

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



In the Matter of)
) Docket No. 9350
)
Graco Inc., et al.)
) PUBLIC
)

MOTION TO FILE *IN CAMERA* GRACO'S MEMORANDUM IN OPPOSITION TO COMPLETE AUTOMATION'S MOTION TO QUASH AND/OR LIMIT SUBPOENA DUCES TECUM, AND THE AFFIDAVIT OF RICHARD A. DUNCAN

1. Defendant Graco Inc. ("Graco"), pursuant to Rules 3.45(e), 4.2(c)(2), 4.2(c)(3)(ii), respectfully requests this Court to accept for filing in camera its Memorandum In Opposition to Complete Automation's Motion to Quash and/or Limit Subpoena Duces Tecum, and the Affidavit of Richard A. Duncan.

[REDACTED]

3. Pursuant to the attached order of Chief Administrative Law Judge Chappell ("Protective Order"), "[i]n the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed in camera." Protective Order, ¶ 9.

4. Pursuant to the attached Protective Order, Graco has notified Complete Automation, Inc. of the inclusion of the confidential materials. Protective Order, ¶ 9.

5. Attached hereto is a copy of each page of the document on which in camera material appears. Confidential material has been highlighted. We have also noted the name and address of

the person who should be notified of the Commission's intent to disclose in a final decision any of the confidential material contained in the document.

Dated: January 30, 2012

Respectfully submitted,

s/ Richard G. Parker

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

_____)
In the Matter of)
)
GRACO INC.,)
a corporation, and)
)
ILLINOIS TOOL WORKS INC.,)
a corporation, and)
)
ITW FINISHING LLC,)
a limited liability company,)
Respondents.)
_____)

DOCKET NO. 9350

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

Commission Rule 3.31(d) states: "In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section." 16 C.F.R. § 3.31(d). Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:

Dm Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date: December 16, 2011

ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material (“Protective Order”) shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, “confidential material” shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. “Sensitive personal information” shall refer to, but shall not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records. “Document” shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. “Commission” shall refer to the Federal Trade Commission (“FTC”), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL-FTC Docket No. 9350" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL-FTC Docket No. 9350" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

**ADDITIONAL NON-PUBLIC DOCUMENTS OMITTED AS
CONFIDENTIAL—FTC Docket No. 9350 – Subject to Protective Order**

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

_____)
In the Matter of)

Docket No. 9350

Graco Inc., et al.)
_____)

PUBLIC

**GRACO'S MEMORANDUM IN OPPOSITION TO COMPLETE AUTOMATION'S
MOTION TO QUASH AND/OR LIMIT SUBPOENA *DUCES TECUM***

Complete Automation, Inc. ("Complete Automation") seeks to quash or limit a subpoena served by Graco, Inc. ("Graco") that requests documents necessary to defend against the allegations set forth in the FTC's Complaint, which requests broad injunctive relief to prevent Graco's acquisition of Illinois Tool Works' ("ITW") finishing business. According to the Complaint,

The acquisition would combine Graco's "#1 market position" with its leading competitor and eliminate the close competition ITW imposes on Graco's liquid finishing business. . . . After the acquisition, Graco will no longer need to effectively discount on sales to distributors to compete with ITW and will have less incentive to develop new and better products. Because competition for sales to distributors will lessen, end use industrial manufacturers may pay higher prices for industrial liquid finishing equipment.

(Compl. ¶ 2.)

_____ Complete Automation is a systems integrator specializing in the development and installation of paint circulation systems for the automotive industry. _____

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Graco served a Subpoena *Ad Testificandum* and a Subpoena *Duces Tecum* (the “Subpoena”) on Complete Automation on January 5, 2012.³ The Subpoena seeks documents pertinent to the allegations in the Complaint [REDACTED], and the requests are definite in scope, relevant to Graco’s defense, and reasonable. *See* FTC Manual § 10.13.6.4.7.3. Documents responsive to the subpoena were to be served upon Graco’s counsel by January 11, 2012.⁴

