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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO COMPEL ADMISSIONS

The Commission initiated its pre-complaint investigation of Aspen's consummated acquisition of its chief rival, Hyprotech, in the summer of 2002. During the course of that investigation Respondent provided the Commission with statements from various customers in an effort to persuade the Commission to close the investigation. The statements, combined with other information obtained by the Commission, were insufficient to prevent the unanimous Commission from issuing its Complaint. Respondent then deconstructed 64 of these statements to create 753 separate Requests for Admission ("RFA"). Only one of the statements appears to be sworn and at least a dozen were not even signed by the putative authors.[1]

The statements have no value in this proceeding because there is no doubt that they are inadmissible hearsay. They are not business documents entitled to any Lenox presumption.[2] Most relate primarily to the personal opinions of the authors as individuals, as opposed to expressing an authoritative position on behalf of the respective companies. They bear no other

[1] Forty of the statements are from witnesses located in foreign countries and, therefore, not subject to the Commission's subpoena power.

[2] See In the Matter of Lenox, Inc., 73 F.T.C. 578, 603-04 (1968) (presumption that documents from respondent's files are authentic and kept in the regular course of business); see also Rule 3.43(b)(2).

indicia of trustworthiness and it is readily apparent that they were prepared at the behest of Respondent in anticipation of its defense of this illegal acquisition.[3]

In an attempt to breathe some life into the statements and somehow shoehorn inadmissible hearsay into the record of this case, Respondent parsed virtually every sentence of each statement to come up with an incredible 753 separate RFAs. In taking this approach, Respondent seeks to force Complaint Counsel to admit to the untested opinions of its witnesses before Complaint Counsel has received any documents from these witnesses or conducted a single non-party deposition.

Notwithstanding the unduly burdensome volume and substance of the requests, Complaint Counsel discharged its duty under the Commission's Rules of Practice by reviewing the credible documentary evidence that it possessed (including documents from Respondent's own files) or reasonably could acquire during the time frame for responding. Upon reviewing that information, Complaint Counsel determined that it did not have sufficient information to admit or deny the requests.[4] What Complaint Counsel did not do – and is not obligated to do – is undertake the impossible task of seeking out sixty-four adverse witnesses, the majority of whom are located in foreign countries, and try to evaluate the credibility of their personal opinions.[5]

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[3] See, e.g., Statement of [ ] dated March 4, 2003 (noting discussions with AspenTech); Statement of [ ] dated February 20, 2003 (same).

[4] Respondent appears to question whether Complaint Counsel expended some further effort in the "hours" between the parties' attempt to confer on this issue and the time Complaint Counsel submitted a revised response. (Motion at 3.) Complaint Counsel did not conduct any further inquiry at that time. The revised language was added merely to conform the language with the technical requirements of the rule. Complaint Counsel's reasonable inquiry was conducted prior the submission of the original response.

[5] The number of interviews required likely would exceed sixty-four because Complaint Counsel has no way of knowing whether the authors of the statements are authorized to make the statements or even whether they are the most knowledgeable persons within the respective organizations. Thus, it is likely that Complaint Counsel would (continued...)

Respondent, however, remains unsatisfied and filed this Motion to Compel ("Motion"). For the reasons outlined below, the Motion should be denied.

I. *Lack of Sufficient Information is a Proper Response Provided That a Reasonable Effort Has Been Made to Obtain the Information*

The purpose of a request for admission is to narrow the issues for trial by relieving the parties of the need to prove facts that will not be disputed at trial and the truth of which can easily be ascertained. In the Matter of General Motors, 1977 FTC LEXIS 293, *3 (Jan. 28, 1977). A responding party is not required to admit a fact merely because the other party has some evidence on the subject if the responding party intends to dispute the fact by introducing countervailing evidence. Id. at *4-5. Further, lack of sufficient knowledge to admit or deny the proposed fact is permissible provided that the party has made a reasonable effort to ascertain the facts. Obviously, a "reasonable effort" is not boundless. See Dubin v. E.F. Hutton Group, Inc., 125 F.R.D. 372, 374 (S.D.N.Y. 1989) ("'reasonable inquiry' under Rule 36 is a relative standard depending on the particular facts of each case"). Generally, a "reasonable inquiry" is one that includes a review of documents and inquiry of persons under the responding party's control. T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co. Inc., 174 F.R.D. 38, 43 (S.D.N.Y. 1997).

Respondent's primary argument is that Complaint Counsel has not conducted an adequate inquiry in order to avail itself of the "lack of information" response. (Motion at 5-8.) Respondent's argument is based upon a fundamental misunderstanding of what constitutes a reasonable effort under these circumstances. An admission under Rule 3.32 is, in effect, sworn

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[5] (...continued)
be required to conduct multiple interviews in order to satisfy itself that the information is reliable enough to be forever bound by the statement.

testimony binding at trial upon the admitting party. General Motors, 1977 FTC LEXIS at *4-5; see also Dulansky v. Iowa-Illinois Gas & Elec. Co., 92 F. Supp. 118, 123 (S.D. Iowa 1950). Because the effect of an admission is to establish a fact conclusively and prevent the introduction of any contrary evidence on the matter, courts do not require a responding party to either: (1) undertake extensive investigations of third parties where there is no identity of interest; or (2) take the words of an opposing witness at face value.

A party is required to make an inquiry only when there is some identity of interest between the party and the third party. T. Rowe Price, 174 F.R.D. at 43; Henry v. Champlain Enterprises, Inc., 212 F.R.D. 73, 78 (N.D.N.Y. 2003) (must make a reasonable effort to obtain information within responding party's relative control). Indeed, Respondent's own cases make this point crystal clear. Respondent relies on Uniden America Corp. v. Ericsson, Inc., 181 F.R.D. 302, 304 (M.D.N.C. 1998) for the unremarkable proposition that a responding party "must make inquiry of a third person *when there is some identity of interest manifested.*" (emphasis added). (See Motion at 6.) The court defined identity of interest to include situations such as where both the responder and the relevant third party are involved in litigation, have a present or prior relationship of mutual concerns, or are actively cooperating in litigation. Uniden, 181 F.R.D. at 304. All of the third parties whose testimony is at issue are adverse witnesses who are being proffered by Respondent. Consequently, Complaint Counsel has no identity of interest with any of the relevant third parties according to the test established by Respondent's own cases. Cf. SEC v. Thrasher, No. 62-6987, 1996 U.S. Dist. Lexis 13016, at *14 (S.D.N.Y. Sept. 6, 1996) (requiring the SEC to supplement response by making inquiry of former employees and another government agency that was aligned in litigation and cooperating with the SEC). Respondent overstates Complaint Counsel's position by asserting that Complaint Counsel intends to argue

that there is no duty to respond merely because the information is in the hands of a non-party. (See Motion at 5.) To be clear, under certain circumstances Complaint Counsel may be obligated to make inquiry of third parties. But as noted above, those circumstances do not exist for these sixty-four statements because Complaint Counsel has no identity of interest with any of them.[6]

II. *Complaint Counsel Made a Reasonable Inquiry of the Documents and Information Within Its Possession or Reasonably Obtainable*

To the extent Complaint Counsel has any duty to investigate the veracity of the opinions of Respondent's witnesses, that duty has been discharged by reviewing the documents and information in Complaint Counsel's possession. See T. Rowe Price, 174 F.R.D. at 43-44 (In the absence of any identity of interest, as is the case here, the duty to conduct a reasonable inquiry is satisfied when the responding party reviews the documents and other information in its possession.); Kendrick v. Sullivan, No. 83-3175, 1992 U.S. Dist. Lexis 6715, at *9-16 (D.D.C. May 15, 1992) (where evidence relates to the state of mind of opposing witnesses, review of information under the responding party's control constitutes compliance with the rule). Of the sixty-four statements provided by Respondent, Complaint Counsel had received documents from exactly none of the purported witnesses at the time the response was due. Complaint Counsel reviewed the documents it had received from AspenTech and based on that review it was unable to either admit or deny Respondent's requests. Nothing more is required.

Respondent makes much of the fact that Complaint Counsel has spoken with a few of the authors of the statements. This is irrelevant. Assuming, *arguendo*, that the witnesses said nothing in these conversations that contradicted their statements, Complaint Counsel still would

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[6] In addition, where matters of personal opinion are concerned, courts generally require no response at all. See Cada v. Costa Line, 95 F.R.D. 346 (N.D. Ill. 1982) (refusing to order a party to respond to requests that related to "matters of opinion that could be eked out" by either side).

not be required to rely on these untested statements of personal opinion. Such a requirement would strip Complaint Counsel of its right to have the credibility of the witnesses tested under cross examination and determined by the trier of fact.

The court's opinion in T. Rowe Price is particularly instructive. There, the plaintiff requested that the defendant admit that a former employee of a non-party "considered the staff of the Special Assets Department of the Bank to be inexperienced and overwhelmed." T. Rowe Price, 174 F.R.D. at 45-46. As the court indicated, requests concerning a person's state of mind "do not . . . in any way serve the goals of Rule 36." Id. at 46. The weight accorded to an individual's subjective beliefs is the proper function of the trier of fact. See also Kendrick, 1992 Lexis 6715, at *6 ("to assume that the . . . declarations of hostile witnesses are conclusive would be to unfairly limit plaintiff's case and *the Court's ability to make credibility determinations at trial.*") (emphasis added).

