counsel's obligations with regard to the assertion of those privileges. Complaint Counsel is unequivocally wrong on this point. Furthermore, Complaint Counsel has taken the unsupportable position that it is not required to, and therefore will not, produce a privilege log – despite FTC Rule 3.38A directly to the contrary. Complaint Counsel's improper and selective assertions of its privileges and refusal to either explain or justify those privileges must be resolved.

A. Complaint Counsel is Obligated to Produce a Privilege Log.

Complaint Counsel takes significant liberties with established case law in its effort to avoid Rule 3.38A's requirement that it provide a detailed privilege log. Giving Complaint Counsel the benefit of the doubt that it was *not* attempting to mislead Your Honor, Complaint Counsel must *not have read* ALJ Timony's opinion in *R.J. Reynolds Tobacco* on which it relies for the claim that Complaint Counsel need only identify withheld documents "by general category" without "detailed specifications of each document." ALJ Timony made Complaint Counsel's obligation perfectly clear in *In re R.J. Reynolds Tobacco Co.*, No. 9285, 1998 FTC LEXIS 179 (F.T.C. Sept. 24, 1998): ***"Documents in Complaint Counsel's files are subject to Rule 3.38A"*** and ***"Complaint Counsel must comply with Rule 3.38A by providing information sufficient to identify each item."*** *Id.* at,

**1 & 3.[13] The treatment Complaint Counsel seeks is given to the *Federal Trade Commission* itself where the Commission is a third-party – not where Complaint Counsel is a party to an action.[14] When a party to an action, Complaint Counsel is obligated to comply with Rule 3.38A and provide a detailed privilege log for any items withheld.

There can be no longer be any legitimate debate that Complaint Counsel is obligated to produce a privilege log. That log must be detailed, specific, and consistent with ALJ Timony's *R.J. Reynolds* decision. It must include "a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." *Id.* at *2. Only after Complaint Counsel provides its required privilege log can Your Honor or MSC even begin to ascertain whether Complaint Counsel is properly relying on its privilege grounds or is simply withholding exculpatory information in violation of its discovery obligations.

Complaint Counsel's delay in providing a privilege log – based on a specious interpretation of case law directly to the contrary – has caused significant delay and can no longer be tolerated.

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[13] The other cases cited by Complaint Counsel were similarly distinguished by ALJ Timony in *R.J. Reynolds Tobacco*, as they pertain to the Commission as a third party and not to Complaint Counsel as a party. *Id.* at *1 n.1 (distinguishing *In re Flowers Indus., Inc.*, No. 9148, 1981 FTC LEXIS 117 (F.T.C. Sept. 11, 1981) (when a third party, Commission itself may produce limited privilege log); *In re Champion Spark Plug Co.*, No. 9141, 1980 FTC LEXIS 200 (F.T.C. Dec. 16, 1980) (same)).

Similarly, Complaint Counsel's reliance on *In re Chock Full O' Nuts Corp.*, 82 F.T.C. 747 (1973), is misplaced. *Chock Full O' Nuts* was decided before the existence of Rule 3.38A and has not been controlling for some time.

[14] Complaint Counsel attempts to confuse the issue, speaking of itself as "the Commission" in its brief. (*See* Complaint Counsel's Opposition Brief at 16). The obligations on the Commission are clearly different from those imposed on Complaint Counsel – as recognized by ALJ Timony in *In re R.J. Reynolds Tobacco Co.*, 1998 FTC LEXIS 179, at *1 n.1, saying "[o]ther offices of the Commission, being third parties to this litigation, and not parties, need not be specific in describing items withheld for privilege."

B. Complaint Counsel Has Failed to Meet Its Burden Regarding the Legitimacy of the Deliberative Process Privilege.

It is also undeniable that Complaint Counsel has the burden of establishing the legitimacy of its privilege assertions and that MSC does *not* have the contrary burden of proving that Complaint Counsel's documents are *not* privileged. *See, e.g., In re Lindsey*, 158 F.3d 1263, 1269 (D.C. Cir. 1998); *FTC v. Lukens Steel Co.*, 444 F. Supp. 803, 806 (D.D.C. 1977). Unless Complaint Counsel can specifically justify the application of the privilege(s) asserted, the documents should be ordered produced. Of course, governmental privileges like the deliberative process privilege are to be narrowly construed and raise additional procedural requirements that Complaint Counsel also ignores. *See Price v. County of San Diego,* 165 F.R.D. 614, 620 (S.D. Cal. 1996) (the deliberative process privilege "is to be narrowly applied"); *Army Times Publ'g Co. v. Department of the Air Force*, 998 F.2d 1067, 1069 (D.C. Cir. 1993) (same).

Complaint Counsel has failed to satisfy almost every element necessary in order to even invoke the governmental process privilege. The governmental deliberative process privilege may only be asserted by the head of a governmental agency or by a designated high-ranking subordinate. *See Resolution Trust Corp. v. Diamond*, 773 F. Supp. 597, 603-04, n.4 (S.D.N.Y. 1991) (collecting cases). Contrary to Complaint Counsel's approach, "***the governmental deliberative process privilege may not be asserted by government counsel.***" *Kaufman v. City of New York*, No. 98CIV 2648, 1999 WL 239698, at *4 (S.D.N.Y. Spr. 22, 1999) (citing *Pierson v. United States*, 428 F. Supp. 384, 395 (D. Del. 1977)). At the time the privilege is asserted, the head of the federal agency involved "must invoke the privilege through an affidavit which states, inter alia, that he or she has reviewed each of the relevant documents and provides the reason(s) why preserving confidentiality – rather than the agency's interest in the particular action – outweighs the public interest in

disclosure." *Id.* (citing *United States v. Board of Educ.*, 610 F. Supp. 695, 598 (N.D. Ill. 1985)). Complaint Counsel – who should certainly be aware of this requirement – has done nothing of the sort.

As an additional matter, despite Complaint Counsel's broad invocation of the privilege, the governmental deliberative process "privilege does not, however, as a general matter, cover '***purely factual material***.'" *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (citing *Hopkins v. United States Dep't of Housing & Urban Dev.*, 929 F.2d. 81, 85 (2d Cir. 1991); *EPA v. Mink*, 410 U.S. 73, 87-88 (1973) ("memoranda consisting only of compiled factual material or purely factual material contained in a deliberative memoranda and severable from its context would generally be available for discovery")); *see also International Bhd. of Elec. Workers v. NLRB*, 845 F2d 1177, 1180 (2d Cir. 1988) (purely factual material is not protected).[15]

Accordingly, any factual information within Complaint Counsel's possession is not subject to the deliberative process privilege and must be redacted or produced. *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000) (upholding lower court finding that documents that contain deliberative process privileged materials should be redacted rather than withheld in their entirety).

C. Complaint Counsel Has Similarly Failed to Demonstrate that the Informer's Privilege Applies.

The informer's privilege is not absolute. *In re Harper & Row Publishers, Inc.*, Nos. 9217-9223, 1990 FTC LEXIS 213, at *9 (F.T.C. June 27, 1990) ("The informer's privilege is not absolute, but is qualified by the need of the respondents for the information to prepare their defense."). The Court must balance the government's desire to keep an informant's identity confidential with a

[15] Complaint Counsel's straw man argument that MSC seeks FTC staff memos to the Commission is preposterous – MSC is not asking for FTC analysis or evaluations of third-party information or the acquisitions at issue. However, if the FTC is withholding factual information provided by third parties (regardless of where that information may be compiled), it should be produced through redaction of staff analysis if necessary.

defendant's need for such information in preparing a defense. *Roviaro v. United States*, 353 U.S. 53, 62 (1957) ("balancing the public interest in protecting the flow of information against the individual's right to prepare a defense"). The privilege must yield, when "the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. *Id.* at 60-61.

