

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of)
)
MSC.SOFTWARE CORPORATION,)
a corporation.)
_____)

Docket No. 9299

TO: The Honorable D. Michael Chappell
Administrative Law Judge

**COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION
TO RESPONDENT'S MOTION TO COMPEL**

Complaint Counsel file this Memorandum in opposition to "Respondent MSC Software Corporation's Motion to Compel Complaint Counsel to Respond to Written Discovery" dated January 25, 2002 (hereafter Respondent's "Motion to Compel"). The motion was filed with an accompanying memorandum in support (hereafter "R. Mem."), and Respondent also has filed a supplemental supporting memorandum dated January 30, 2002 (hereafter "R. Supp. Mem.").

For the reasons set forth below, the Motion to Compel should be denied. The demands made in the Motion to Compel have been substantially mooted by the substantial body of meaningful discovery materials provided by Complaint Counsel over many weeks, and by Complaint Counsel's lengthy and detailed revised interrogatory responses which were provided to Respondent's counsel on January 25, 2002, the same day the Motion to Compel was filed. To the extent there remain further categories of documents and information not provided by Complaint Counsel pursuant to Respondent's discovery demands, these are being properly withheld from production by Complaint Counsel pursuant to the work product doctrine and various well-established privileges. Because Respondent has not provided even the most

rudimentary basis for seeking to breach these privileges, the Motion to Compel – insofar as it seeks to compel further discovery from Complaint Counsel beyond the substantial quantity of information and material already provided – must be denied.

I. RESPONDENT IS PURSUING GAMESMANSHIP BY ITS USE OF CONTENTION INTERROGATORIES.

Respondent opens its supplemental memorandum by declaring that this litigation “is not a game.” R. Supp. Mem. at 1. But by the pending motion Respondent continues its own brand of discovery gamesmanship, in what is plainly an effort to perpetuate pre-trial disputes, delay the prosecution of this case and prevent the ALJ from completing his Initial Decision within the one-year period required by Rule 3.51 of the Commission’s Rules of Practice. Respondent already has used its protestations about Complaint Counsel’s discovery responses to unjustifiably delay depositions of its executives and employees for nearly two months. Respondent now seeks an order compelling Complaint Counsel, among other things, to provide further answers to the open-ended contention interrogatories it served at the outset of this litigation, and seeks without any showing of particularized need to breach well-established privileges protecting the limited categories of information and documents that have not already been provided to Respondent.

A. Complaint Counsel Have Already Provided Respondent With Substantial and Meaningful Discovery.

To place the current dispute in context, we note that in fact Respondent has abundant materials for preparation of its defense, provided by Complaint Counsel in full compliance with their legitimate obligations to make initial disclosures under Rule 3.31(b) and the Scheduling Order in this case, and in response to Respondent’s interrogatories and document request. The discovery materials provided by Complaint Counsel include:

- Copies of all third-party materials received in response to Commission investigative subpoenas, or voluntarily in lieu of process, in the investigation of this case;
- Complaint Counsel's preliminary witness list, which specifies information on more than forty third party witnesses who Complaint Counsel may call at trial, most of whom are employees of MSC customers;
- All verbatim statements of witnesses identified on Complaint Counsel's preliminary witness list; and
- All materials received by Complaint Counsel to date in response to outstanding Part 3 subpoenas to third parties.

In addition to these materials provided by Complaint Counsel, of course, Respondent has access to its broad general knowledge of its business and to its particularized knowledge of the circumstances of the acquisitions that are the subject of the Complaint, all of which is available to it from its own business records and the recollection of its employees. Moreover, as to the matters at issue here, Respondent has been aware since early on in the pre-complaint period of the specific matters under investigation by the FTC. Indeed, as long ago as November 2000 – nearly a year before the Commission issued its Complaint – Respondent was able to produce and submit to the Bureau of Competition a 45-page confidential white paper discussing in great detail precisely the same matters as to which it now claims to need contention interrogatory answers.¹ These real-world facts undermine significantly the Respondent's current assertions that it cannot meaningfully prepare its defense without further generalized discovery of the contentions underlying the allegations of the Complaint.