Complaint Counsel's responses are further supported by the fact that, as Respondent acknowledges, at least one witness AspenTech fails to identify is considering providing clarifying statements which would render its original statement even more suspect. (Declaration of Mark W. Nelson at ¶ 5.) This fact alone should be dispositive of this Motion because it casts doubt on the remaining statements. The Court should have the opportunity to make credibility determinations based on fact testimony and other record evidence, not on hearsay, untested, unsworn, opinion statements.

III. *The Issues Addressed in the Statements Are In Dispute and Too Vague and Subjective to be the Subject of Requests for Admissions*

As Respondent concedes (Motion at 1), one of the more significant disputes involves whether the pre-acquisition products of AspenTech and Hyprotech were substitutes for one another. Indeed, with respect to the anticipated discovery and hearing testimony, Complaint

Counsel believes that it will spend substantial effort cross examining the authors of the subject statements to the extent they remain on Respondent's witness list. The requests for admission both relate to this disputed issue of fact and contain subjective statements that are not capable of confirmation or denial.

Respondent appears to misunderstand the very purpose of RFAs. They are not designed to render admissible otherwise inadmissible hearsay; rather they are tools used to reduce the costs of litigation by reaching agreement on facts that *are not in substantial dispute*. T. Rowe Price, 174 F.R.D. at 42.[7] Requests for admission "expedite trial by removing essentially undisputed issues, thereby avoiding time, trouble and expense which otherwise would be required to prove issues." Burns v. Phillips, 50 F.R.D. 187, 188 (D.C. Ga. 1970). As the ALJ in General Motors explained, if a party intends to present countervailing evidence at the hearing, then there is no obligation to admit. Complaint Counsel believes, based on documents and pre-complaint sworn testimony from Respondent, that there will be documents and testimony from these witnesses that substantially contradicts Respondent's reading of these statements and impeaches the credibility of the statements themselves. Moreover, this dispute goes to the heart of the allegations in the Commission's complaint, *i.e.*, whether AspenTech and Hyprotech were significant pre-acquisition competitors. Complaint Counsel cannot "be bound by a version of events presented by third parties, particularly where it has asserted that it has reason to believe that those individuals may have interests hostile or adverse" to its case. Burns, 50 F.R.D. at 44; see also T. Rowe Price, 174 F.R.D. at 44. Therefore Complaint Counsel cannot admit the requests. Because, however, Complaint Counsel had not received any discovery from the

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[7] See also Diederich v. Department of the Army, 132 F.R.D. 614, 616 (S.D.N.Y. 1990); Henry v. Champlain Enterprises, 212 F.R.D. 73, 77 (N.D.N.Y. 2003).

relevant witnesses, Complaint Counsel determined that it would have been improper to simply deny the requests outright.

Respondent casually asserts that the statements "contain simple facts that can easily be confirmed" by "reviewing the materials Complaint Counsel has had in its possession for the past eight months" and "asking the right questions." (Motion at 2-3, 7.) If only it were that simple. Full discovery is needed because, as noted above, a large number of the requests relate to the subjective beliefs of Respondent's witnesses.[8] For example, in RFA 172 Respondent asks:

> Admit that [ ] does not believe he knows of any chemical company in his business or geographical area that has made any attempt to replace Aspen Plus with HYSYS.Process.

What are the "right questions" for Complaint Counsel to determine the truth or falsehood of what [ ] *does not believe he knows*? Would Complaint Counsel be limited to asking only questions that relate to what [ ] does not believe he knows or would Complaint Counsel be required to try to figure out the real facts before responding to the request? In order to admit or deny this request, Complaint Counsel would need to identify all of the chemical companies in [ ] business (which is currently unknown) and his geographical area (also unknown) and determine whether, at any time in their entire corporate history, they have ever tried to replace Aspen Plus with HYSYS.Process. These are not simple facts subject to easy confirmation.

Respondent seeks to accomplish exactly what the court refused to permit in T. Rowe Price. There, the court held that it would not force the defendant to:

> admit as true the statements of former bank employees about Bank matters which

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[8] As for "verifying the authenticity" of the statements (see Motion at 7), that seems to be a useless exercise. The authenticity of a document might matter if there was any reasonable likelihood that the document is admissible. It is a complete waste of resources to try to authenticate inadmissible hearsay.

> are outside the defendant's knowledge, and as to which there may be other evidence, either in the form of documents or testimony of other Bank employees. The absence of contradictory information in the record as it now stands simply means that [defendant] is unable to deny the truthfulness of what various deponents testified occurred in their areas of the Bank.

174 F.R.D. at 44. Likewise, at this stage of the proceedings Complaint Counsel is unable to deny the statements by Respondent's witnesses because discovery is in the early stages. Complaint Counsel does, however, believe that evidence contrary to the statements may be found in business documents and future testimony. If Your Honor forced Complaint Counsel to admit these statements, Complaint Counsel – and Your Honor – would be denied the opportunity of testing or conducting any further inquiry into the accuracy of the statements.

In addition, many of the requests are unanswerable because the requests are misleading. For example, the statement of [ ] of [ ] in Germany recites that "*[t]o my knowledge*, there are currently about 150 Aspen users within [ ]. . . . *As far as I know*, [ ] presently has no licensed seats for HYSYS.Process." (emphasis added). Notwithstanding [ ] obvious hedging, Respondent propounded the following requests for admission:

> 28. Admit that there are currently about one hundred fifty (150) Aspen Plus users within [ ] performing simulation work in the areas of Process Technology, Engineering, and at a variety of production sites.
>
> * * * *
>
> 29. Admit that [ ] presently has no licensed seats of HYSYS.Process.

Respondent simply ignored the very substantial qualifications that [ ] was careful to include. Complaint Counsel is unable to provide useful responses when Respondent takes creative license with the statements and converts a personal opinion into a request to admit empirically proven facts. [ ] explicitly limited his statement to his own personal

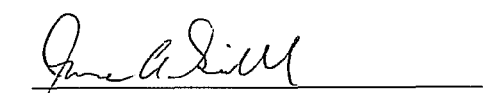
knowledge and does not purport to provide a statement on behalf of the entire company. Respondent must live with the language that it procured and not rewrite the statements to suit its litigation goals.

Therefore, the proper course is to require Respondent to adhere to the rules of evidence. To the extent Respondent believes that any of the 64 witnesses can provide admissible fact testimony, it should identify those witnesses, who will then be subject to deposition, discovery and cross examination by Complaint Counsel. See, e.g., Dubin 125 F.R.D. at 374 (reasonable inquiry does not entail seeking information from third party absent sworn testimony).

Conclusion

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

Respectfully Submitted,



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

Dated: November 28, 2003

Attachments:
A. In the Matter of General Motors, 1977 FTC LEXIS 293, *3 (Jan. 28, 1977)
B. SEC v. Thrasher, No. 62-6987, 1996 U.S. Dist. Lexis 13016, at *14 (S.D.N.Y. Sept. 6, 1996)
C. Kendrick v. Sullivan, No. 83-3175, 1992 U.S. Dist. Lexis 6715 (D.D.C. May 15, 1992)
D. Proposed Order

Public Version
FTC Docket No. 9310

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION
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In the Matter of	)	
ASPEN TECHNOLOGY, INC.,	)	Docket No. 9310
Respondent.	)	

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO COMPEL ADMISSIONS

ATTACHMENT A

LEXSEE 1977 FTC LEXIS 293

In the Matter of GENERAL MOTORS CORPORATION, a corporation.

DOCKET No. 9077

Federal Trade Commission

1977 FTC LEXIS 293

MEMORANDUM AND ORDER RESPECTING COMPLAINT COUNSEL'S REQUESTS FOR ADMISSIONS

January 28, 1977

ALJ: [*1]

Morton Needelman, Administrative Law Judge

ORDER:

I. Introduction

On November 19, 1976, complaint counsel filed over 1,000 requests for admissions directed at respondent GM. GM's answers were filed on December 20, 1976. On January 7, 1977, complaint counsel moved that I determine the sufficiency of GM's responses to 347 of these requests for admissions. Some of GM's responses are in the form of objections to certain requests and complaint counsel have generally moved that these objections be overruled. In other instances, complaint counsel allege that GM has not conducted reasonable inquiry, or that GM has improperly refused to either admit or deny. In still other instances, complaint counsel say that the answers are either unresponsive, inconsistent with other statements made by or on behalf of respondent, based upon improper qualifications, or use terminology which is not clearly defined. Complaint counsel move that new answers be required to correct these alleged deficiencies. GM has opposed complaint counsel's motions on the grounds that its objections are well taken and its responses are all that it is required under the Commission's Rules. *

* See, "Response of Respondent General Motors Corporation To Complaint Counsel's Motion To Determine The Sufficiency Of 'Response of Respondent General Motors Corporation To Complaint Counsel's Substitute Request For Admissions'" [hereinafter "Response"]. [*2]

In ruling on complaint counsel's motion, I have taken up each requested admission which is cited in complaint counsel's motion although in some instances they have been grouped below according to certain common objections or answers. Where I have overruled GM's objection or determined that the answer is insufficient or defective as a matter of law under 3.31 of the Rules, a new answer, consistent with the principles discussed below, must be filed no later than February 28, 1977, or I will deem the request admitted. Wherever such a new answer is required, I will include the notation "File New Answer". In those instances in which I believe that proper objections have been made by respondent, or that the answer satisfies the requirements of Section 3.31, I will include the notation "Motion Denied", thereby indicating that complaint counsel's motion to overrule the objection or to require a new answer has been denied.