Before the government can invoke the informant privilege, it must meet two prerequisites. *In re Harper & Row*, 1990 FTC LEXIS, at *20. The failure of either of these requirements will prevent the privilege from attaching to the informant or his information. *Id.* First, the information sought to be protected must relate to an unlawful activity and, second, the information must be "of a nature reasonably likely to precipitate reprisals." *Id.*, at *20-21. The privilege does not apply when the report concerns ***lawful*** activities because "law enforcement goals are not furthered and the informer need not fear bodily harm if his identity is disclosed." *Alliance to End Repression v. Rockford*, 75 F.R.D. 441, 445 (N.D. Ill. 1977).[16]

In this case, MSC seeks the identity of individuals that Complaint Counsel has communicated with and who have provided ***exculpatory*** evidence. Thus, MSC seeks to learn who told the government that ***MSC has not*** engaged in unlawful activity. Therefore, Complaint Counsel cannot – and has not – met the first requirement for application of the informant's privilege. Despite its continuing efforts at such, Complaint Counsel cannot have it both ways. Complaint Counsel's position that it may withhold exculpatory evidence is based upon its view that this case is civil and not criminal – but the informant's privilege may only be invoked with regard to criminal activity. This

[16] The policy behind the informer's privilege is even less persuasive in an antitrust case. *See Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 771 (D.C. Cir. 1965). Customers threatened with anti-competitive harm have adequate economic incentive to report antitrust violations to the government and do not need anonymity as an added incentive to do so. *See id.*

obvious conflict between Complaint Counsel's positions demonstrates the lengths to which Complaint Counsel has gone to withhold relevant and responsive information and undermines its position on both issues.

Also, because these individuals have presumably told Complaint Counsel that they see no anti-competitive threat from MSC's acquisitions, the information is not likely to lead to reprisal or retaliation by MSC, thus defeating the second prerequisite. Indeed, Complaint Counsel ***has*** disclosed to MSC the names of dozens of customers and competitors who have provided information ***against*** MSC's position. Again, Complaint Counsel cannot have it both ways – either they have no belief in the retaliation prerequisite or they have waived the informer's privilege. Complaint Counsel, like any other litigant, may not use privileges as both a sword and a shield. *Columbia Pictures Tele., Inc. v. Krypton Broad.*, 259 F.3d 1186, 1196 (9th Cir. 2001) ("[t]he privilege which protects attorney-client communications may not be used both as a sword and a shield.") (quoting *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992)); *SEC v. Lavin*, 111 F.3d 921, 933 (D.C. Cir. 1997) (holding that privileges cannot be used as both a sword and a shield). As a result, invocation of the informant's privilege by Complaint Counsel is improper and unsupportable. Further, Complaint Counsel's refusal to produce "the names of . . . witnesses or the substance of their statements" gathered during the course of the investigation is an unconstitutional deprivation of due process. *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 256-57 (1987) (holding that Department of Labor's refusal to disclose to defendant in administrative proceeding the witnesses and statements gathered during pre-deprivation investigation failed to comport with minimum requirements of due process); *see also Pacific Molasses Co. v. FTC*, 356 F.2d 386 (5th Cir. 1966) (Due process violated by failure to abide by agreement to provide administrative defendant with relevant documents and the names of witnesses).

Moreover, even if the informant privilege could apply, it would be defeated by MSC's need for the requested information in order to prepare its defense. Complaint Counsel's allegations turn on a variety of facts which are unique to each customer. MSC needs to be able to explore these issues and take the necessary related discovery. And it needs to do so ***now***. MSC "should not have to survey the entire industry to find out who has specific information on these charges if that information is in the hands of the plaintiff." As held in *United States v. Aluminum Ltd.*, the informer's privilege does not apply to the identity of those "'known to have' the information . . . being sought," and the government in a civil antitrust suit must turn over such information. 268 F. Supp. 758, 762 (D.N.J. 1966). Complaint Counsel's invocation of the informant's privilege must be rejected and any information being withheld should be turned over.

D. Complaint Counsel Cannot Hide Factual Information Behind The Work Product Doctrine.

Similarly, the work product doctrine does not prevent Complaint Counsel from having to provide this information to MSC. The court in *In re Aetna Inc. Secs. Litig.*, ruled that the identities of the individuals interviewed by plaintiffs' counsel was not work product, or "at most, . . . ha[d] minimal work product content." *In re Aetna Inc. Secs. Litig.*, No. Civ. A. MDL 1219, 1999 WL 354527, at *1 (E.D. Pa. May 26, 1999). The court in *Aetna* relied in part upon the holding in *United States v. Amerada Hess Corp.*, 619 F.2d 980 (3d Cir. 1980), where the court enforced a subpoena seeking the identity of individuals that counsel interviewed. *Id.* at 987-88. The court held that, even if the list of interviewees had some minimal work product qualities, "[a]voidance of the time and effort involved in compiling a similar list from other sources" is sufficient to meet the burden required to override any work product protection. *Id.* at 988. Therefore, Complaint Counsel must provide MSC the list of names of people interviewed during their investigation and the reports containing

factual information provided by those interviewees. If those reports contain any work product, they can be redacted and should be logged.

V. COMPLAINT COUNSEL HAS IMPROPERLY MARKED ITS INTERROGATORY RESPONSES "RESTRICTED CONFIDENTIAL."

Complaint Counsel continues to improperly designate its Interrogatory Responses and Supplemental Responses as "Restricted Confidential" – thus preventing any MSC personnel from reviewing those responses. The purpose of the Protective Order is to prevent the disclosure of certain sensitive materials which – if seen by a competitor or customer – would result in potential competitive harm. The Protective Order limits the type of material that may be so designated and Complaint Counsel's responses fall well outside that boundary.

Here, Complaint Counsel's vague and general responses to MSC's interrogatories lack the kind of detail that would make them satisfactory or responsive, much less bring them under the umbrella of the Protective Order. Complaint Counsel's responses do not contain competitively sensitive information about any MSC customers or competitors. Even if Complaint Counsel believed something was so sensitive, it could provide a redacted copy of its responses. Yet Complaint Counsel has refused MSC's request for a redacted version, lazily stating that it is impossible to redact the sensitive information from its responses.

Complaint Counsel's reliance on *In re Toys 'R' Us*, No. 9278, 1998 FTC LEXIS 185 (F.T.C. Oct. 14, 1998), is misplaced. In *In re Toys 'R' Us*, the ALJ only excluded Toys 'R' Us employees from the hearing room while competitors and suppliers testified about certain sensitive facts that could be used in Toys 'R' Us's business efforts. *Id.* In so holding, the Court specifically distinguished that situation from the present one -- stating that disclosure is required where "it may be necessary for

consultation . . . in order to prepare for and assist in the defense of the action." *Id.* (citing *United States v. Lever Bros. Co.*, 193 F. Supp. 254, 258 (S.D.N.Y. 1961)).

Because Complaint Counsel has no legitimate basis for marking its interrogatory responses "Restricted Confidential," and MSC has a legitimate interest in reviewing these responses with its client so that it might prepare its defenses, Complaint Counsel should be ordered to remove that designation immediately.