¹ "The Acquisitions by MSC Software of Universal Analytics, Inc. and Computerized Structural Analysis and Research Corporation Were Procompetitive," O'Melveny & Myers LLP, Attorneys for MSC Software Corporation (Nov. 28, 2000). The white paper included lengthy discussions of, among other things, the capabilities and uses of Nastran software, its comparability to the products of other firms, the ability of Nastran users to switch to competing products, and the likelihood of anticompetitive effects resulting from the acquisitions in question.

B. Respondent's Early and Open-Ended Contention Interrogatories Are A Well-Recognized Form of Discovery Abuse.

The contention interrogatories to which Respondent now seeks further responses were served at the very outset of the discovery period. They were prepared without any thorough review of the discovery materials referred to above. They follow a simplistic and repetitive form – for example, repeatedly asking Complaint Counsel to state “all evidence” or “the bases” for allegations made in the Complaint or “each instance” of a particular occurrence or circumstance referred to in the Complaint. The interrogatories by their terms are plainly intended to be as open-ended as Respondent can make them, subsuming virtually every fact or circumstance that may be related to the matters set forth in the Complaint.

Use of such open-ended interrogatories, particularly early in the discovery process, is a well-recognized form of civil discovery abuse. As one court has said:

[T]here is substantial reason to believe that the early knee jerk filing of sets of contention interrogatories that systematically track all the allegations in an opposing party's pleadings is a serious form of discovery abuse. Such comprehensive sets of contention interrogatories can be almost mindlessly generated, can be used to impose great burdens on opponents, and can generate a great deal of counterproductive friction between parties and counsel. Moreover, at least in cases where defendants have access to most of the evidence about their own behavior, it is not at all clear that forcing plaintiffs to answer these kinds of questions, early in the pretrial period, is sufficiently likely to be productive to justify the burden that responding can entail.

In re Convergent Technologies Securities Litigation, 108 F.R.D. 328, 337-338 (N.D.Cal. 1985).

Accord, Fischer & Porter co. v. Tolson, 143 F.R.D. 93, 95-97 (E.D.Pa.1992). Because of the risk of systematic abuse from the filing of premature contention interrogatories prior to the parties' review of relevant documents and pursuit of identified witnesses, some courts in their local rules prohibit any interrogatories seeking the claims and contentions of an opponent until after the

conclusion of other fact-related discovery, unless leave of the court is obtained. E.g. Local Rule 33.3, United States District Court for the Southern District of New York. See In re Convergent Technologies Securities Litigation, supra, 108 F.R.D. at 336.

C. Complaint Counsel Already Have Provided More-Than-Sufficient Answers To Respondent's Contention Interrogatories.

The precedent discussed above would have provided Complaint Counsel with abundant grounds to refuse to provide any response to the Respondent's premature and improper contention interrogatories. Nonetheless, Complaint Counsel not once but twice have provided good-faith written answers to the interrogatories, despite their unjustifiable breadth and premature timing. On December 12, 2001, Complaint Counsel served objections and responses to the interrogatories (R. Mem. Ex. D) that provided generalized responses but noted that answers to many if not all of the questions propounded were ascertainable with equal if not greater ease by Respondent from its own information or from a review of the materials to be submitted in response to Respondent's document request.

Respondent was not satisfied, however, and protested that further more specific responses should be provided. Although Complaint Counsel did not then and does not now believe that its initial responses were inadequate,² we conferred on several occasions with counsel for Respondent and agreed to accommodate Respondent by preparing further more detailed responses (R. Supp. Mem. Ex. A). Preparation of the 49-page revised responses took more time

² Respondent's assertion that Complaint Counsel in a letter to Respondent on January 3 "acknowledged the deficiencies in its [sic] responses" (R. Mem. at 2) is a bald misrepresentation. What the letter said was: "[W]e do not concede that our [responses] were in any way deficient, and do not believe that a motion to compel would be warranted or successful ..." Letter of Kent Cox, Jan. 3, 2002 (R. Mem. Ex. B) at 1.

than anticipated, and they were served on Respondent on January 25, the same day Respondent filed its Motion to Compel.