Before turning ot the specific answers which have been questioned by complaint counsel, it may be useful to outline certain principles with respect to requests for admissions which I have followed. These guidelines are derived

generally from the application of Rule [*3] 36 of the Federal Rules of Civil Procedure in such cases as Johnstone v. Cronlund, 25 F.R.D. 42 (D.C. E. Pa. 1960), United States v. Watchmakers of Switzerland Inf. Ctr., 25 F.R.D. 197 (S.D.N.Y. 1959), and Havenfield Corporation v. H & R Block Inc., 67 F.R.D. 93 (W.D. Mo. 1973), as well as the authoritative discussion of Rule 36 at 4A Moore's Federal Practice PP36.01-36.06, and Wright and Miller, Federal Practice and Procedure: Civil § § 2251-2264. I have used these sources since the Commission itself has had little occasion to rule on the proper procedure to be followed in administering Section 3.31 of the Commission's Rules.

As I read the authorities cited above with respect to Federal Rule 36 practice, the following considerations apply in ruling on objections to admissions and the sufficiency of the answers to requests to admit:

The purpose of Federal Rule 36 (and presumably of Commission Rule 3.31) is to expedite the trial and to relieve the parties of the costs of proving facts that will not be disputed at the trial, and the truth of which can be easily ascertained by reasonable inquiry. Since the crucial consideration is whether or not the answering [*4] party seriously intends to dispute the fact, the proper procedure is for the answering party to admit even if it lacks direct personal knowledge, but does not intend to place that particular fact in issue. By the same token, objections on the basis of relevance should not be pressed if the fact is relevant (under a broad interpretation of relevance) to the subject matter in dispute or as background, and can readily be ascertained or is not really contested. By admitting to a fact, a party does not waive later argument that under applicable substantive law the admitted fact is of limited or no relevance. Furthermore on the subject of relevance, it should be understood that my rulings below that a matter is relevant for purposes of requiring answers to requests to admit does not preclude later argument that a particular fact should not be considered in determining ultimate substantive issues.

A party is not required to admit a fact simply because the other side has evidence on the subject. Since the consequence of an admission is to remove the fact from the case and not allow any evidence in rebuttal, a party may properly deny if it, in good faith, wants to place the fact [*5] in issue by, for example, introducing countervailing evidence.

The request to admit should be phrased in clear and simple language so that it can be admitted or denied or the answering party can give a detailed explanation as to why it cannot admit or deny.

By its terms, Section 3.31 does not allow the answering party to answer on the basis of lack of knowledge - ... unless he states that he has made reasonable inquiry and that the information known to, or readily attainable by, him in insufficient to enable him to admit or deny.

Practice under Rule 36 does not anticipate a minihearing into the adequacy of the investigation conducted by the answering party. If the answer on the basis of lack of knowledge is in proper form, it must be accepted; the answering party, however, runs the risks of invoking the sanction -- costs -- if it later becomes apparent during the trial that the information was readily available. (Since Commission Rule 3.31 does not provide for assessment of costs, it appears that the usefulness of admissions is questionable at best, and largely turns on the willingness of parties to remove certain facts from the case because it is in their own self-interest [*6] to avoid time-consuming and expensive trial time.)

A request to admit is closed-ended in the sense that the request formulates and limits the possible answers to it. Thus the answering party may not reply to a request to admit by stating its position in an ambiguous or equivocal manner which evades the central point of the requested admission.

Under either Federal Rule 36 or Commission Rule 3.31, the answering party may not respond simply by stating a qualification if it intends to admit the essential truth of the basic proposition stated in the request. Thus, Section 3.31(b) says,

A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much as it is true and qualify or deny the remainder.

In other words, the answer must go to the essential truth of the proposition stated, and any reservations due to slight inaccuracies or for any other reason should be so stated as qualifications to a general admission.

It is not a proper answer to a request to say that the fact involved only tells part of the story. [*7] This could be said about any fact, and the very purpose of the trial is to develop context and surrounding circumstances. Requests are only objectionable as "half-truths" if such "half-truths" would lead inevitably to a conclusion which is different from the whole truth.

One final point. At the last prehearing conference in this matter on October 29, 1976, I ordered substantial deletions in complaint counsel's initial request for admissions. These deletions limited both the subject matter and the time frame for the requests which are now before me. I did this in anticipation that both the letter and spirit or Section 3.31 would be followed in answering the requests and that every effort would be made to remove uncontested facts from this case. In filing the new answers required by my rulings below, respondent is directed to keep in mind this and the other points discussed above.

II. Rulings on Specific Requests

Request 10: All service GM fenders that are produced by independent manufacturers for GM are produced from tooling owned by GM.

Answer: Denied on the basis of Step-Vans.

Ruling: The use of the apparently minor qualification respecting "Step-Vans" is not a [*8] proper answer to a request to admit the essential truth of the general proposition stated. FILE NEW ANSWER

The same ruling applies to the following requests and answers:

11	221	310	473	678
52	262	346	551	682
53	263	347	552	683
94	299	388	556	684
95	300	389	557	688
136	304	430	558	720
137	305	431	562	721
220	306	472	677	

Request 13: GM cannot name the independent manufacturers who produce service GM fenders for sale to firms other than GM.

Answer: Objected to as irrelevant and improper.

Ruling: Whether or not GM can name independent manufacturers and distributors of service GM crash parts is relevant since it is evidence relating to the existence of competition in the alleged relevant market which GM is said to have monopolized. Complaint counsel may fairly request that GM admit or deny the truth of the statement respecting the collective knowledge of respondent's officials. FILE NEW ANSWER

The same ruling applies to the following requests and answers:

14	139	266	391	476
55	140	307	392	559
56	223	308	433	560
97	224	349	434	685
98	265	350	475	686

Request 15: Of the various service GM fenders listed [*9] by their part numbers in 1976 GM parts catalogs, independent manufacturers, to the best of GM's knowledge, produce equivalents for sale to firms other than GM of [15b, c are separate requests]

b. 50% or more of these listed part numbers

c. under 10% of these listed part numbers

Answer: Reasonable inquiry has been made and information known to or readily obtainable by Respondent is insufficient to enable Respondent to admit or deny.

Ruling: I have no basis at this time for questioning the adequacy of GM's efforts to determine the truth of the statement, and in the absence of a showing that the effort was patently inadequate no additional answer is required. MOTION DENIED

The same ruling applies to the following requests and answers:

28a	154b	322a	448b	616c
28b	154c	322b	448c	616d
28c	154d	322c	448d	658a

28d	196a	322d	477b	658b
57b	196b	351b	477c	658c
57c	196c	351c	490a	658d
70a	196d	364a	490b	700a
70b	225b	364b	490c	700b
70c	225c	364c	490d	700c
70d	238a	364d	532a	700d
99b	238b	393b	532b	731a
99c	238c	393c	532c	731b
112a	238d	406a	532d	731c
112b	267b	406b	574a	731d
112c	267c	406c	574b	898
112d	280a	406d	574c	918
141b	280b	435b	574d	
141c	280c	435c	616a	
154a	280d	448a	616b	

[*10]

Request 20: GM distributes the service GM fenders that are funnelled through GM for resale.

Answer: GM sells all such products produced by or for it other than those that are scrapped.

Ruling: The request contains the imprecise word "distributes" and the use by GM of a more precise term in its answer is not objectionable. MOTION DENIED

The same ruling applies to the following requests and answers:

62	230	398	566	723
104	272	440	608	
146	314	482	650	
188	356	524	692	

Request 35: GM refuses to sell service GM fenders to IBSs.

Answer: Other than sales by retail outlets, GM does not sell such products to IBSs.

Ruling: This request goes to the question of whether GM refuses to sell certain products and the essential point of that request may not be evaded by responding to a question which was not asked. FILE NEW ANSWER

The same ruling applies to the following requests and answers:

36	203	330	497	624
77	204	371	498	665
78	245	372	539	666
119	246	413	540	707
120	287	414	581	738
161	288	455	582	739
162	329	456	623	

Request 39: Generally speaking, the dealer prices of service GM fenders sold by GM during model [*11] year 1976 were equal to GM's suggested list prices for such parts less 40%.

Answer: Denied.