VI. CONCLUSION.

For far too long, Complaint Counsel has refused to provide a wealth of documents and other relevant information that it is obligated to disclose.

First, Complaint Counsel has failed to reveal the existence of, let alone actually produce, key information (including transcripts and exhibits) provided by third parties – much of which was then provided to and relied upon by Dr. Hilke. This information is relevant and responsive, and must be produced.

Second, Complaint Counsel has still not provided MSC with an adequate definition of the relevant market or any evidence of anti-competitive effects. MSC is entitled to a complete response to these interrogatories and Complaint Counsel must be compelled to provide one.

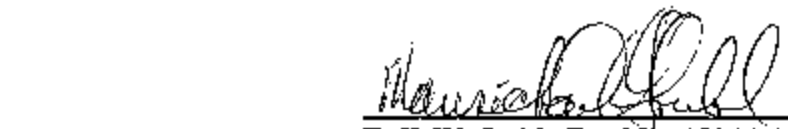
Third, it is well established that contention interrogatories are an appropriate tool to be used at the present time, in the present case. Complaint Counsel fails to provide any support for its position to the contrary, so it should be required to provide adequate responses.

Fourth, it is imperative that Complaint Counsel disclose exculpatory evidence (including the names of witnesses interviewed and the information provided during the government's investigation) so that MSC can properly prepare its defense. This obligation is well supported by the case law and Complaint Counsel should be ordered to comply.

Fifth, Complaint Counsel's "assertion" of the governmental deliberative process and informant privileges as well as its other privileges are woefully inadequate -- and those bases cannot be tested without the production of the required log by Complaint Counsel. Complaint Counsel must either be compelled to produce a detailed log and bring its inadequate privilege assertions up to par or Complaint Counsel's vague privilege objections should be determined to be waived and all such documents produced.

Sixth, in order for MSC personnel to be able to properly and promptly formulate its defense, it must be able to review Complaint Counsel's interrogatory responses along with its counsel. Complaint Counsel has provided no support for its claim that such materials are confidential in any way, and such restrictions on these documents must be lifted.

Respectfully submitted,



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Counsel for Respondents,
MSC.Software Corporation

Dated: February 25, 2002

CERTIFICATE OF SERVICE

This is to certify that on February 25, 2002, I caused a copy of the attached Request for Leave to File Second Supplemental Memorandum in Support of its Motion to Compel (Addressing Complaint Counsel's Expert Report Supplement) and Public Version of Respondent MSC.Software Corporation's Second Supplemental Memorandum in Support of its Motion to Compel (Addressing Complaint Counsel's Expert Report Supplement) to be served upon the following persons by hand:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Richard B. Dagen, Esquire
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
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Federal Trade Commission
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Counsel for Respondents,
MSC.Software Corporation

Tefft Smith
02/15/2002 11:35 AM

To: pmccartney@ftc.gov, kmills@ftc.gov
cc:

Subject: Re: Norton Transcript

Can I PLEASE have an answer.

---------- Forwarded by Tefft Smith/Washington DC/Kirkland-Ellis on 02/15/2002 11:36 AM ----------

Tefft Smith
02/15/2002 10:08 AM

To: Tefft Smith/Washington DC/Kirkland-Ellis@K&E
cc: pmccartney@ftc.gov, d.harcketts@ftc.gov, kmills@ftc.gov

Subject: Re: Norton Transcript

Abbott

I have still not received a response to this email.

Nor have I received a response to my question -- which you said you were taking under advisement -- as to how many statements were being withheld on supposed "privilege" grounds.

Can I PLEASE get responses.

Tefft
Tefft Smith

Tefft Smith
02/14/2002 11:17 AM

To: pmccartney@ftc.gov
cc: d.harcketts@ftc.gov, kmills@ftc.gov

Subject: Norton Transcript

Abbott

Your 2/7 letter promised us the Norton and Dischinger transcripts "shortly."

We did not get even a release on getting the Dischinger transcript until yesterday and we still do not have the transcript.

Today is 2/14 and we still don NOT have even a release on the Norton transcript. Dennis Harcketts just said he would have to "check with Abbott."

What is the delay/excuse?

Respectfully

Tefft

"P McCartney" <pmccartney@ftc.gov> on 02/15/2002 02:30:33 PM

To: Tefft Smith/Washington DC/Kirkland-Ellis@K&E
cc:

Subject: Your request to identify number of statements

The number of statements is not relevant to our claim of privilege and will not be released.

B

11:01

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,	Docket No. CA 97-0701
Plaintiff,	Washington, D.C.
	May 8, 1997
v.	10:00 a.m.
STAPLES, INC.,	
and	
OFFICE DEPOT, INC. 2200 Old Germantown Road Delray Beach, FL 33445	
Defendants.	

TRANSCRIPT OF STATUS CALL
BEFORE THE HONORABLE THOMAS F. HOGAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
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200 East Randolph Drive
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Court Reporter: PATRICIA J. YERKES
Official Court Reporter
Room 6814, U.S. Courthouse
Third and Constitution, N.W.
Washington, D.C. 20001

(Computer-Aided Transcription From Stenotype Notes.)

PROCEEDINGS

THE DEPUTY CLERK: Civil Action 97-701, Federal Trade Commission v. Staples, Inc., et al. For Federal Trade Commission, Melvin Orlans, David Shonka. For Defendants, Donald Kempf, Christopher Curran, Mark Gidley and Mark Kovner.

11:01

THE COURT: Good morning, counsel. Thank you for coming back in with your busy schedules. We had set up today to talk about this Brady request issue and any other matters that have come up. I have been served some other recent pleadings and responses on that issue, as well as a subpoena deposition notice issue for Third Party that FTC wanted to take. I don't know if you have gotten that this morning.

11:01

MR. ORLANS: The Motion to Quash, we did, Your Honor, and I am prepared to address that.

11:02

THE COURT: Are the parties here in that other matter? What firm are they from?

MR. KEMPF: I think it is Latham, Watkins.

THE COURT: Latham, Watkins. Let me just for the record get that pleading out and make a proper reference to it.

11:02

All right. It was a Motion of Non-Party Avery Dennison Corporation to Quash Plaintiff's Deposition Subpoena. And I can discuss that with FTC, and Defendants. If you have any response, I can hear from them; and then I

11:02

can get Latham, if I need to hear from them, down here.

MR. ORLANS: Can we take up that, first?

THE COURT: Yes. Let's get rid of that.

MR. ORLANS: Fine. This involves a Third Party wh provided a declaration to the Defendants, Your Honor.

On May 2nd we served a deposition subpoena and noticed the deposition for May 7th. We then had communications with Avery, and they informed us that the declarant was out of the country and would not be available when she came back, because she had some important business meetings. And in an effort to accommodate, we said that we would be happy to take that on the 14th; and we reached an accommodation in regard to doing that.

We then called the Defendants, indicating the circumstances that we felt warranted taking the deposition beyond the discovery cutoff, particularly since it was their declarant, and we had noticed it in time. And they indicate they were unwilling to accommodate in that fashion, and therefore, forced this motion.

My view is that either that the deposition should be done beyond the discovery cutoff -- this is, after all, a position taken by Defendants who on that same day changed experts. But beyond that, frankly Your Honor, I just as soo not take the deposition and have the deposition stricken, which strikes me to be an unequally reasonable remedy.