Respondent's reaction to Complaint Counsel's revised interrogatory responses suggests that the interrogatories are so flawed that answers given to them will never satisfy the Respondent. Despite the substantially greater detail contained in the recent revision, Respondent continues to assert that the revised responses "remain deficient for all the reasons set forth" in the Motion to Compel as originally filed. R. Supp. Mem at 2 (emphasis added). This reaction strongly suggests that Respondent views its interrogatories as indefinitely open-ended.

For example, in support of its motion Respondent takes Complaint Counsel to task for assertedly failing to delineate the "metes and bounds" of the relevant product markets at issue in the case (R. Mem. at 8-14). Respondent specifically asks for an order requiring, among other things, that Complaint Counsel identify specific products and firms that are within each of the product markets alleged in the Complaint and identify the ways in which Nastran is differentiated from other FEA solver products (R. Mem. at 21). In the revised responses, Complaint Counsel identify the versions of Nastran, from specific firms, that are in the defined "advanced Nastran" product market (R. Supp. Mem. Ex. A at 13-16) and discuss the products of the specific firms that fall within the broader defined product market for advanced linear analysis solvers (id. at 19-20). Complaint Counsel discuss the considerations pertaining to substitution between advanced versions of Nastran and non-Nastran solvers (id. at 16-18) including specifying the various categories of switching costs that make such substitution difficult (id. at 17). Complaint Counsel identify numerous third-party customers of Respondent that have analyzed the conditions that discourage switching between Nastran and non-Nastran solvers (id. at 17). Complaint Counsel

discuss numerous specific products of MSC and other firms that fall outside the defined product markets, and summarize the reasons for their conclusion that these products fall outside the defined markets (id. at 21-23). In short, the revised responses, served on the same day as the Motion to Compel was filed, provide exactly the discussion called for by Respondent in its memorandum in support of its Motion to Compel.³

Yet in its supplemental memo, filed after having received the revised interrogatory responses, Respondent's demands have morphed again. Now the Respondent accuses Complaint Counsel of "dodg[ing] its responsibility" to describe the relevant product market because Respondent deems that the revised responses are insufficiently precise in discussing the specific features of the competing products identified in the respective markets (R. Supp. Mem. at 2-4).

³ Contrary to Respondent's assertion (R. Supp. Mem. at 4-5), Complaint Counsel also provided a meaningful response describing our contentions concerning the existence of anticompetitive effects from the challenged acquisitions. The revised responses state Complaint Counsel's contention that MSC is the dominant supplier of products in highly concentrated markets, and that the challenged acquisitions enhanced MSC's power to raise or maintain prices above competitive levels and withhold or delay product enhancements and developments. (R. Supp. Mem. Ex. A at 44). The responses note specific customers as to which the acquired firms had competed with MSC prior to their acquisition – competition that plainly was ended by the acquisitions. *Id.* at 44-45. Although, as the responses note, it is likely that MSC may have refrained from fully exercising its enhanced market power during the pendency of the Commission's investigation, the response describes several specific instances of conduct by MSC that appear to reflect the exercise of post-merger market power. *Id.* at 45. These include charging customers higher prices for advanced versions of Nastran than they would have paid had they been able to switch to lower cost advanced versions of Nastran available from UAI or CSAR; (b) charging former licensees of UAI Nastran and CSAR Nastran higher prices for their advanced versions of Nastran; (c) implementing higher 1999 list prices for MSC Nastran when renewing existing licenses or maintenance agreements following the acquisitions; (d) charging higher prices for renewing annual licenses for single-user and campus licenses in 2002; and (e) eliminating the availability of annual licenses for 2002 and beyond. *Id.* The responses also describe specific instances of competition by UAI and CSAR with MSC in developing product enhancements and new functions and features for their respective products, listing a number of specific customers. *Id.* at 46-47. In short, it is preposterous for Respondent to suggest that "Complaint Counsel has no concrete examples of anticompetitive effects." R. Supp Mem. at 5.

For example, says Respondent, a comment in the revised responses concerning Nastran's ability "to solve large problems with a large number of degrees of freedom" is insufficient because the responses do not address what it apparently believes are further questions implicitly posed by the interrogatories: "[W]hat number of degrees of freedom constitute a large problem? And, does complaint counsel contend ... that MSC can price discriminate to those customers (i.e. charge a higher price)?" (R. Supp. Mem. at 3-4).