Ruling: The fact that complaint counsel believes it has evidence in the form of documents, admissions or otherwise to prove this point does not mean that GM is foreclosed from putting it in issue by use of denial. MOTION DENIED

The same ruling applies to the following requests and answers:

21	207	375	543	670
40	208	376	544	671
41	209	377	545	672
42	210	378	546	689
63	231	399	563	690

81	249	417	564	693
82	250	418	567	708
83	251	419	585	711
84	252	420	586	712
105	273	441	587	713
123	291	459	588	714
124	292	460	605	724
125	293	461	606	742
126	294	462	609	743
147	311	483	627	744
165	312	501	628	745
166	315	502	629	781
167	333	503	630	785 *
168	334	504	647	786
185	335	521	648	870
186	336	522	651	
189	357	525	669	

* Original answer was withdrawn and respondent filed a denial in its response to complaint counsel's motion. (See "Response", p. 22).

Request 755: The dealers to whom GM admits (in Paragraph 11 of its "Answer") "that it sells, and has sold, service GM crash parts, as defined in [*12] the complaint, exclusively" and "who are located through-out the United States" are all GM franchise dealers.

Answer: To clarify the record, Respondent's admission as to these statements in paragraphs 11 and 13 of the Complaint was incorrect, as some of the parts included in the definition of "crash parts" are sold or have been sold to others than franchised dealers, and, through its retail outlets, GM also sells "crash parts". There is no such thing as a "GM franchise dealer."

Ruling: Taking the reply as an amendment to respondent's answer to paragraph 11 of the complaint, complaint counsel have submitted the following redraft of the request,
"The dealers to whom GM admits (in paragraph 11, its 'Answer') that it sells and has sold, service GM crash parts, as defined in the complaint' and 'who are located throughout the United States are all GM franchise dealers'."

As redrafted and repropounded, this request is "admitted except that there is no such thing as a 'GM franchise dealer'." * MOTION DENIED

* see GM's "Response", p. 21.

Request 764: As of December 31, 1974, GM, through its Motors Holding Division, had a financial interest in and owned part of each of 379 GM franchise [*13] dealers.

Answer: As of December 31, 1974, GM through its Motors Holding Division had a temporary financial interest in 379 U.S. dealerships.

Ruling: This is a proper qualification since respondent admits the essential truth of the proposition stated and fairly qualifies the admission by use of the term "temporary". MOTION DENIED

The same ruling applies to the following requests and answers:

765b, 766b

Request 768: Those of the 23 GM dealer locations alluded to in Request 763 that conducted body shop operations during 1974 in doing so competed with at least one IBS.

Answer: GM is unable to respond to this request without an extensive field investigation.

Ruling: This is an improper answer since GM has not indicated whether it has conducted a reasonable inquiry, and that the information known or readily obtainable is insufficient to enable respondent to admit or deny. FILE NEW ANSWER

The same ruling applies to the following requests and answers:

770, 770A, 772

Request 802: The GM dealer locations which GM owns entirely and operates through the sales departments of its vehicle divisions are eligible for wholesale compensation when such locations wholesale eligible service [*14] GM crash parts to qualified purchasers.

Answer: Objected to as incomprehensible.

Ruling: This request, which goes to the question of participation by GM-owned outlets in the wholesale compensation program, is sufficiently clear on its face. FILE NEW ANSWER

Request 804: The essentials of GM's current program, governing the grant of wholesale compensation to its franchise dealers in connection with such dealers' sales of service GM crash parts, have been in effect, except for the rate of wholesale compensation, since November 1, 1968.

Answer: GM is unable to respond to this statement without a definition of "essentials".

Ruling: This request is sufficiently clear on its face and should be answered. FILE NEW ANSWER

Request 808: GM has employed various persons to audit the claims of GM franchise dealers for wholesale compensation on sales of service GM crash parts - the number of such persons so employed, as of July 1, 1976 was [808 a, b, c and d are separate Requests]
a. under three
b. under five
c. under ten
d. under fifteen.

Answer: Objected to as irrelevant and confidential.

Ruling: The operation of the wholesale compensation plan is relevant to the charge [*15] that respondent has a monopoly in the distribution of service GM crash parts and has engaged in unfair methods of competition and unfair acts or practices. If the answer involves confidential information, it may be placed in the in camera file. FILE NEW ANSWER

The same ruling applies to the following requests and answers:

810, 811

Request 825: Figures in the Ward's publications to which GM subscribes are accurate reflections of [825 a, b are separate Requests]
a. the automobile sales information GM supplies to Ward's
b. the automobile production information GM supplies to Ward's

Answer: GM does not verify the accuracy of Ward's publications.

Ruling: This answer is rejected as improper. GM was not asked to verify the accuracy of Ward's publications, but whether Ward's accurately publishes the information which GM itself supplies to Ward's. FILE NEW ANSWER

Request 834: In connection with advance planning, GM has utilized figures [834 a, b, c, d, e and f are separate Requests]
a. reflecting annual sales of automobiles as published by Ward's
b. reflecting annual production of automobiles as published by Ward's
c. reflecting annual sales of light trucks as published [*16] by Ward's
d. reflecting annual production of light trucks as published by Ward's
e. reflecting annual registrations of automobiles as published by R.L. Polk Company
f. reflecting annual registrations of light trucks as published by R.L. Polk Company.

Answer: Objected to as irrelevant.

Ruling: Industry figures are cited in the complaint and are relevant to the proliferation issue and as the general industry background for the complaint allegations. Use by GM of these figures reflects on the accuracy of these data. FILE NEW ANSWER

Request 862: Service GM crash parts are part of the exterior protective cover of GM automobiles and light trucks.

Answer: Some service GM crash parts are part of the exterior of GM automobiles and light trucks.

Ruling: This is an adequate answer to an obvious point. MOTION DENIED

Request 865: Disregarding part numbers that are "carried over", viz. used as original equipment in automobiles and/or light trucks during successive model years, GM typically sells more units of a particular GM part number designating a service GM crash part [865 a, b and c are separate Requests]
a. during the second model year GM sells the part than during any [*17] other model year GM sells the part
b. during the third model year GM sells the part than during any other model year GM sells the part
c. during the fourth model year GM sells the part than during any other model year GM sells the part.

Answer: GM cannot admit or deny these statements. This would require an analysis of the history of the sales of each of the individual parts to determine whether they "typically" follow the same specific sales pattern.

Ruling: This response is improper since it does not indicate that reasonable inquiry has been made and that the information known to or readily obtainable by respondent is insufficient to enable GM to admit or deny. FILE NEW ANSWER

The same ruling applies to the request and answer 866.

Request 871: GM's Fisher Body Division manufactures the following products [871 a, b, c, d, e, f, g, h and i are separate Requests]:
a. service GM doors
b. service GM deck lids
c. service GM quarter panels
d. service GM wheel opening panels
e. service GM tail gates
f. service GM rear end panels
g. service GM exterior mouldings
h. service GM rocker panels
i. service GM attaching parts.

Answer: Objected to as irrelevant. [*18]

Ruling: This request which relates to the current or recent manufacture of crash parts by GM (in contrast to past history of acquisitions and increase of productive capacity) is relevant since manufacturing practice, including the contracting out of manufacturing, is relevant as background and bears on the subject of the complaint, namely that GM has a monopoly in the distribution of service GM crash parts and has engaged in unfair methods of competition and unfair acts or practices.

The same ruling applies to the following requests and answers:

872, 873, 874, 875, 876, 888, 889, 890, 910, 911, 912, 913

Request 877: Much of GM's capacity to produce service GM crash parts that existed as of October 31, 1976, had been acquired or developed as of January 1, 1969.

Answer: Objected to as irrelevant and beyond the Administrative Law Judge's guidelines.

Ruling: This request is an indirect attempt to obtain information respecting the growth of GM's manufacturing capability, an area which I have removed from the case for the purpose of limiting admissions and compulsory discovery. Whether testimony or documents will be allowed in this area, is an issue I do not have to [*19] decide at this time. MOTION DENIED

Request 878: From at least November 1, 1968 until at least November 1, 1976, there have been no instances in which GM has purchased service GM crash parts from independent manufacturers which manufacturers have owned all of the tooling used to produce such parts.

Answer and Ruling: GM's original answer was "GM cannot admit or deny this statement as it does not know who owns all the tooling except in situations where it owns all the tooling." This was changed to "admitted, except for Step-Vans". * This new response is a properly qualified admission. MOTION DENIED

* See GM "Response", p. 27.

Request 885: GM believes that at least 50% of the wholesale compensation it pays annually is on dealer sales of service GM crash parts which are eligible for wholesale compensation.

Answer: Objected to as irrelevant and ambiguous.

Ruling: GM's payments under the wholesale compensation plan are relevant to allegations in the complaint that respondent has a monopoly in the distribution of service GM crash parts and has engaged in unfair methods of competition and unfair acts or practices. The request is sufficiently clear on its face for respondent [*20] to frame an answer. FILE NEW ANSWER

Request 887: GM refuses to grant Chevrolet dealers wholesale compensation on service GM crash parts that are not applicable to Chevrolet automobiles.

Answer: See Attachment A

Ruling: Attachment A is neither an admission nor a denial of the essential truth of the facts stated in the request. FILE NEW ANSWER

Request 891: GM's Fisher Body Division manufactures some service GM rear end bezels for GM automobiles.

Answer: Objected to as irrelevant.