11:02 MR. KEMPF: Your Honor, Mr. Kovner from our side will address this.

THE COURT: All right. Thank you.

MR. KOVNER: Your Honor, we are under very tight 11:02 deadlines here. The Defendants have been constrained by the May 9th fact discovery cutoff, and we have endeavored to mak sure we get all of our depositions done by that date. We think the FTC should be held to the same standard.

We are talking here about a declarant, not a live 11:02 witness. And quite frankly, FTC has sat on this issue for some time now. Ms. Streeter, Avery Dennison gave the deposition Mr. Orlans referred to on February 21st. And my understanding from their counsel was, she then provided that declaration immediately to the FTC, so they have had this 11:02 declaration since the end of February.

On April 17th we again disclosed this declaration to the FTC; they again did nothing. They could have noticed this deposition at any time since February. We should not b penalized by their delay.

11:02 THE COURT: We are talking about this case, not talking about administrative -- this was not filed in February.

MR. KOVNER: That's true, Your Honor. They could have taken a deposition during the investigative phase. The 11:02 could also have taken a deposition during this phase of

litigation any time after April 17th. They instead waited until the evening of May 2nd, which is last Friday to send a fax out noticing her deposition; and like many busy executives, she is out of the country. Now they want to penalize us because they were unable to schedule this deposition in time. And quite frankly, Your Honor, that is simply unfair.

My understanding from the papers filed by the Latham, Watkins firm is that the FTC and Avery Dennison have been in constant contact over the last few months and yet never told Avery Dennison that they wanted to take her deposition.

THE COURT: What I will do is this: I will have this telephone status conference set up with Latham a little later on today, and you all just say where you will be and I will reach you by phone, and I will discuss it with the party directly to see about her availability or not.

All right. Let's take up the matter of Defendants' motion that was filed two days ago producing documents relating to the persons of the FTC that are identified, or we will identify as declarants or live witness, which is factual or exculpatory information helpful to the preparation of Defendants' case. And they reference certain documents and interrogatory requests. They have been served. Shorthand comment is, we are really talking about Brady material and

other privilege issues that the Defendants have not submitted with requisite specificity.

The Plaintiffs have filed a response consisting of -- today, consisting of contingent cross -- or yesterday -- Contingent Cross Motion to Compel Responses by Defendants to the motion that I just referred to of Defendants, and a Memorandum in Opposition to the Motion to Compel in support of their cross motion. A reply was received this morning from the Defendants; so let's put those in context and take a look at those.

MR. KOVNER: Thank you, Your Honor. The FTC's role in this case, as they will concede, is to do justice. And we think refusing to turn over all of the factual material that they have gathered during the six-month investigation is not doing justice in this case.

THE COURT: Is there privileges that they have that they can rely upon? Or do you think that in the context of this argument there is no privileges that can come into play?

MR. KOVNER: There are privileges they can rely on. However, if there is factual material that they have gathered during the course of their investigation that would be helpful to the Defendants' case, and they know what that kind of information is. Material that would talk about the broad array of competition; material that would talk about

11:03 the prices going down; material that would talk about ease o
entry, et cetera. We think that they, under duty of
fairness, should disclose that information to us. And we
know that we do not have this type of exculpatory material
11:03 that we requested. We don't have, for example, a list --
THE COURT: Let me just define. There are two
issues, right? There is the privilege issue and how we are
going to address that; what the time frames are to address
that in before the trial; and the necessary view the Court
11:03 would have to make of these documents in camera or otherwise
to determine if the privileges are properly raised, or
whether they have made a specific showing that is sufficient
I can rule upon them as it is.
The second issue is whether or not they have to
11:03 search all of their files that they have collected over the
months to find exculpatory material that may be
non-privileged or is otherwise producible, because it is
exculpatory under the Brady analogy.
And the Brady issue you are relying upon, my
11:03 reading is essentially I guess Judge Winner's reference in
'74, this New Mexico case with the EEOC, there is a footnote
there, and footnote in Judge Harold Greene's case here, AT&T
case, again referencing an analogy to Brady saying that the
Government has an obligation in certain circumstances to
11:03 produce these favorable materials. At least that is what

11:03 your argument is as I understand.

The Plaintiffs have relied upon some appellate decisions involving administrative decisions, but there may not be discovery generally available, in any event. But wha
11:03 I see and what you will tell me is, no decision directly on point saying that in an antitrust case the Brady doctrine, Brady v. Maryland of the Supreme Court criminal context, applies with equal force to normal civil litigation. Particularly in antitrust litigation. And why shall we do
11:03 that now?

MR. KOVNER: Let me address the points you raised in order. First, with respect to the issue of the privilege log; and secondarily, the search of the files. We view thos two issues as interrelated.

11:03 The Government has indicated they have given us al non-privileged material. Now, we know what we have and what we don't have from them. We know we don't have this exculpatory material from them. We know we don't have the people that they have talked to that have supported the
11:03 deal. We know we don't have the documents that talked about the broad array of competition; and we know such documents and people exist, because we have talked to such people. We have gotten declarations from some of them who say, "Yeah, I support the deal. I think it will be good for competition
11:03 and I told the FTC that." We have also collected documents

that support that. We have not seen any of that from the FTC.

If we take the Government at its word, that it produced all non-privileged documents, then this exculpatory material must be contained in their privilege log. Their privilege log is 50-pages long, contains broad groupings of documents, is not provided with any great deal of specificity; and we believe that they owe us a going back to these documents.

THE COURT: Some of the specificity discussions, i seems to me, you would have to look at what they say particularly, and many are listed as attorney conferences with other attorneys, other type of materials. I mean, some seem to be, unless you're questioning their good faith how they delineated those as being fairly clearly matters that would be privileged. There may be others that it's not as clear on.

MR. KOVNER: There is no doubt that there is some privileged material in their privilege log; we will not dispute that. But some of the entries, it seem on their face, do not contain privileged material.

For example, with respect to two of the experts wh are providing testimony under oath through declarations, Mr. Bill Vigdor, who provided the backup for PX3 is listed o their privilege log in 44 separate entries. And the entries

11:04 read such things as, raw data analysis, pricing analysis, several of these entries reference PX3; notes of meetings to discuss backup to PX3. This is the kind of material that would strike me to be factual, and also strike me to be 11:04 relevant in terms of turning over documents and experts the case relies upon.

Similarly with their other expert, Boris Steffen. Entries like HHI analysis, draft questions, analysis of efficiencies, there are numerous entries like that that 11:04 appear to be completely factual. And we think that there ha to be some process in place. We think that the process should be that the FTC should first go back and take a hard look at this material, disclose to us the factual material and information within the privilege log; and if there is 11:04 some remaining issues, there can be some in-camera review. We would be happy to select a few of theirs to submit for in-camera review. They can select a few of ours from our privilege log for in-camera review and we can let Your Honor decide.

11:04 With respect to the legal arguments, we agree that there is no controlling authority in this circuit with respect to this Brady issue. The issue here is what principles should apply though in this case? And we think the authority that we cite is much more persuasive, than the 11:04 authority they cite. And Judge Greene in the U.S. v. AT&T

11:04 case did say that Brady disclosure obligations are instructive in a civil antitrust case. And he noted particularly that the antitrust laws are different than othe purely civil laws.

11:04 He noted, quote -- this is quoted in our reply brief -- "the antitrust laws are of quasi-constitutional breadth and significance, and constitute a means for protecting the economic interests of the citizens of this country, not infrequently on a national scale."