Respondent plainly considers its general interrogatories sufficiently open ended to subsume even this kind of third, fourth or fifth-level subsidiary questions. Moreover, by taking Complaint Counsel to task for using what it deems "qualifying language" in the revised responses (terms like "including" or "such as"), Respondent states expressly that its intention in the interrogatories is to force Complaint Counsel to "provid[e] whatever factual information [Complaint Counsel] possesses supporting the allegations in its complaint." (R. Supp. Mem. at 4, emphasis added). Respondent thus plainly admits that it is not simply seeking to clarify Complaint Counsel's contentions about the allegations of the complaint, but rather to extract exhaustive written responses detailing all facts and contentions concerning all conceivable issues in the case.⁴ Such an objective is illegitimate, burdensome and harassing, and is precisely the sort of use of contention interrogatories that the courts have found to be an abuse of the discovery process.

⁴Indeed, Respondent's motion not only socks further answers with respect to particular matters touched on in its supporting memos, but expressly goes beyond such specifics to "respectfully request" that all of the interrogatories be answered "meaningfully" even if no particular critique of Complaint Counsel's response has been raised by Respondent here. R. Mem. at 21 n.8. In its supplemental memo, Respondent expressly reaffirms its request for the same broad relief. R. Supp. Mem. at 7.

D. Complaint Counsel Should Not Be Required To Provide Any Further Response To The Contention Interrogatories.

The objective of the Respondent in pressing for further answers to its interrogatories goes far beyond any legitimate need of the Respondent to clarify the allegations of the Complaint so that it can conduct discovery, work with experts or prepare its defense. Indeed, Respondent's papers make clear that the interrogatories are intended to be so broad and open-ended that they are essentially incapable of being answered to Respondent's satisfaction. Requiring Complaint Counsel to further pursue the impossible task of satisfying the Respondent would serve no legitimate purpose, would merely perpetuate the pre-trial conflicts that have beset the case thus far, and would indulge Respondent's desire to use the discovery process to harass and to delay the resolution of this case. Respondent's Motion to Compel further responses to its contention interrogatories should be denied.⁵

II. RESPONDENT'S PURSUIT OF FURTHER DISCOVERY FROM COMPLAINT COUNSEL SEEKS WITHOUT BASIS TO BREACH WELL-ESTABLISHED PRIVILEGES AND DOCTRINES PROTECTING AGAINST DISCLOSURE OF NARROW CATEGORIES OF INFORMATION AND MATERIALS.

As noted above at page 2, Complaint Counsel have provided Respondent with a

⁵ Respondent complains that Complaint Counsel's designation of its revised responses as "Confidential - Attorneys Eyes Only" pursuant to the Protective Order in this case prevents Respondent's counsel from providing the document to executives of its client, and interferes with the ability of the Respondent to prepare its defense. R. Supp. Mem. at 2. The designation of the document in this fashion was appropriate, however, because it was prepared by Complaint Counsel from a broad range of evidence and information obtained from numerous sources, including sources considered confidential by the originators of the evidence and information. The Commission has held that such confidential designations, which make confidential third-party documents or information available to a respondent's counsel but not its in-house personnel, balance the respective rights and interests of the respondent and the providers of information, and do not infringe a respondent's rights under the Due Process Clause or the Administrative Procedure Act. Tovs "R" Us, Inc., 1998 FTC LEXIS 185 *194-199 (1998).

substantial body of materials and information in response to its interrogatories and document requests, including all documents received from third parties pursuant to subpoena or in lieu of process during the pre-complaint investigation in this case, the names and verbatim transcripts or statements of all potential witnesses identified on Complaint Counsel's witness list, and all materials received from third parties pursuant to subpoenas from Complaint Counsel during the litigation phase of this case. However, Complaint Counsel have withheld from production certain narrow categories of information and materials that are protected from disclosure by operation of well-established doctrines and privileges. The categories of responsive information and materials withheld by Complaint Counsel are:

- the identity of persons with whom Complaint Counsel communicated concerning the acquisitions that are the basis for the complaint in this case, other than persons identified on Complaint Counsel's preliminary witness list or persons who provided documents to Complaint Counsel during the Part 2 investigation in this case;
- transcripts of investigational hearings and a declaration from third parties who are not persons identified on Complaint Counsel's preliminary witness list;
- non-verbatim notes and memoranda of third-party interviews prepared by FTC attorneys;
- memoranda prepared by FTC attorneys and economists for the Commission recommending issuance of a complaint in this matter; and
- notes, correspondence, email communications, or other documents prepared by FTC attorneys or economists and sent to other FTC attorneys, economists or staff in connection with the investigation of this case.