Ruling: This request is directed at a part which is beyond the guidelines previously established by the Administrative Law Judge for admissions. MOTION DENIED

Request 896: During 1975, more of the at least 13,155 separate part numbers alluded to in Request 895 for which there was manufacturing activity during 1975 were manufactured by GM rather than by independent manufacturers for GM.

Answer: Without making a detailed review of the sources for all of these part numbers, it is impossible to respond to these statements. Furthermore, GM objects to these statements as they constitute an improper use of requests for admissions.

Ruling: This is an improper answer since respondent has not indicated [*21] that reasonable inquiry has been made and that information known to or readily obtainable by respondent is insufficient to enable GM to admit or deny. FILE NEW ANSWER

The same ruling applies to the following requests and answers:

897, 899

Request 900: GM anticipated that the initiation on November 1, 1968 of wholesale compensation payments on specified service GM crash parts as well as on service GM top panels and rear compartment panels would lead to fraudulent claims by GM franchise dealers for wholesale compensation on non-qualified sales.

Answer: Objected to as irrelevant and beyond the time period for discovery of GM as stated by the Administrative Law Judge.

Ruling: This request is relevant to complaint allegation that respondent has a monopoly in the distribution of service GM crash parts and has engaged in unfair methods of competition and unfair acts or practices which result in the effects charged in complaint P17. This request is not beyond the time limitations previously imposed since respondent may answer by admitting or denying the request as to its beliefs as of November 1, 1968. FILE NEW ANSWER

Request 901: GM believed that the initiation on November 1, [*22] 1968 of wholesale compensation payments on specified service GM crash parts as well as on service GM top panels and rear compartment panels would not achieve equality of prices between GM franchise dealers and IBSs.

Answer: Objected to as irrelevant and beyond the time period for discovery of GM as stated by the Administrative Law Judge.

Ruling: This request is relevant to complaint allegations that respondent has a monopoly in the distribution of service GM crash parts and has engaged in unfair methods of competition and unfair acts or practices which result in the effects charged in complaint P17. This request is not beyond the time limitations previously imposed since respondent may answer by admitting or denying as to its beliefs as of November 1, 1968. FILE NEW ANSWER

Request 906: During November 1, 1968 until November 1, 1976, GM has on occasion increased the prices that it charges its dealers for service GM crash parts that are eligible for wholesale compensation in order inter alia to make, at least in part, due allowance for increases in cost to GM of payments of wholesale compensation to such dealers on such parts.

Answer: During November 1, 1968, until November [*23] 1, 1976, GM has on occasion increased the prices that it charges its dealers for "service GM crash parts" that are eligible for wholesale compensation.

Ruling: This is an inadequate answer since it neither admits nor denies an essential part of the request. FILE NEW ANSWER

Request 907: During 1975, between 30% and 40% of the shipments of service GM crash parts were made on an emergency basis.

Answer: GM is unable to admit or deny this statement.

Ruling: GM has not explained in adequate detail why it can neither admit nor deny as required by the Rules. FILE NEW ANSWER

The same ruling applies to the request and answer 908.

Request 914: Prior to the introduction of any new service GM crash parts, GM encourages its dealers to order approximately a three-months' supply of such parts relative to their needs.

Answer: Objected to as irrelevant and beyond the Administrative Law Judge's guidelines.

Ruling: GM's practices with respect to the ordering and stocking of crash parts are relevant to the charge that GM has a monopoly in the distribution of service GM crash parts and has engaged in unfair methods of competition and unfair acts or practices. FILE NEW ANSWER

The same [*24] ruling applies to the following requests and answers:
915, 916, 917

Request 920: For some years, GM has generally made substantial and costly engineering and styling changes every two or three years with lesser changes in the intervening years.

Answer: Objected to as ambiguous.

Ruling: The use of such imprecise language as "substantial and costly" is improper in a request for admissions. MOTION DENIED

Request 922: GM's dies, tools and fixtures used to produce crash parts are generally written off within approximately one or two years of the introduction date of the model vehicle that the parts fit.

Answer: Objected to as irrelevant.

Ruling: Facts relating to the current practice of writing off tooling are relevant to the "proliferation" cited in Complaint P15 as well as the charge that GM has a monopoly in the distribution of service GM crash parts and has engaged in unfair methods of competition and unfair acts or practices.

Request 923: GM has reason to believe that a wholesaling GM dealer who consistently purchases parts at 30% lower prices than competitors has a significant competitive advantage over such competitors, all other things being equal, when competing with [*25] them in wholesaling said parts.

Answer: Objected to as irrelevant and ambiguous.

Ruling: The use of such an imprecise phrase as "significant competitive advantage" is improper in a request for admissions. MOTION DENIED

The same ruling applies to request and answer 923B.

Request 923A: In wholesaling eligible service GM crash parts to qualified purchasers, Chevrolet dealers can obtain 30% lower prices on such parts that are uniquely applicable to Chevrolet automobiles than can GM franchise dealers who are not Chevrolet dealers.

Answer: Objected to as irrelevant and ambiguous.

Ruling: Compensation paid to GM dealers is relevant to the charge that GM has a monopoly in the distribution of service GM crash parts and has engaged in unfair methods of competition and unfair acts or practices. The language of the request is sufficiently clear for GM to make a responsive answer. FILE NEW ANSWER

Request 926: GM management has at all times recognized the importance of dealer stability and has striven earnestly to do those things that will build up and strengthen the economic position and effectiveness of this most important instrumentality upon which it must depend for the distribution [*26] of most of its products to the individual purchaser.

Answer: Objected to as irrelevant and ambiguous.

Ruling: This entire request is rife with imprecise language which is improper in a request to admit. MOTION DENIED

III. Confidential Requests and Answers

Request 991: Whether respondent makes use of these figures is besides the point and GM must file a proper response. FILE NEW ANSWER

Requests 992, 993, 994, 995: Evasive answers were filed to all of these requests since respondent was not asked to admit the "sum" of the figures in other requests, but rather to admit to the truth of specific figures appeared in each of these requests. FILE NEW ANSWER

Request 996: GM's current practices with respect to manufacturer of crash parts is relevant as background and bears on the subject of the complaint, namely that respondent has a monopoly in the distribution of service GM crash parts and has engaged in unfair methods of competition and unfair acts or practices. The response "burdensome" is an improper reply to a relevant request to admit. FILE NEW ANSWER

Request 999: GM's recent experience with the production or purchase of crash parts for the replacement market is relevant [*27] as background and bears on the subject of the complaint, namely that respondent has a monopoly in the distribution of service GM crash parts and has engaged in unfair methods of competition and unfair acts or practices. The response "burdensome" is an improper reply to a relevant request to admit. FILE NEW ANSWER

Requests 1000, 1001: The amount of wholesale compensation paid to GM dealers is relevant to the charge that respondent has a monopoly in the distributin of service GM crash parts and has engaged in unfair methods of competition and unfair acts or practices which result in the effects charged in Complaint P17. FILE NEW ANSWER

Public Version
FTC Docket No. 9310

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO COMPEL ADMISSIONS

ATTACHMENT B

LEXSEE 1996 US DIST LEXIS 13016

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, -against- HUGH THRASHER et al., Defendants.

92 Civ. 6987 (JFK)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1996 U.S. Dist. LEXIS 13016

September 5, 1996, Decided
September 6, 1996, FILED

DISPOSITION: [*1] Defendant Hirsh's application to compel the plaintiff to serve supplemental responses to his requests to admit granted.

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL: For SECURITIES AND EXCHANGE COMMISSION, plaintiff: Richard H. Walker, Securities and Exchange Commission, NY, NY.

For HUGH THRASHER, defendant: John B. Harris, Stillman, Friedman & Shaw, New York, NY.

For GUILLERMO GOMEZ aka William Gomez, defendant: Barry Levin, Barry Levin, Esq., Los Angeles, CA.

For JONATHAN S. HIRSH, defendant: Lawrence H. Nagler, Lawrence H. Nagler and Associates, Beverly Hills, CA. Lawrence H. Nagler, Nagler and Associates, Beverly Hills, CA.

For ROGER K. ODWAK, defendant: Lloyd S. Clareman, Lloyd S. Clareman, New York, NY.

For DAVID SCHAEN, defendant: Gary E. Eisenberg, Herzfeld & Rubin, P.C., New York, NY. Gary E. Eisenberg, Gary E. Eisenberg, Monroe, NY. Jerry D. Sparks, Jerry D. Sparks, Chicago, Il.

For LEONARD SHAEN, defendant: Louis Joseph Posner, Louis J. Posner, New York, NY.

MARK R. SHAWZIN, defendant, [PRO SE], Los Angeles, CA, USA. For MARK R. SHAWZIN, defendant: Todd J. Cleary, Esq., Todd J. Cleary, Esq., Law Offices, Santa Monica, CA.

For EZRA CHAMMAH, defendant: Martin Perschetz, [*2] Schulte Roth & Zabel, New York, NY.

For STEPHEN V.R. GOODHUE, JR., defendant: Thomas E. Engel, Engel & McCarney, New York, NY.

For DARRELL SANDY MARSH, defendant: Bobby C. Lawyer, Pettit & Martin, San Francisco, CA.