11:04 If there ever was an area for this type of extension of Brady in a civil context, this is it, in this kind of antitrust prosecution. We think that the Brady principles here are instructive. And we do know that the Court, in EEOC, as Your Honor made reference to, did require production of Brady-type materials in a civil context.

THE COURT: Well, I think that in the EEOC Judge Winner's case, I read it through. What he required was actually the names of potential witnesses, and did not require the production of any documents. And his reference 11:04 was that they may lead to evidence that could be exculpatory, and that is why the Defendants in that case shared the right to find out who the Government's potential witnesses are, so they could depose them. But he specifically withheld production of the documents. He said their declarations may 11:04 come up later at trial; and he referenced the Jencks Act

11:04 actually, another criminal statute in that regard, after evidencing great frustration with the Government in discovery in that case.

But if you analyze Judge Greene's opinion, I think 11:04 he is talking in terms of constitutional issues, and then makes a reference and the footnote is quoting from the Government's brief actually in that case apparently as to the antitrust role of the Government in the antitrust matters.

MR. KOVNER: Your Honor, the bottom line I think 11:04 from the Judge Greene case is that antitrust laws are different than other civil laws. The Government, when bringing an antitrust case, is doing something different than in the normal context; they are acting like a prosecutor.

The antitrust laws have a breadth and stature that 11:05 distinguishes them from other civil laws; and therefore, Brady-type disclosures and Brady-discovery issues are instructive in that kind of a case.

THE COURT: Let me ask you, if you put that in context a little bit in this case as to Judge Greene's case. 11:05 Judge Greene -- this is the AT&T case. And for the record, reciting 461 Fed. Supp. 1314, his 1978 opinion, one of many he wrote as to discovery under this litigation brought by the Government as to break up of AT&T.

In that context, that was a case I think that 11:05 started in 1974. This was 1978, and they are still in

discovery and argument of discovery at that time.

Regardless of the principle that you want me to apply in a case that we are going to trial on in ten days, approximately, 11 days, how does it apply in this case in a preliminary injunction context, as opposed to something that you have four or five years in discovery in where you have time to go back through records if the principle would apply?

MR. KOVNER: Well, I think in terms of the time issue, they have already compiled their privilege log. They have already seen a lot of these materials. It seems to me they can make a pretty quick cut. Just looking at their privilege log. The first -- you know, you made reference to the fact that in the EEOC decision the judge seemed to be focusing upon disclosure of witnesses. The first three entries on their privilege log are potential witnesses. The first one -- potential witnesses for our side, at least. The first entry is signed declarations from non-witnesses; that is the first entry in their privilege log.

The second entry is ongoing correspondence to Third Party non-witnesses. The third one is, letters and emails from Third Parties. Witness issues are involved in this matter, Your Honor. We think we are entitled to that information, as well as the documentary information.

THE COURT: I will hear from the Government as to

11:05 the burden, much less the principle that applies in a minute. I have referenced back to my case that was cited back to me Friedman v. Bache Halsey, which the F.2d cite is, 738 F.2d 1336. And that was a privilege of a qualified law enforcement privilege. FCC, where we had an emergency subpoena, came in with some 200,000 pages of materials, plus 60,000 additional pages of documents. I guess it was over 60,000 different documents located from various cities they collected and hundreds of pages of indices alone, and there was a timetable in that. I well remember the case. There was a one-week window when the Plaintiff said they needed these documents produced immediately for trial. I held it at the request of the Plaintiffs in an emergency hearing two days after I think the case was filed, and had a procedure I thought we had agreed upon where it would be whether or not the privilege applied at all would be decided. It could apply to these documents. I held it did. It was a criminal investigation ongoing. That went to the Court of Appeals. Months later the Court of Appeals said, No, I should have done a specific review of the documents. In that two-to-one decision, Judge Starr dissented. That I had to go back and endeavor to do a specific review after counsel had made their review and given specific reasons of which documents particularly should be revealed, and which ones they could still have to hold under the privilege, and whether they

could redact them, et cetera. Although the trial that they wanted it for was long gone, but still it was not moot.

In the context of this case, to apply this privilege system you want me to apply, how are we going to d that in the next week?

MR. KOVNER: I think as an initial matter, the outstanding request of this material, you know, is two-weeks old now, at least. They could have been gathering it during the interim period; they chose not to. They chose to simply say, "We are not going to turn it over." They've compiled a 50-page privilege log. It seems to me, they have already gone through these documents. They can begin to pull some o the stuff that seems on its face blatantly factual very, ver quickly, and we can meet and confer. We can work with them on this.

To the extent that there are any other privilege issues -- and of course it depends on Your Honor's ruling, quite frankly, in terms of what they have to turn over.

But if there are any remaining privilege issues, w can submit a few examples from each party's privilege log, and Your Honor can make the decision as to whether these documents and these materials are privileged. I think that is a fairly manageable thing, even given the time frame and time pressures that we are under.

THE COURT: Because really what we need to do is t

11:06 get focused to get ready for a trial, and not continue the discovery disputes, if we expect to be ready and go forward in a timely fashion.

MR. KOVNER: That is correct. We are not asking for the wholesale production of everything in their files. But if they have material in their files that would be helpful to our case, and my guess is they know where that material is, my guess is they focused upon that. All we are asking is that that material and the identity of those witnesses be turned over. And it seems to me that would be fairly easy thing for them to do. They have been on notice that we want this material for weeks. They can turn it over.

If there are any remaining issues, we can submit the few documents by way of example to Your Honor by way of in-camera review.

THE COURT: Thank you. Let me hear from counsel for the Government again.

What about this Brady concept in the context of antitrust litigation, as opposed to civil litigation, why it shouldn't apply to the Government in viewing the Government, in essence, as a prosecutor in an antitrust cases?

MR. ORLANS: First of all, I think Your Honor was quite correct saying there was no case law that is on point that would require this of the Government.

11:06 I think the other key point here, Your Honor, this is a preliminary injunction case done on an expedited schedule at Defendants' instance and request. There is simply a limit to what we can do.

11:06 Let me tell Your Honor what you we did. We turned over 25 boxes of material to the Defendants. The only thing we withheld are privileged material. We didn't segregate exculpatory or non-exculpatory. Frankly, I don't know what that means in the antitrust context. We gave them everything we have that wasn't privileged. And then we said to them, as to the draft declarations and as to signed declarations we are not going to use, we will exchange those if you want to exchange those. We said that at the outset of the litigation; they didn't want to do that. This is just another instance for what they want is a one-way street.

Brady by its terms is a criminal doctrine. There is no case law that applies it in the civil context, let alone the antitrust context.

Frankly, Your Honor, with all of the reference to Judge Greene's opinion, the issue before Judge Greene where you cited Brady was the issue of whether for the discovery purposes an action instituted in the name of the United States, the Plaintiff, is the Department of Justice or some broader entity. And it is with respect to that issue that he found Brady instructive, not with respect to the discovery

question.

THE COURT: That's right, as to the documents elsewhere and other agencies for discovery purposes.

MR. ORLANS: The burden, Your Honor, would be extraordinary to review these documents on a document-by-document basis at this point.

THE COURT: What is the response that you have to the Defendants' concern that your privilege logs are too broad and clearly have redactable producible materials in them? Such as these entries regarding -- they gave an example of an expert or of witness' statements, et cetera.