These categories of information and materials have been properly withheld from production to the Respondent, and insofar as its Motion to Compel seeks production of such materials the motion must be denied.

A. Respondent's Demand for Further Disclosure of the Identity of Persons With Whom Complaint Counsel Communicated Should Be Denied.

Respondent's Interrogatory 1 demands that Complaint Counsel identify all persons with whom Complaint Counsel have communicated concerning the MSC acquisitions at issue in the Complaint. R. Mem. at 17, 19-20, 21; R. Supp. Mem. at 5. In its initial response to the interrogatory, Complaint Counsel noted that the identities of a substantial number of such persons could be ascertained from an examination of the complete set of all third-party documents provided to Complaint Counsel in the Part 2 investigation (given to Respondent pursuant to its document request), and also from the list of prospective witnesses to be submitted by Complaint Counsel pursuant to the Scheduling Order. R. Mem. Ex. D at 8-9. In their revised responses, Complaint Counsel provided a listing of the persons from whom such third-party documents had been received,⁶ and offered to assist Respondent's counsel in identifying the submitter if the identity was not apparent from a review of the documents.⁷ R. Supp. Mem. Ex. A at 9-12.

⁶ Complaint Counsel inadvertently omitted ANSYS, Inc., from the list of third parties shown in its revised response to Interrogatory 1, although Respondent has been provided with copies of documents received from this firm. Respondent calls the omission of the firm from the list a "glaring example of gamesmanship" by Complaint Counsel (R. Supp. Mem. at 5), but it is plain that the identity of ANSYS is no secret to Respondent. ANSYS was referred to repeatedly at Respondent's initiative in its white paper (*supra* n.1) submitted to the Bureau of Competition nearly a year before the Complaint was issued, and since the issuance of the Complaint Respondent has been aggressively pursuing its own discovery from ANSYS, as Respondent's own papers make clear (e.g. R. Supp. Mem. at 6 n.2).

⁷ In its supplemental memo, Respondent faults Complaint Counsel for failing to state what "persons or departments" at the listed third parties were involved in the communications. R. Supp. Mem. at 5. However, more detailed information is ascertainable from the documents provided to Respondent, and Complaint Counsel has stated that we are prepared to provide further assistance in particular instances if requested by Respondent.

Not satisfied with this disclosure, Respondent now seeks further discovery of the identities of other persons with whom Complaint Counsel have communicated concerning the MSC acquisitions. R. Mem. at 18-20; R. Supp. Mem. at 5. Respondent makes no attempt at demonstrating any particularized need for further discovery concerning persons with whom Complaint Counsel have communicated, instead basing its argument on the assertion that there is a “clear obligation on government representatives to turn over all evidence in its [sic] possession.” R. Mem. at 15.

It is clear, however, that a respondent does not have an absolute right to all information in the possession of the government. Specifically, the identity of persons who communicate with the government in connection with the investigation or preparation of a case may properly be withheld from disclosure on grounds of the informant’s privilege and the work-product doctrine. The informant’s privilege is “the government’s privilege to withhold from disclosure the identity of persons who provide information about violations of the law to law enforcement officials and others who render assistance that is necessary to effective law enforcement.” Harper & Row, Publishers, Inc., 1990 FTC LEXIS 213, *8 (F.T.C. 1990). The privilege is based on the public interest in assuring the free flow of information needed to conduct law enforcement functions by preserving anonymity and avoiding the risk of possible retaliation against citizens who communicate to law enforcement officials their knowledge of law violations. Id. The privilege is not limited to criminal cases, but applies in the civil context as well, including in discovery under the FTC rules. Id. Accord, The Gifette Co., 98 F.T.C. 875 (1981); Graber Mfg. Co., 68 F.T.C. 1235 (1965).