For JACK P. MARSH, defendant: Dan Kornstein, Kornstein Veisz & Wexler, New York, NY, USA.

For JONATHAN S. HIRSH, cross-claimant: Lawrence H. Nagler, Lawrence H. Nagler & Associates, Beverly Hills, CA.

For ROGER K. ODWAK, cross-defendant: Lloyd S. Clareman, Lloyd S. Clareman, New York, NY.

David Meister, Esq., Assistant United States Attorney, Southern District of New York, New York, New York.

JUDGES: MICHAEL H. DOLINGER, UNITED STATES MAGISTRATE JUDGE. Judge John F. Keenan

OPINIONBY: MICHAEL H. DOLINGER

OPINION:

MEMORANDUM & ORDER

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE:

Defendant Jonathan Hirsh has moved for an order directing the Securities and Exchange Commission to provide responsive answers to 74 requests to admit served by Hirsh. n1 Most of these requests focus on statements allegedly made to staff members of the Commission or to representatives of the United States Attorney by co-defendant Jeffrey Sanker. Hirsh has a strong interest [*3] in these statements because Sanker, who is reportedly cooperating with the Commission in this case by virtue of a plea agreement in a parallel criminal prosecution, is said to have tipped Hirsh about the Motel 6 transaction that triggered this lawsuit. Thus, Sanker is apparently the key witness against Hirsh in this case.

n1 Defendant's motion papers are not clear as to precisely which requests are still in dispute. At the request of the court, Hirsh's counsel has supplied a list of those requests concerning which defendant seeks relief. (Aug. 13, 1996 letter to the Court from Robert M. Zabb, Esq.)

The Pertinent Facts

Our assessment of the disputes being litigated requires a brief review of some background facts. Sanker was charged on September 24, 1992 with criminal violations of the securities laws in connection with insider trading in Motel 6 stock. As part of his plea bargain with the Government, he agreed to cooperate with the United States Attorney's Office ("USAO") and any other "law enforcement [*4] agency" in their investigations of the Motel 6 transactions, and he agreed as well to negotiate a settlement of the Commission's claims against him in this case. (See Affidavit of Robert M. Zabb, sworn to June 28, 1996, at Exh. P). Given this agreement, he was sentenced to probation, which represented a significant departure down from the otherwise applicable sentencing guideline range. (See Zabb Affidavit, at Exh. P). At the same time the sentencing court required him to comply with his plea agreement, including specifically the requirement that he cooperate with federal law-enforcement authorities. Sanker has been cooperating with the Commission in this case, and we understand that the Commission intends to call him as a witness to testify, inter alia, that he tipped Hirsh and that Hirsh then invested in Motel 6 stock and agreed to share his profits with Sanker.

In May 1993, the District Court in this case directed the Commission to prepare and provide to Hirsh an affidavit specifying what Sanker had told the Commission staff when he met with them in September 1992. n2 See *Securities and Exchange Comm'n v. Thrasher, 1995 U.S. Dist. LEXIS 13431, 1995 WL 456402,* at *14 (S.D.N.Y. Aug. 2, 1995). [*5] In granting this somewhat unusual relief, the Court apparently relied on a representation by the Commission that it had no documents reflecting the substance of Sanker's statements to its staff.

n2 The September 1992 meeting was apparently the only occasion on which Sanker discussed the facts of the case with the Commission until January 1996, when he was deposed.

The Commission subsequently moved for reargument, a motion that was not addressed for some time because of an intervening stay of discovery and the need to resolve other pre-trial issues. In 1995 the Court relieved the Commission of the obligation to prepare such an affidavit, apparently because the Commission reported to the Court that it had in fact located notes of the staff members' discussion with Sanker. See id. The Commission later produced those notes, as well as a draft of the affidavit that it had prepared in anticipation of the need to comply with the May 1993 order of the District Court. In addition, pursuant to court order, the Commission [*6] produced to defendant a set of USAO notes reflecting statements made by Sanker during a meeting with representatives of the United States Attorney in August 1992.

Finally, in January 1996 Sanker appeared for his deposition. During the course of the deposition Hirsh's counsel questioned him about his dealings with Hirsh and about his prior statements to the United States Attorney's Office and the Commission. Hirsh now asserts that Sanker's testimony during his deposition was inconsistent in a number of respects with what he had apparently told the prosecutors and the Commission staff in 1992.

To solidify his case for undermining Sanker's credibility at trial, Hirsh has propounded a long list of requests to admit for the Commission. Most of the disputed requests seek admissions either (a) that Sanker made certain statements to the Commission in September 1992, (b) that Sanker made certain statements to the United States Attorney's Office in August 1992, (c) that he did not say certain things to the Commission and to the USAO in 1992, (d) that the notes of the Commission interview and the notes concerning the prosecutors'

meeting with Sanker show that Sanker said certain things or failed [*7] to say certain things at those meetings, and (e) that, as far as the Commission knows, Sanker had never said certain things to anyone prior to January 1996, when he was deposed. Several other requests seek admissions as to events that may have occurred in connection with the preparation of the Pre-Sentence Report concerning Sanker or at his sentencing, and a few seek to elicit admissions as to Sanker's obligations under his plea agreement and under the sentence imposed by Judge Carter.

In response to many of the requests concerning what was said between Sanker and the Commission staff in September 1992, the Commission responded that it lacked sufficient information to admit or deny because all of the staff members who had participated in the 1992 meeting have left the Commission. As for queries regarding the meeting between Sanker and the USAO, the Commission made the same response, based on its representation that no SEC staffer had attended the meeting. As for requests directed to the contents of the SEC notes and the prosecutors' notes of the two meetings with Sanker, the Commission objected, at least in part, on the ground that the documents in question "speak for themselves." [*8] Concerning some of the requests directed to whether, as far as the Commission knew, Sanker had ever made certain statements to anyone prior to January 1996, the Commission stated that it lacked sufficient information to admit or deny.

The Commission also resisted responding to requests asking whether it had supplied certain information to the Probation Office for use in preparing the Pre-Sentence Report, and others asking either about events occurring at the sentencing or about the nature of Sanker's obligations under the plea agreement and the sentence. As to the first category, the Commission claimed that it lacked sufficient information to admit or deny, and as to the others it again asserted that the respective documents, including the plea agreement and the relevant transcripts, spoke for themselves.

ANALYSIS

Requests to admit serve as a device to narrow issues for trial. See, e.g., *Donovan v. Carls Drug Co., 703 F.2d 650, 652 (2d Cir. 1983); Beberaggi v. New York City Transit Auth., 1994 U.S. Dist. LEXIS 384, 1994 WL 18556,* at *3 (S.D.N.Y. Jan. 19, 1994). To that end the party on whom such requests are served is obliged to make reasonable efforts to ascertain the accuracy of the proposed [*9] admissions before responding, even if he lacks personal knowledge of the facts. Nonetheless, the requested party may respond by denying sufficient knowledge, provided that he represents that he has made such reasonable efforts to determine the facts. Fed. R. Civ. P. 36(a). See, e.g., *Beberaggi, 1994 U.S. Dist. LEXIS 384, 1994 WL 18556,* at *5 (citing *Asea, Inc. v. Southern Pac. Transp. Co., 669 F.2d 1242 1245-47 (9th Cir. 1981)).*

When imposing an obligation on the responding party to seek out information in order to answer a request, the courts have generally acted only in circumstances in which the responding party has the means independently to ascertain the truth. Thus, if the information is held by the responding party or by an individual or entity with which the responding party maintains a relationship that enables it readily to procure the required information, then that party may be expected to seek out the information and respond substantively to the request for an admission. See, e.g., *Caruso v. The Coleman Co., 1995 U.S. Dist. LEXIS 6638,* *3, *1995 WL 347003,* at *5 (E.D. Pa. 1995) (defendant to make admissions based on knowledge of own employee); *Sequa Corp. v. Gelmin, 1994 WL 538124,* at *5 (S.D.N.Y. 1994) (same); [*10] *In re Gulf Oil/Cities Service Tender Offer Litig., 1990 U.S. Dist. LEXIS 5009,* at *7-8 (S.D.N.Y. 1990) (citing cases) (information held by another litigant with parallel interests and with which defendants were closely cooperating). Absent such a reasonably reliable source, a substantive response may not be required. See, e.g., *Dubin v. E.F. Hutton Group, Inc., 125 F.R.D. 372, 374 (S.D.N.Y. 1989)* (declining to require admissions based on possible interview of potentially unreliable former employee); n3 *Kendrick v. Sullivan, 1992 U.S. Dist. LEXIS 6715, 1992 WL 119125,* at *3-4 (D.D.C. 1992) (admissions not required based on deposition testimony of hostile witnesses).

n3 The court in Dubin referred to the absence of a deposition of the former employee. Nonetheless, the concern of the court plainly was with the possible lack of reliability of the information source. See *In re Gulf Oil, 1990 U.S. Dist. LEXIS 5009* at *13-14.