One was, you said you agreed not to turn them over. I understand both sides agreed not to turn over these declarations.

MR. ORLANS: Right.

THE COURT: What was the other one?

MR. ORLANS: I would say two things with respect to that. First of all, that the burden of redaction of all of that -- let me go a step back and say, I think that the aggregation of factual materials by attorney is nonetheless privileged. I don't think that you are required to redact those materials. Attorneys' personal view of the facts, and that is what we have here, an agency that functions like a law firm. A lawyer's view of the facts that he or she has aggregated are I do believe privileged.

Certainly the law firm has not indicated they are prepared to go back through their memoranda and redact factual materials, and give us that material. You are also talking about tens of thousands of documents.

Frankly, Your Honor, they are refusing even to redact the under seal materials. They say that is a burden. Here we are talking about tens of thousands of documents, compared to the 50 or so that are at issue in terms of the under seal protection of the Court. So I think that burden would be extraordinary as well. That would basically bring this litigation to a halt.

Now, if we want to stop for a month or two to do this, it might be doable, but it certainly is not doable on a ten-day basis and should not be required in a preliminary injunction context and expedited decision.

THE COURT: Well, the only concern that I have with that is, if there are any areas at least that appears superficially in your privilege log that could contain non-privilege documents, it seems to me, then, because of the expedition of this case, that materials may not be produced that could be produced if there was a time frame that we had to go through them, or I had to do an in-camera review of them.

MR. ORLANS: I don't think there is anything in our privilege log that we don't in good faith believe is

privileged. Frankly, our privilege log is every bit as good as their privilege log, which clearly contains a number of ordinary course of business documents which they apparently try to assert a privilege by adding in connection with White & Case instructions or some such, and then the document described is clearly an ordinary-course-of-business document.

Counsel referred to documents regarding Mr. Vigdor and Mr. Steffen. As counsel well those, those are not experts. Mr. Vigdor was the individual -- and he has already been deposed in this case -- he is the lawyer for the Commission who compiled PX3. And what he did, he took a calculator, and that is what Mr. Steffen did, and he added numbers up, and he took a computer program and made pretty charts out of those numbers from Defendants' documents. These are the kinds of things they point to in alleging we were hiding privileged documents that are factual documents.

Mr. Vigdor is a lawyer. As to everything except PX3, his material is privileged. As to PX3, he has been deposed and we offered him full discovery of those materials.

Moreover, to the extent that the Defendants believe that there is full discovery, full discovery will be available to them at a part-three hearing. That is what a trial on the merits is about. This is not that kind of a

proceeding.

THE COURT: All right. Thank you, sir. Anything else?

MR. KOVNER: Yes. Just quickly, Your Honor. I think we can cut through a lot of this. I understand the arguments Mr. Orlans is making.

Perhaps what we can do that would expedite the process is, we can pick ten items from their privilege log. We have real questions as to whether these items are really privileged. They can pick items from our privilege log. We can submit them for in-camera review and go from there. I think we would be satisfied with that kind of a result here. That would allow us to move forward in an expeditious matter and still allow us to get some of the materials that we believe we are fully entitled to.

THE COURT: All right. Thank you.

What I will do is the following on this issue: Th Defendants' motion for an order compelling the FTC to answer certain interrogatories or do certain documents concerning privileged materials, and the second issue as to review of these materials to produce exculpatory materials that may no be privileged, or if they are privileged, to produce them.

As to the first issue on the privilege, I can review the privilege log submitted by the parties and see if it is satisfactory. I will accept Defendants' suggestion if

they wish to present to the Court ten specific documents the feel that are privileged, where privilege has been claimed b the Plaintiffs that does not clearly apply and have those submitted; that is fine. And the Plaintiffs can do likewise.

As to the Brady arguments, I do think the antitrus area is as recognized by Judge Greene, is a specialized area by the Government in the sense that as Judge Greene has quoted the Government's memorandum apparently in that case, the role and responsibility of the antitrust prosecutor is analogous to that of a criminal prosecutor, and that they have special obligations, even though this is civil litigation, to be full and forthright in their production of documents and their response to discovery in the conduct of this case.

I have seen nothing yet that indicates it not bein that way, but I have not gone through the privilege logs, which I just received some of them, to determine how they have listed these documents and how accurate they have been in their listing as to whether or not a privilege would apply, and we will see about that.

But then to argue from that, therefore, there should be a Brady rule imposed in the civil context because Judge Greene was deciding an issue as to whether or not the entire Government should respond to discovery request -- and

11:08 This case went on for ten years or so -- in contrast to this case, which is a preliminary injunction hearing at this stage, in the manner of a few weeks from the time of filing suit until the hearing is a very different situation.

11:08 Even if the principle has some appeal, theoretically, I do not find any case law that has yet adopted it specifically.

Judge Winner has a reference to it that expresses his frustration with EEOC, and again the case has gone on fo some time where they produce no discovery, which is somewhat different.

11:09 The Plaintiffs' cases are really appellate decisions, but they refer to administrative matters where discovery is quite different.

11:09 I am not prepared to adopt this rule of law that w should look to Brady to inform the type of production that should be required in every antitrust case filed so that all the exculpatory materials in the Government's possession mus be turned over, and they to have review all of their files i 11:09 advance to do that.

The Brady doctrine says it should be done, or there could be reversal of a criminal conviction. It is not actually if the Defendant can show prejudice. It is not really the discovery rule as such. It is more of a 11:09 constitutional issue in a criminal context; and I don't see

that it can be applied in this context, this preliminary injunction case. So I will not order the Government to go back through their privileged materials and determine if there is exculpatory material that should be produced that hasn't been produced at this juncture of the case in the time frame that we have.

I will take a look at the privilege material logs and the issues regarding whether there is some application of too broad of a privilege. In other words, people are throwing in a large blanket over documents. They don't want to produce for whatever reasons, or find it difficult to produce because of time restraints, and see if they have to produce some redacted versions of certain documents on either side. But beyond that, I'm not going to venture any further into this Brady thicket.

(A phone was ringing in the gallery.)

I don't like telephones in the courtroom. We have, also, a couple of other matters. I want to discuss just procedural matters in getting things organized. Let me hear from counsel other matters they want to bring up today, first.

MR. KEMPF: There are a couple things we are discussing, several that we are discussing that I don't think are ripe today. It struck me there was one you might have thought was ripe, but I don't remember.

11:09 MR. ORLANS: As long as we are on the privilege issue, Your Honor, one that I might flag for the Court is, we are today deposing a company that was involved in the preparation of the efficiency study that the Defendants are relying on, and that company refused to produce a number of documents on the basis of attorney-client privilege and I believe work product privilege.

We question how an efficiency study the Defendants are relying on can have any privilege attached to it. Certainly attorney-client is inappropriate. This is not the company that is represented by these lawyers.

That aside, as to work product, if they are relying on the study, they can't shield the underlying materials on the grounds of privilege. So, we have raised that with the Defendants and they have not responded. They said that they will respond. It does strikes me that we need a fairly immediate turnaround on that.

MR. KEMPF: Mr. Orlans called me on this. This is one that is in flux. He called me yesterday, and you know, we had a large group of people working on this thing. And finally about, I think it was 2:00 in the morning, I talked to Mr. Vasquez. He is the fellow on the far end over there. And I said, "You know who has this? It finally made its way to me, but I am working on this brief that is due in the morning. I will get to it some time in the middle of the

night." And I told Mr. Orlans I had not had a chance to circle back to him on that.