Respondent’s Interrogatory 1 on its face implicates the informant’s privilege, since by its

terms it asks for disclosure of the identity of persons who communicated with Complaint Counsel concerning the matters that are the subject of the FTC Act violations alleged in the Complaint. The risk of possible retaliation in the current context is suggested by the Complaint allegations themselves: MSC is in a powerful position as the sole supplier of an essential product to a wide range of firms, who may plausibly fear commercial retaliation by MSC for cooperating with the FTC's investigation. These circumstances are more than sufficient to implicate the informer's privilege – proof of an actual likelihood of retaliation against particular persons is not necessary before the privilege may be invoked.⁸

Moreover, the interrogatory also plainly implicates the work-product doctrine, which protects the ability of attorneys to do their work without the opposing side looking over their shoulders. The interrogatory focuses directly on communications made by Complaint Counsel in connection with the investigation and preparation of this case. Indeed, Respondent could not be clearer that its reason for seeking disclosure of these identities is to re-trace the steps taken by Complaint Counsel in the preparation of the case, in hopes of developing a basis for its own defense.⁹ Discovery for purposes of carrying out such a tactic has been precluded on work-

⁸ In Harper & Row, supra, the Commission overturned an ALJ's ruling against invocation of the privilege where the ALJ failed to make any inquiry into any need by the respondent for the demanded information, but instead required affirmative proof that the respondent "will retaliate against Commission informants if their names are revealed." 1990 FTC LEXIS 213 at *6. The Commission said that by this ruling, the scope of the privilege was "seriously misconstrued." Id. at *2.

⁹ Respondent states that its objective is to "retrace Complaint Counsel's steps and depose each of the customers and competitors that Complaint Counsel interviewed during the investigation ... to identify those with exculpatory evidence." R. Mem. at 17.

product grounds. Cavanaugh Communities Corp., 1976 FTC LEXIS 133 *4-5 (Dufresne, ALJ).¹⁰

Neither the informant's privilege nor the work-product doctrine is absolute and either may be overcome by a requisite showing of need. But it is clear that "[t]he burden of overcoming the [informant's] privilege ... falls squarely on the party requesting disclosure," and "the grounds on which disclosure is sought must be clearly articulated." Harper & Row, supra, 1990 FTC LEXIS 213 at *9, quoting Gillette, supra, 98 F.T.C. at 877. The Commission has observed that "[i]t rarely will be the case that the respondents can demonstrate that disclosure of the names of informants is essential to their defense," particularly where the context of the case arises from the respondent's own conduct with which it is thoroughly familiar. Harper & Row, supra, 1990 FTC LEXIS 213 at *2.

The Respondent here offers no evidence of any particularized need for further information concerning informants' identities and does not make any effort to demonstrate that disclosure of the names is essential in any way to its defense. Indeed, given the breadth of the discovery already provided to the Respondent by Complaint Counsel, as well as Respondent's own thorough knowledge of the industry and of the acquisitions that are the subject of the Complaint, it is hard to imagine how there could be any real need by Respondent for this information.¹¹

¹⁰ In Cavanaugh, the ALJ observed that "Counsel for [respondent] has been and will continue to be accorded due process ... Counsel should be focusing on addressing the evidence that complaint counsel has said he intends to use rather than engaging in what has many aspects of a fishing expedition in the hope that some evidence favorable to his clients might turn up" 1976 FTC LEXIS 133 *5.

¹¹ Cf. Ethyl Corp., 1979 FTC LEXIS 188 *3 (Hanscom, ALJ) ("The basis of the complaint does not lie in an 'event' witnessed by a few or a limited number of persons, but on an alleged course of industry-wide business conduct. As a consequence, the individuals with whom