Bearing these general standards in mind, I address seriatim the series of disputes ventilated by the parties on this motion. [*11]

1. What Sanker Told the SEC

The Commission apparently interviewed Sanker only once, on September 1, 1992. Hirsh represents without contradiction that three Commission staffers were present at this meeting. Following the meeting someone present on behalf of the Commission prepared a three-page summary of what Sanker had told the Commission during the conversation. For reasons that are unclear, in 1993 the Commission's counsel advised

the District Court that it had no document reflecting what had been said at the meeting, and the Court, by order dated May 3, 1993, directed the Commission to prepare an affidavit by one of the staff members attesting to what had been said. Although the Commission moved for reargument, it also had one of those staffers -- Janet Broeckel, Esq. -- prepare a draft of such an affidavit.

Since that time, we are advised by the Commission, all personnel who attended the meeting have left the employ of the Commission. n4 On that basis the Commission argues that it has no reasonable means of admitting or denying Hirsh's requests to admit that Sanker said certain things during the meeting and did not say certain other things. In the specific circumstances [*12] of this case, that assertion is unconvincing.

> n4 The Commission makes a number of representations in its memorandum of law. None of any consequence are made by affidavit or other document that the court can deem the functional equivalent of an affidavit.

First, Hirsh represents, without contradiction by the Commission, that the Commission's counsel conceded to defendant's attorney that the written summary of the conversation accurately reflected what Sanker had said. According to Hirsh, again without contradiction, the Commission offered to so stipulate, but only on condition that defendant waive the right to depose the former staffers about the creation of the document, an offer rejected by defendant. (See Zabb Affidavit, at P 11).

Second, it appears that the Commission has consulted with the three former staffers in dealing with pre-trial issues. Indeed, in its response to the current motion the Commission alludes to its understanding as to their recollection, or lack of it, concerning the details of [*13] their meeting with Sanker (see Plaintiff's Memorandum of Law in Opposition to Defendant Jonathan Hirsh's Motion to Compel, dated July 19, 1996, at 5), a representation that was presumably based on counsel speaking with those three individuals. Thus, it is apparent that they are available for consultation on these matters by their former employer, and the Commission offers no reason to mistrust the reliability of their version of what occurred -- indeed, it was apparently prepared to rely on Ms. Broeckel's account if the District Court had not rescinded its May 3, 1993 order.

Third, the Commission does not establish that it ever attempted to obtain the information required to respond to Hirsh's requests by consulting these three individuals, despite their apparent availability. Moreover, to the extent that the Commission suggests in its memorandum of law that they do not remember details of the discussion with Sanker, it does not demonstrate that it posed specific questions to them which were designed to elicit responses to the specific requests posed by defendant, nor does it indicate that it gave them a copy of the written summary of the discussion to refresh their recollections. [*14]

Fourth, the Commission does not indicate when each of these individuals left its employ, but it is reasonable to infer that one, two or perhaps all three left sometime after the May 3, 1993 court order to produce an affidavit. As noted, the May 3 order resulted from the Commission's misstatement that it did not have documentation of Sanker's statements. Had that error not been committed, the notes would presumably have been provided more promptly to Hirsh, and he might then have been in a position to complete his discovery much earlier, with the result that he could have posed his requests to admit at a time when one or more of the staff members were still on the Commission's payroll.

Under these circumstances, I conclude that the Commission has not justified its response to requests asking for admissions as to whether Sanker made certain statements during his interview with the Commission. The participants in that meeting are apparently available to the Commission, they are cooperating with the Commission when called upon to do so, they have no known interests that would call into question the reliability of their account, they have not been shown to lack any recollection of the [*15] discussion, and the Commission has a relatively detailed written summary of the conversation, which is apparently conceded to be accurate. It is therefore reasonable to require the Commission to consult with the former staffers, as well as to consult the written summary, in an effort to answer those requests.

In resisting this conclusion, it appears that the Commission relies largely on the assumption that an employer will never be required to consult former employees in order to respond to a request to admit. That is not the law; indeed, in a number of instances the courts have deemed it appropriate to require such a consultation, at least when the former employee was readily available and not of questionable reliability. See, e.g., *Brown v. Arlen Mgt. Corp., 663 F.2d 575, 580 (5th Cir. 1981); Leland v. Prime Motors Inns, Inc., 1990 U.S. Dist. LEXIS 11546, 1990 WL 128637,* at *2-3 (D. Conn. July 30, 1990). These rulings are consistent with the generally recognized principle that reasonable efforts are required by Rule 36 and that what constitutes such a reasonable effort is to be decided on a case-by-case basis with due regard for what is practical. See, e.g., *Al-Jundi v. Rockefeller, 91 F.R.D. 590,* [*16] *593 (W.D.N.Y.*

1991) (defendant obliged to consult co-defendants); *In re Gulf Oil/Cities Service Tender Offer Litig., 1990 U.S. Dist. LEXIS 5009,* at *14 (defendant required to consult non-parties aligned in interest with it). Cf. *Morreale v. Willcox & Gibbs DN, Inc., 1991 U.S. Dist. LEXIS 7741, 1991 WL 107441,* at *1 (S.D.N.Y. June 7, 1991) (defendant consulted its former accountant to answer requests, but was not obliged to contact former employees of former accountant). n5

n5 To the extent that *Dubin v. E.F. Hutton Group, Inc., 125 F.R.D. 372 (S.D.N.Y. 1989),* could be read for a contrary proposition, I respectfully disagree with it. I note in any event that after concluding that it was aware of no authority holding that a request for admissions could compel reliance on the statements of a non-party absent sworn testimony by that individual, *id. at 375,* the court in Dubin cited just such an authority. *Id at 376* (citing *Brown, 663 F.2d at 580).*

2. What Sanker Told the United States Attorney

A number of requests ask [*17] for admissions concerning what was said or not said by Sanker during a session in August 1992 with unnamed representatives of the USAO. The Commission has produced some handwritten notes of that meeting, apparently supplied by an investigator or attorney at the USAO. The Commission represents that none of its staffers were present at the meeting, and it asserts that it therefore lacks sufficient information to admit or deny requests that target what was said at the meeting.

This court has previously noted that the USAO and the Commission have cooperated in conducting their respective investigations of the alleged insider trading scheme. See *Securities and Exchange Comm'n v. Thrasher, 1995 U.S. Dist. LEXIS 1355, 1995 WL 46681,* at *15 (S.D.N.Y. Feb. 7, 1995). Despite that cooperation, and some apparent degree of coordination -- which has included the prosecutors supplying information and documents to the Commission for use in this case -- the Commission does not suggest that it attempted to obtain from the USAO the information necessary to respond to the cited requests of the defendant. The Commission also does not indicate whether it sought to use the USAO's notes of the August 1992 meeting when responding [*18] to Hirsh's Rule 36 requests.

Under the circumstances the Commission has not justified its refusal to provide responsive answers to the requests concerning statements made by Sanker at the August 1992 meeting with the prosecutors. Its position appears to rest on the not-fully-articulated premise that it need not attempt to obtain the requested information either from the USAO or from the notes of the meeting, but that implicit position is not sustainable. In view of the alignment of interests between the Commission and the USAO, and the demonstrated cooperation and coordination between them, the Commission cannot be said to face an undue burden in consulting with the prosecutors. It may be the case that they will be unable or unwilling to supply the necessary information, but that is scarcely a foregone conclusion. Moreover, if they can, we see not the slightest basis for questioning the reliability of their representations, since their interests are seemingly directly aligned with those of the Commission. Hence, it cannot be said that the Commission might be bound by unreliable or hostile witnesses to key events.

Similarly, there is no reason for the Commission to refuse to consult [*19] the prosecutors' notes. The Commission does not suggest that these are unreliable, and indeed the Commission used those notes to refresh or test Sanker's recollection in preparation for his deposition, thus evidencing the Commission's reliance on their utility and presumably their accuracy.

3. The Substance of the Commission's and the United States Attorney's Notes

Hirsh has sought admissions as to the contents of the SEC and USAO notes of the two meetings with Sanker. The Commission has objected, albeit not with consistency, on the stated basis that these documents "speak for themselves." Although it may be the case that the Commission has abandoned this objection sub silentio on the current motion -- Hirsh so contends -- we are not certain that this is the case, and therefore briefly address the question.

The noted purpose of requests to admit is not to discover new information, but rather to establish whether the parties are in disagreement as to relevant factual matters. Given that function of the request, it is not improper for a party to request that his adversary admit or contest the requesting party's interpretation of a document. By responding simply that the document [*20] speaks for itself, the Commission evades its obligation to make clear whether it reads the document in the same way as its adversary. Such an approach, if permitted, would frustrate a significant purpose of Rule 36, since it applies to the substance, and not merely the authenticity, of documents. Not surprisingly, therefore, the courts have generally rejected the type of response that the Commission has proffered. See, e.g., *Diederich v. Department of the Army, 132 F.R.D. 614, 616-17 (S.D.N.Y. 1990); Kistler Instrumente, A.G. v. PCB*

Piezotronics, Inc., 1983-1 Trade Cas. (CCH) P65,449, 1983 WL 1838, at *4 (W.D.N.Y. May 6, 1983).