What time does the deposition start today?

MR. ORLANS: I don't know. I assume 9:30, 10:00.

MR. KEMPF: My thought is this, let us see if we can't work it out. And if we need to, perhaps we can hook in a conference call with the Court on that.

THE COURT: That's fine. Get back to me on that if you have to. I am here today on other matters, so that is no problem.

All right. What other thing did you have that you want to work on today that we can take care of? And I can set up another date for matters that may come up in discovery and have you back here, if necessary, beginning of the week.

MR. ORLANS: Did Your Honor want to address the under seal question with respect to Defendants' documents?

THE COURT: We just received a supplemental.

MR. KEMPF: We did, Your Honor. I am a bit of a frustrated camper on this, Your Honor. Maybe we all are on this issue. I think the way that I would summarize it, the last time before it was one of these things where I said the bottle was half empty -- or I said it was half full and he said it was half empty.

THE COURT: I received the supplemental memorandum by the Defendants in support of their Motion to Maintain

Certain Business Records Under Seal yesterday afternoon.

MR. KEMPF: Well, I really did think when I was before you the other day that we might be able to resolve th whole thing. In fact, I think it was later the same day Mr. Orlans and I had a call, and I had spoken to Mr. Curran. I probably ought to get him up here to address this. And I said, Gee, it looks like we are making real progress here. And he again repeated his concerns, especially on PX3. And told him, and I will tell you as well, is from a trial perspective, I don't care if it all is made public. The business people are the ones that care about this issue. An the way that I said to him, I said, "Look, if you continue this process that I understand is making good progress, my hunch is we can resolve all of this stuff. Because what I will do at the end of the day is go back and lean on the client on PX3, if you have been reasonable on the other things, and tell him that is a reasonable trade off." I think we were both in pretty good spirits then, but later in the day I got a report that everything had broken down. And I think Mr. Curran's sense of it -- and let me call him up t address this -- is that with all of the work that they have to do on their side, this is an unexciting task and basicall we don't want to do it. Now, there are a lot of unexciting tasks on both sides that we don't want to do. But I think that is the real stomach bucket. I am the wrong person.

11:10 THE COURT: Let me make sure I understand the importance of this issue, is not that the parties don't have these documents and can't share them with each other. It is either the public can't see them, or some in-house people. Is that the concerns we have?

MR. KEMPF: I don't think we have any in-house concerns at this time.

MR. ORLANS: It's strictly the public.

THE COURT: I will hear again from them and I will attempt to resolve it if we can't resolve by the parties. But I don't think that should be first on the list to gettin this to trial from my point of view, despite -- I am sure that the lawyers here for the public interest think it shoul be -- but I think we have other things to do.

MR. KEMPF: I agree with that, Your Honor. And at trial, we have to make hard and fast decisions at that time.

THE COURT: That's right. And at trial it will come out if you rely on them and use them, and they will be public in a week.

MR. KEMPF: The only thing that I am uncomfortable with is -- I don't really think that the partics need to burden you with this -- but it is my view that if we can impose upon them to get some people to park their fanny in a chair, along with our imposing on some of our people to do this, we should be able to, in my judgment, resolve if not

11:10 all of it, nearly all of it; and that is much too long a lis
in my judgment for you to have to review right now.
THE COURT: It is not on the top of my list right
now to do.
11:10 MR. KEMPF: I will a say one thing, Your Honor. I
was thinking about this and I don't think this is today,
because I have not discussed it with Mr. Orlans yet. But in
looking through my stuff last night as to what we are
actually going to put on live in front of you, there are a
11:10 couple of Third Party matters that I think are powerfully
helpful to my case that my client does not know about, and I
fully understand why some of these Third Parties would not
want my client to know about that. I don't want to discuss
that obviously in open court. But let me think about that,
11:11 talk to Mr. Orlans about it, but that is something that I
have some concerns about how we handle that appropriately.
THE COURT: All right.
MR. KEMPF: And this one really is in the Third
Party realm, because I know my client would love to have this
11:11 stuff in open court, and I feel very uncomfortable doing it
that way.
THE COURT: Do you want to respond to anything
further on that?
MR. ORLANS: Just a few minor comments, Your
11:11 Honor. It just seems to me from the outset that the onus has

been put on the Commission to try to sit down with Defendants' documents, and they are not our documents.

I have some sympathy for Defendants' position and I am not trying to be unreasonable requiring them to go through document-by-document. We certainly recognize there are some legitimate concerns about forward-looking pricing information and material of that sort.

On the other hand, the categories that they set out, for example, market research demographic information, obviously the sensitivity of that information depends on the age of the information; the nature of the information; the subject of the information.

They have another category for pricing information and into that category they have put all of the historic pricing information, which I have explained time and time again, we do not view as sensitive.

THE COURT: They mentioned a two-year rule at the last thing and you indicated that is ancient.

MR. ORLANS: Yeah. And the problem, Judge, and let me give you an illustrative example. On April 30th, Mr. Kempf in passing said, "I didn't know PX3 was on our list; I will take a look at it. I am anxious to have a lot of that in the public domain, so I will be cooperative there." Later he says, "I am anxious to turn that on them, and say to the public and this Court, What a bunch of

malarkey. I think we will be able to work that out."

In their motion, Judge, they say that the lyon's share of PX3, they now agreed should be made public. Well, when you look at the designations you find that what they want to continue to designate is confidential and under seal are tabs B through H, tabs J and tabs L. If I can roughly d this, J through L. So roughly of this book, Your Honor, the portions that I am holding are the portions that they insist should still be confidential under seal. The portions left are the portions that they suggest are the lyon's share they are willing to make accommodation on.

My problem with this process, and I am frustrated with it as well, is I don't think there has been any movement on that. Certainly, there is some material in PX3, such as cost information or margin information, that may well be sensitive, but the bulk of it is historic pricing information. I do not see how that material -- even current historic pricing information, these are prices that are available on the shelves today; people can go out and look at them. I just don't see how that should be sensitive information. I don't see how a strategic plan that is three-years old should still be sensitive information.

Those are the kinds of frustrations I have in dealing with this and the categories. And we have found it very difficult to make any progress on this, and I think that

11:11 the categories are overinclusive. But I certainly don't mea to suggest by that, that I think there is no legitimately privileged information in here. Clearly there is.

THE COURT: Well, I think that there is -- I do 11:12 want to resolve it. As I said, I didn't put it in the first of priorities. I think we have to get our discovery matters resolved and get the case ready for trial in the next few days. We can't do this and try to resolve it.

I will let the parties discuss it some more, but 11:12 there will come a time when I will go through each of these lists that have been filed and determine the best I can what should be made public and make a ruling. And then perhaps the Defendants can come back and tell me why areas that I felt can be made public, can't be. But it seems to me that 11:12 there is a timeline that can apply in the rapidly involving markets. That old pricing information, for instance, or old strategic plans are outdated; I'm not sure I see the necessity for that.

I did see a couple of documents brought to my 11:12 attention for my interest and that was an excerpt from Project Fishing Trip. The presentation of Board of Directors, and Goldman Sachs. I am not quite sure who went on that trip and what they caught, but seems to me it should be privileged information. At least the lures they used.

11:12 MR. CURRAN: Your Honor, we are hoping you will

11:12 help us reel that one in.

THE COURT: I won't get into a discussion of that. But I do want to focus on that and get it done. I just won' order you to do it today or tomorrow immediately because of other needs we obviously have here.