Respondent cannot sidestep its burden by characterizing its discovery demand as part of an effort to obtain disclosure of “exculpatory evidence” developed by Complaint Counsel. Even if the interrogatory were framed in such terms (which it is not), this would not provide any grounds for compelling the disclosure. The Commission, and numerous decisions by FTC ALJ’s, have squarely held that the principle of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny requiring the government to provide exculpatory information in a criminal investigation, which was developed in the context of criminal charges involving capital offenses, does not apply in the very different context of Commission administrative proceedings. Amrep Corp., 102 F.T.C. 1362, 1983 FTC LEXIS 17, *566-567 (1983); Allied Chemical Corp., 75 F.T.C. 1055, 1056-57 (1969). Accord, California Dental Ass’n, 1994 FTC LEXIS 31 *1-2 (Parker, ALJ); College Football Ass’n, 1991 FTC LEXIS 119 *3 (Timony, ALJ); Textron, Inc., 1990 FTC LEXIS 549, *3 n.2 (Timony, ALJ); Reuben H. Donnelly Corp., 1976 FTC LEXIS 610 *6-7 (Timony, ALJ); American Medical Association, 1976 FTC LEXIS 422 *7-8 (Barnes, ALJ).¹² It should be noted, moreover, that Respondent does not contend that there is any particular exculpatory evidence that is being withheld by Complaint Counsel. Rather Respondent seeks discovery now for the

complaint counsel have communicated are not necessarily individuals uniquely possessed of knowledge of the subject matter of this proceeding, or the only individuals from whom the facts can be obtained.”)

¹² The decision of ALJ Hyun in Olin Corp., Docket No. 9196 (Nov. 26, 1985), cited R. Mem. at 16, is not only contrary to this precedent, but is also factually inapposite. That decision involved the deliberate withholding of a single document that agency officials believed was clearly exculpatory, not a circuitous attempt at a fishing expedition for material that might only be arguably exculpatory in the eyes of the respondent. Indeed, the decision recognizes the “horrendous burden” that would be imposed of reviewing a body of documents to determine whether they might be exculpatory. See California Dental Ass’n, 1994 FTC LEXIS 31 at *1-2 (Parker, ALJ).

admitted purpose of attempting to retrace Complaint Counsel's investigatory efforts in hopes of finding evidence that it can characterize as "exculpatory." R. Mem. at 17. Respondent cites no case that suggests even remotely that the Brady principle, even if applicable in the FTC context, would sanction such a fishing expedition.

B. The Remainder of the Materials Withheld By Complaint Counsel Are Plainly Privileged And Do Not Require Production Of A Privilege Log.

Respondent complains that Complaint Counsel have refused to produce a detailed privilege log, as demanded in paragraph 15 of the Respondent's Document Request (R. Mem. Ex. H at 3). However, it is well-established that demands for production of documents in the files of the Commission may be quashed upon general assertions of privilege, and that the description of documents for which the privileges are asserted may be by general category and need not include detailed specifications of each document. Great Atlantic & Pacific Tea Co., 82 F.T.C. 1860, 1862 (1973); Chock Full O'Nuts Corp., 82 F.T.C. 747, 748 (1973); R.J. Reynolds Tobacco Co., 1998 FTC LEXIS 179 *2-3 (Timony, ALJ); Flowers Industries, Inc., 1981 FTC LEXIS 117 *2 n.3 (Timony, ALJ); Champion Spark Plug Co., 1980 FTC LEXIS 200 *8 (Timony, ALJ).

The categories of documents that have been withheld from production by Complaint Counsel all fall within well-established privileges, and as such are protected from disclosure under FTC precedent without the need for preparation of a detailed privilege log:

Investigative hearing transcripts and declarations of persons who Complaint Counsel do not intend to call as witnesses are protected from disclosure under the work product doctrine, under a long line of precedent. See, e.g., Toys "R" Us, Inc., 1997 FTC LEXIS 336 *15 (Timony, ALJ) (denying leave for interlocutory appeal of an order quashing a subpoena specification