4. Requests As to Whether Sanker Previously Made Statements Consistent With His Testimony

In a series of requests Hirsh asks the Commission to admit that, "to its knowledge", Sanker had never made certain statements to anyone prior to January 1996, when he was deposed. Although perhaps inartfully worded, the requests in effect ask the Commission to admit that it knows of no prior consistent statements by Sanker on specified factual issues. Although the Commission answers a few of these requests (see Plaintiff's Responses to Jonathan Hirsh's First Set of Requests for Admission, [*21] dated March 11, 1996, at PP 73-76, 85-86, 112), it generally invokes the assertion that it lacks sufficient information to admit or deny.

If defendant were simply asking plaintiff to admit that Sanker had never made prior consistent statements, the Commission's response might well be appropriate, since, in the absence of a consistent statement by Sanker to the Commission or the USAO, the plaintiff would have no way of knowing the answer to such an open-ended question. The noted qualification in the requests, however, puts them in a somewhat different light.

As noted in an earlier decision in this case, there is legal authority for the notion that a party responding to a Rule 36 request may by required, in appropriate circumstances, to state whether it has any information to contradict a requested admission. See *Securities and Exchange Commission v. Thrasher, 1996 U.S. Dist. LEXIS 11591, 1996 WL 3014,* at *2 (S.D.N.Y. Aug. 12, 1996 (citing *Kendrick v. Sullivan, 1992 U.S. Dist. LEXIS 6715, 1992 WL 119125,* at *2 (D.D.C. 1992)). In effect, the responding party is not admitting the asserted fact, but simply admitting that it is aware of no evidence to contradict the factual representation of the inquiring party.

In this instance, the [*22] Commission's case against Hirsh turns, in significant measure, on the testimony of a cooperating co-defendant. It is therefore evident that Hirsh's defense will rest heavily on an attack on the credibility of that co-defendant. Accordingly, it is appropriate to require the Commission to respond to the cited requests, since that will at least clarify whether Hirsh will be able to argue plausibly to the trier of fact the absence of prior consistent statements by the co-defendant and whether that argument will be challenged as a factual matter by the plaintiff.

5. Miscellaneous Requests

The remaining requests in dispute concern the sentencing of Sanker and his obligations under the plea agreement and the sentence. Hirsh has asked for admissions as to whether the Commission conveyed certain financial information to the Probation Office for purposes of preparing the Pre-Sentence Report, and the Commission has denied sufficient information to admit or deny. It is unclear from the motion papers whether plaintiff has a valid basis for making this assertion. If the response is based on the assumption of the Commission that it was not obliged to consult its available and cooperative former [*23] staff members, I reject that conclusion for reasons already noted. If there is another basis for the representation, then the Commission can so state in its supplemental responses.

Hirsh has also asked for admissions with regard to (1) certain events that may have transpired at Sanker's sentencing and (2) Sanker's asserted obligations under the plea agreement and sentence. As to these, the Commission has invoked its "the document speaks for itself" objection. For reasons already noted, this objection is not well founded, and thus, unless the request is objectionable for some other reason, it must be responded to.

6. Rulings on Specific Requests

As noted, Hirsh has listed those requests as to which he seeks rulings from the Court. Based upon the foregoing conclusions, the Commission will be required to provide supplemental responses to some of these requests. Others do not require a further response, either because the Commission has already provided an adequate response or because the request is objectionable for other reasons.

Consistent with our previously stated conclusions, the Commission is to serve supplemental responses to the following requests:

> 17, 19, 20, [*24] 22, 23, 24, 25, 27, 43, 44, 45, 46, 48, 49, 59, 61, 62, 63, 64, 77, 79, 83, 87, 88, 90, 92, 93, 94, 96, 98, 99, 100, 101, 102, 104, 106, 107, 113, 115, 117, 119, 120, 153, 160, 161, 162, 165, 166, 172, 176, 181, 182, 183.

It bears mentioning in this regard that, upon proper inquiry, the Commission may determine that it lacks sufficient information to admit or deny. Our ruling does not foreclose such a response where appropriate. Rather, it requires reasonable efforts -- as outlined above -- to acquire the necessary information.

The Commission need not make supplemental responses to the other requests targeted by Hirsh. I address these briefly.

Requests 18, 60 and 114 ask for admissions based on interrogatory answers previously supplied by the

Commission. The interrogatory answers constitute binding admissions of the Commission, and hence there is no need to burden plaintiff with admitting, in effect, that it has already admitted a given fact.

Requests 57 and 58 each ask for admissions based on the Commission notes. In response to requests 55 and 56, however, the Commission explicitly admits the underlying facts. Thus, again there is no need for the Commission to make duplicative [*25] admissions as to the same facts.

In response to requests 69-76, 85-86, 95, 105 and 118, the Commission has answered with unqualified denials. That is all that is required of it.

Requests 78, 138 and 158 are properly objected to on the basis of form. Item 78 is a compound and confusing sentence; request 138 presumes a fact not shown to be true; and request 158 contains and assumes the truth of an entirely inappropriate characterization of conduct by Sanker's attorney.

CONCLUSION

Defendant Hirsh's application to compel the plaintiff to serve supplemental responses to his requests to admit is granted to the extent noted. Supplemental responses are to be served by September 12, 1996.

Dated: New York, New York
September 5, 1996

MICHAEL H. DOLINGER

UNITED STATES MAGISTRATE JUDGE

Public Version
FTC Docket No. 9310

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO COMPEL ADMISSIONS

ATTACHMENT C

LEXSEE 1992 US DIST LEXIS 6715

CHAN KENDRICK, et al., Plaintiffs, v. DR. LOUIS SULLIVAN, Defendant, and A WOMAN'S CHOICE, INC., et al., Defendant-Intervenors.

Civil Action No. 83-3175 (CRR)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1992 U.S. Dist. LEXIS 6715

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

LexisNexis (TM) HEADNOTES - Core Concepts:

JUDGES: [*1] RICHEY

OPINIONBY: CHARLES R. RICHEY

OPINION:

MEMORANDUM OPINION OF CHARLES R. RICHEY UNITED STATES DISTRICT JUDGE

I. Introduction

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

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

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

II. Analysis

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

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

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

Given the tremendous number of responses with which the defendant takes issue, it is impossible to

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

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

Plaintiff's first responsive tactic, namely admitting that a witness testified to a particular fact rather than admitting the underlying fact, is best described as a giving a qualified response. Qualification of responses is permissible under the rule where a request contains assertions which are only partially correct, but hair-splitting, disingenuous distinctions are inappropriate. *Thalheim v. Eberheim, 124 F.R.D. 34, 35 (D. Conn. 1988)* (citations omitted). The Court does not find plaintiffs' distinction between admitting an underlying fact and admitting that an adverse witness so testified either hair-splitting or disingenuous. The plaintiffs rest the distinction on the well established proposition that only the factfinder (here, the Court) can make conclusive, binding credibility determinations. They claim that defendant's attempt to compel their admissions is, in fact, an attempt to force plaintiffs to accept testimony, taken from interested third parties who are hostile to plaintiffs, as conclusive. Plaintiffs contend that this would undercut the discretion awarded the trial court to determine [*6] the weight and credibility of the evidence. See *Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855 (1982).*

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

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

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

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

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

Pl. Opp. at 2-3 (footnotes omitted). Plaintiffs also stated on the cover page of their responses to all but the first six sets of requests for admissions that

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

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

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

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

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

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

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

Perhaps defendant is correct that plaintiffs' responses to the requests for admissions are, at times, technically deficient. Yet these defects are relatively minor and do not confuse the issues. The Court finds that the plaintiffs

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

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

The Court appreciates that the defendant has suffered legitimate difficulties in attempting to narrow the scope of this [*15] case. However, it believes that the remaining time left before trial would be better spent by the parties engaging in serious stipulation conferences to attempt to narrow the issues, rather than burdening themselves and this Court with time-consuming motions on the intricacies and limits of the discovery rules. It is in the interest of both sides to use their best efforts to address these issues now so that they can use the limited time allotted them for trial most effectively.

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

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

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

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

III. Conclusion

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

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

May 15, 1992

CHARLES R. RICHEY,

UNITED STATES DISTRICT JUDGE

ORDER - MAY 15, 1992, Filed

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

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

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

CHARLES R. RICHEY,

UNITED STATES DISTRICT JUDGE

Public Version
FTC Docket No. 9310

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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO COMPEL ADMISSIONS

ATTACHMENT D

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

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

ORDER DENYING RESPONDENT ASPEN TECHNOLOGY, INC.'S MOTION TO COMPEL ADMISSIONS

On November 18, 2003, Respondent Aspen Technology, Inc. ("AspenTech") filed its motion to compel admissions in response to AspenTech's First Request for Admissions. Complaint Counsel filed its response and opposition on November 28, 2003.

Complaint Counsel's Revised Objections and Responses to Respondent Aspen Technology Inc.'s First Request for Admissions meets the requirements of Commission Rule 3.32 Accordingly, the Motion is **DENIED**.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I, Evelyn J. Boynton, hereby certify that I caused a copy of the attached Public Version of Complaint Counsel's Response to Respondent's Motion to Compel Admissions to be delivered this day:

Two copies by hand delivery:

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

By electronic mail and by hand delivery:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-159
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Evelyn J. Boynton
Merger Analyst
Federal Trade Commission

Dated: November 28, 2003