On January 17, 2012, Complete Automation’s counsel left one voicemail at 4:00 p.m. and sent one e-mail to Graco’s counsel at 4:15 p.m. regarding the issues raised by the instant motion to quash or limit twelve of the twenty-five requests in the Subpoena before filing the motion on January 18, 2012. (*See* Complete Automation Br. 12.) Complete Automation generally argues that those twelve requests are overly broad, unduly burdensome, and/or seek irrelevant or confidential information, but it has failed to meet the “heavy burden” necessary to quash the Subpoena—or identify any specific burden at all. *In re Flowers Indus., Inc.*, No. 9148, 1982 FTC

[REDACTED]

[REDACTED]

³ True and correct copies of the Affidavits of Service for the subpoenas served on Complete Automation are attached as Exhibit C to the Affidavit of Richard A. Duncan. The actual date of service was January 5—not January 9, as alleged in Complete Automation’s motion. (*Compare* Duncan Aff. Ex. C, *with* Complete Automation Br. 1.)

⁴ The parties subsequently agreed to extend the date for production until one week before the deposition of Complete Automation—which has yet to be scheduled.

LEXIS 96, at *12 (Mar. 19, 1982). And, although Complete Automation does not object to thirteen of Graco's requests, it has failed to produce *any* documents responsive to the Subpoena.

Graco nevertheless attempted to negotiate a resolution and avoid adjudication of this motion, by offering to narrow the scope of its requests, to accept an initial production of the most critical documents prior to Complete Automation's deposition, and to postpone the collection and production of the remainder of the documents until after the deposition and only if the deposing attorney determined that those documents would be necessary for Graco's defense.⁵ Although the parties were able to agree upon a limited scope and the phased production, Complete Automation ultimately refused to accept the agreement unless Graco guaranteed reimbursement for the entire cost of complying with the initial production.⁶

Graco respectfully requests that Complete Automation's motion to quash or limit twelve of the Subpoena's document requests be dismissed in its entirety.

ARGUMENT

The Court should deny Complete Automation's motion to quash on both procedural and substantive grounds. Procedurally, the motion to quash is untimely, and Complete Automation did not fulfill its obligation to meet and confer on its objections. [REDACTED]

[REDACTED]

[REDACTED] Graco's Subpoena is reasonable in scope and seeks documents and data which are necessary to its defense, including

⁵ A true and correct copy of a January 26, 2012 e-mail from Complete Automation's counsel to Graco's counsel is attached as Exhibit D to the Affidavit of Richard A. Duncan.

⁶ A true and correct copy of a January 27, 2012 e-mail from Complete Automation's counsel to Graco's counsel is attached as Exhibit E to the Affidavit of Richard A. Duncan.

testing the FTC's theories regarding product market and anticompetitive effects [REDACTED]

I. COMPLETE AUTOMATION'S MOTION TO QUASH OR LIMIT THE SUBPOENA WAS NOT TIMELY.

Pursuant to Commission Rule of Practice 3.34(c), “[a]ny motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the *earlier* of 10 days after service thereof or the time for compliance therewith.” 16 C.F.R. § 3.34(c) (2010) (emphasis added). This language appears on the Subpoena provided by the Secretary of the FTC and served on Complete Automation on January 5, 2012. (*See* Duncan Aff. Ex. B.) Because subsequent discussions between counsel for the parties indefinitely extended Complete Automation’s time for compliance, any timely motion to limit or quash the Subpoena would have needed to be filed ten days after the date of service, January 5, 2012. Ten days after January 5 was January 15—the Sunday before the Martin Luther King, Jr. holiday. Rule 4.3 would thus extend the period of time for Complete Automation to file its motion until the end of the next following business day, or Tuesday, January 17. *See* 16 C.F.R. § 4.3(a).

Even with the fortuitous two-day extension provided under Rule 4.3, Complete Automation’s motion to quash or limit the Subpoena was still a day late. Had Complete Automation required an extra day, it should have sought an extension from the Court. *See id.* § 4.3(b) (permitting an Administrative Law Judge to provide extensions of time “for good cause shown”). No extension issued, however, and this Court should dismiss the motion, and order Complete Automation to comply with the Subpoena.