because there is no "substantial ground for difference of opinion that investigational hearing transcripts in Federal Trade Commission proceedings are protected work product"); Diram M. Seropian, M.D., 1991 FTC LEXIS 445, *1 (Parker, ALJ); College Football Ass'n., 1991 FTC LEXIS 119, *5-7 (Timony, ALJ); Abbott Laboratories, 1992 FTC LEXIS 296, *7; Detroit Auto Dealers Ass'n, Inc., 1985 FTC LEXIS 93, *4-6; Chain Pharmacy Ass'n, D. 9227, (Order, Oct.12, 1989) at 4 (Hyun, ALJ). These ALJ rulings are consistent with decisions of federal courts that verbatim transcripts of witness statements are protected from discovery because it is impractical to separate out the attorneys' questions, which are work product. See New York by Vacco v. Mid Hudson Medical Group, P.C., 877 F. Supp. 143 (S.D.N.Y. 1995); Ross v. Bolton, 106 F.R.D. 22 (S.D.N.Y. 1985); Motley v. Columbia Broadcasting Sys., 94 F.R.D. 733 (N.D. Ind. 1982); American Standard, Inc., v. Bendix Corp., 71 F.R.D. 443 (W.D. Mo. 1976).

Memoranda prepared by FTC attorneys and economists for the Commission recommending issuance of a complaint in this matter also are plainly protected from disclosure. These materials are subject to the deliberative process privilege, which has been held to preclude a respondent from inquiring into the mental processes leading up to the Commission's decision to issue a complaint. Seeburg Corp., 70 F.T.C. 1818, 1826 (1966); Champion Spark Plug Co., 1980 FTC LEXIS 200 *11 (Timony, ALJ). Neither is it appropriate to attempt to redact such documents in order to segregate factual from other matter, as demanded by Respondent's Document Request.¹³ "The very choice of facts reveals the concerns of the agency and the deliberations of staff personnel," making redaction inappropriate. Champion Spark Plug Co., 1980 FTC LEXIS 200 *11 (Timony, ALJ), quoting Koch v. Department of Justice, 376 F.Supp.

¹³ R. Mem. Ex. II, Instruction 16 at 3-4.

313, 317 (D.D.C. 1974). Accord, Mervin v. Federal Trade Commission, 591 F.2d 821, 826 (D.C. Cir. 1974). To the extent that staff memoranda to the Commission contain factual analyses and recommendations, they are also protected from disclosure under the attorney-client privilege. Chain Pharmacy Ass'n, D. 9227, (Order, Oct. 12, 1989) at 5 (Hlyn, ALJ). Cf. S.E.C. v. World-Wide Coin Investments, Ltd., 92 F.R.D. 65, 67 (N.D.Ga., 1981); Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593 (E.D. Pa. 1980).

Finally, non-verbatim notes and memoranda of third-party interviews prepared by FTC attorneys, as well as notes, correspondence, email communications, or other documents prepared by FTC attorneys or economists and sent to other FTC attorneys, economists or staff in connection with the investigation of this case, are all plainly materials that are protected from disclosure under the work-product doctrine and may be disclosed only upon a showing of substantial need. E.g., Hickman v. Taylor, 329 U.S. 495 (1947); General Motors Corp., 103 F.T.C. 105, 108 (1984); The Gillette Co., 98 F.T.C. 875 (1981); Detroit Auto Dealers Ass'n, Inc., 1985 FTC LEXIS 93, *5 (Timony, ALJ).

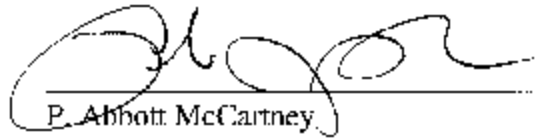
In short, the narrow categories of materials that have been withheld from production by Complaint Counsel are all plainly protected from disclosure under well-established privileges and doctrines. Because this can be ascertained on the basis of the general character of the documents, there is no need to prepare any log with detailed specifications of each document. Respondent's demand that Complaint Counsel be compelled to produce such a privilege log therefore should be denied.

III. CONCLUSION

For all the reasons set forth above, Respondent's Motion to Compel should be denied.

February 4, 2002

Respectfully Submitted,



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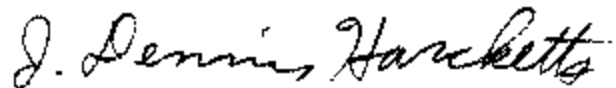
CERTIFICATE OF SERVICE

This is to certify that on February 4, 2002, I caused a copy of Complaint Counsel's Memorandum in Opposition to Respondent's Motion to Compel to be served by hand upon the following persons:

The Honorable D. Michael Chappell
Federal Trade Commission
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