11:12 MR. CURRAN: Your Honor, I will sit right back down. You have indicated that you don't need to hear from me. I didn't plan on addressing you, and I have no interest in doing so; but I do want to point out that what the review of the documents that Mr. Orlans just presented to you was significantly more elaborate than the review that we were given when we attempted to sit down two days in a row to fin out from the FTC what problem they had with our document designations. We understand they are having a very busy week, but we tried to sit down and go document by document. And the reaction we got initially was, This is taking too long. We have not had a chance to review these documents. Is there another way we can do it?

We made a good faith effort to try to get this resolved. It was only out of utter frustration that we made that supplemental submission to Your Honor yesterday. If Your Honor has an opportunity to look at that, we would be happy to appear in court or sit down in chambers and explain exactly why every one of those documents we feel is legitimately deserving of under seal treatment.

11:12 THE COURT: I will take a look at it, as well as have the parties attempt to discuss it some more. I recognize, as I said, the pressure on the parties and I did not want to impose upon them some deadline in forcing the FT
11:12 to divert its resources any more than they have to argue ove
what documents, temporarily at least, should remain sealed. I think many will become public if the trial goes forward, the preliminary injunction goes forward, and I can also address these others as need be. It is not hurting the
11:12 parties, at least, to not have these documents left under seal. The only concern is whether they are properly under seal, and it is the public's right to have access to these now that this is in litigation.

So, if the parties at the next status call have no
11:12 resolved it, I will go ahead and resolve these matters, and it may be I will have certain questions that I can review with counsel and go through these discussions.

I do have concerns on the -- as I said, what seems to me to be ancient history, once the particular pricing
11:13 information is no longer current, and a lot of these studies are no longer current; what really rationales to hold these under seal. But as long as the parties can use them for the trial purposes in preparation, then I am not too concerned immediately.

11:13 Let me set up another status call, and then talk to

11:13 the parties a little bit about some procedures in getting organized for the trial. I don't want to detract from your work that you have to be doing getting ready. And this will probably -- the next one will probably be the ultimate call we have, and we may have one final one just before trial to make sure we have got things in line. I will be out of pocket, unfortunately, although reachable by phone sometime starting on the 14th probably. I guess it would be a pretrial date set that day. After that pretrial for the nex two days of this genetic DNA conference they are putting on to educate us in this area further, but I can be reachable b phone on that.

How about coming in on Monday and I can take up if there is any other matters that need addressing, or other discovery issues that come up. And then my ultimate conference, hopefully, will be on the 14th in the morning fo pretrial review of where we are and trial, and make sure we have our witnesses listed and people are organized with the time frames, and we can run through that on that day on how the parties he view the trial.

One thing I want to discuss at that time is the Plaintiffs anticipating putting on a case, and then the Defendants and the Plaintiffs want to reserve some time for rebuttal or not. The Defendants will jump up and want some time for surrebuttal, those type of issues. Whether we are

11:13 going to have submission of some declarations and other materials, as well as the live testimony. And then finally, I want to make sure our experts are organized and where we are going with the experts and who they finally are and we will hopefully know that by the 14th.

We will look at the times. We already set some times for brief filing, but it may help me to get some filings at the time. We will talk about the pretrial as to just the presentation of the case as we have some type of trial summary for the Court to review.

As to the mechanical side of it, I will leave that to the experts. But you are welcome to -- we can be in this courtroom, I believe. That is not yet configured, although the wiring has been put in, in part. But I will allow that to the experts. I have talked to my court reporter. There has been a request that the parties be hooked up with computers so they can get the online realtime testimony. As long as we can tape the wires up, I have no problems with that. What you will have to do is work with the court reporter on that. You can certainly use it during the day. It is not the official record and you will have to then purge it and put in the official record the next day, and it can be tied back in with your notes everything that made during the day. You will be able to use the realtime capabilities, as I have set up.

11:13 And then you can also work with the court clerk in bringing in the equipment and when you want to bring it in prior to trial. And make sure it is all working. I will no be here on the 15th and 16th, so that is a good time to 11:13 schedule that to be done.

The parties' witnesses, I would like you to have them here somewhere in the city so they can get over here quickly. We don't have any spaces; we used to have. We use to have enough space for two trial rooms during the trial fo 11:14 counsel to use. I will talk to the court administrative officer, Ms. Hall -- but the one that I always used across the hall here has been changed into a video-conferencing roo -- whether that can be made available to some of the parties. And there is another room next to that, sometimes 11:14 that can be used by the other side. I will see what I can arrange. If there is one on another floor that is not being used, one of the other parties can have that perhaps. And I can get one on this floor. And you may have to flip who get which one. But that will allow you to move in file cabinets 11:14 and keep your people and you can have a telephone and eat lunch there and stay focused, instead of having to go back somewhere else. FTC is close, but they can also -- as I said, both sides -- I will make arrangements to get some rooms for both sides here.

11:14 I think mechanically that is probably all I need to

look at right now. I would like to have you back in next Monday to take up any of these continuing issues and resolve them. And on the phone this afternoon or this morning, whenever we can get a hold of Latham and Watkins, we will take up the concerns on the deposition that has been noted, this other witness; and later today if necessary, we can have another conference on the other matter to try to resolve them on this discovery of this other records that you were talking about for the Plaintiff on it. So, I will be available. I also am available tomorrow. I'm in court a lot, but I am available as well. We will be back Monday then, at 9:30 just for a status call.

MR. KEMPF: Your Honor, if I might be heard for a minute? This is in response to your suggestion on Monday.

THE COURT: What is your schedule like?

MR. KEMPF: I think the schedule we can probably work around. There are a couple of depositions that we -- they are in a bit of a state of flux. We will try to work around those. My only thought is this. You had said that you wanted to sort of at that time get a bit of a preview of things. And the witness lists I think are due and exhibit lists the end of that day.

THE COURT: So Tuesday might be better?

MR. KEMPF: I am sort of thinking outloud. I was thinking Tuesday might be better. I have not really looked

or thought through. We are still negotiating on which experts are when.

One constructive thing we have agreed to I think yesterday was that while the Court had given us unlimited time, we imposed one-day limit on each other yesterday, whic I think was probably a good idea. When we did that, we had several experts who were tentatively listed for two days, an Mr. Orlans and I have been juggling schedules to see now how we rearrange that. And I really don't -- let's think outlou for a minute here, Your Honor. I'm not sure whether Monday or Tuesday would be better.

THE COURT: Why don't you all talk and look at you schedules, and we can talk on a telephone conference this afternoon.

MR. KEMPF: You would be available Tuesday, as wel as Monday?

THE COURT: I will be available Tuesday. I have a sentencing, but I can delay that hopefully for a half-hour o so and take up this first.

MR. KEMPF: Why don't we confer and we'll try to come back with a joint recommendation whether we think Monda or Tuesday is more productive.

THE COURT: All right.

MR. ORLANS: That is fine, Your Honor.

THE COURT: Thank you, counsel, for coming in.

11:15

We'll stand in recess.

THE DEPUTY CLERK: All rise. This honorable court is in recess.

(Which were all proceedings had at this time.)

C E R T I F I C A T E

I, PATRICIA YERKES, RMR-CRR, do hereby certify that the foregoing transcript constitutes a full, true, and correct report of the proceedings which then and there took place.

P. Yerkes

PATRICIA YERKES, RMR-CRR