II. COMPLETE AUTOMATION HAS FAILED TO COMPLY WITH COMMISSION RULE 3.22.

Commission Rule 3.22 required counsel for Complete Automation to “confer[] with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the

motion” prior to filing the instant motion to quash. 16 C.F.R. § 3.22(g). Complete Automation purports to satisfy this requirement by leaving “a voice mail message for John Hinderaker, counsel for Graco, at approximately 4:00 pm EST on January 17, 2011 [sic], in an attempt to resolve any disputes concerning the Subpoena that is the subject of the foregoing motion,” and then e-mailing “on or about 4:15 pm EST on January 17, 2011 [sic], a draft of this motion seeking concurrence or resolution of the same.” (Complete Automation Br. 12.)

One voicemail and one e-mail attaching a draft motion sent at 4 p.m. on the day before the motion is filed cannot be deemed a good-faith attempt to resolve the issues raised therein. Indeed, Complete Automation’s first attempt to resolve the issues set forth in the motion occurred twelve days after service and only after a draft motion had been generated. This feeble outreach falls short of the “duty to make reasonable efforts to confer with opposing counsel” as required by Rule 3.22(g). *In re Lab. Corp. of Am.*, No. 9345, Order Denying Compl. Counsel’s Mot. to Compel Doc. Prod., at 3 (FTC Feb. 8, 2011) (Chappell, J.) (finding that “[o]ne single e-mail to counsel, sent . . . one calendar day before filing a motion to compel, without awaiting a response to that e-mail, does not constitute a good faith effort to resolve by agreement the issues raised by the motion” and denying the motion), *available at* <http://www.ftc.gov/os/adjpro/d9345/110208aljorrdentccmocompel.pdf>. Similarly, Complete Automation’s motion to quash should be dismissed.

III. THE COURT SHOULD DENY COMPLETE AUTOMATION’S MOTION TO QUASH BECAUSE COMPLETE AUTOMATION FAILED TO MEET THE HEAVY BURDEN OF RESISTING GRACO’S REQUESTS.

The Commission Rules provide for discovery “to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” 16 C.F.R § 3.31 (c)(1). A party seeking to quash a subpoena has the burden of demonstrating that the request is unduly burdensome. *FTC v.*

Dresser Indus., No. 77-44, 1977 U.S. Dist. LEXIS 16178 at *12 (D.D.C. April 26, 1977); *In the Matter of Intel Corp.*, No. 9341, Order on Non-Party Hewlett-Packard Co.'s Mot. to Quash Subpoena *Duces Tecum* (F.T.C. May 19, 2010) (Chappell, J.) (finding generalized allegation of burden insufficient to support motion to quash) available at <http://ftc.gov/os/adjpro/d9341/102105intelaljorder.pdf>. Due to the strong public policy in favor of broad discovery, that burden is a heavy one. *In re Intel Corp.*, 2010 WL 2143904, at *2; *Flowers Indus.*, 1982 FTC LEXIS 96, at * 15 (“The law is clear that a recipient of a subpoena *duces tecum* issued in an FTC adjudicative proceeding who resists compliance therewith bears a heavy burden.”). Indeed, “[e]ven where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding.” *In re Kaiser Aluminum & Chem. Corp.*, No. 9080, 1976 FTC LEXIS 68 at *19-20 (Nov. 12, 1976). Complete Automation simply has not met this heavy burden.

Complete Automation does not object to thirteen of the twenty-five requests for documents contained in the Subpoena.⁷ Complete Automation's remaining objections fall under three general categories: the document requests are (1) not relevant, (2) overly broad or unduly burdensome, or (3) call for the disclosure of confidential materials. Graco addresses each of these objections in turn.

⁷ In response to Requests Nos. 4, 6, 7, 9, 12, 13, 15, 19, 20, 21, 22, 23, and 25, Complete Automation states that the requests are “neither objected to nor . . . required to be quashed.” Complete Automation's other objections are meritless. Contrary to Complete Automation's allegation that Request No. 4 does not set forth a time frame, that Request actually seeks “materials describing the services and products *now* being sold by you in the United States.” (emphasis added). Commission Rule 3.38a permits a party to withhold privileged documents if it provides a privilege log. *Compare* Complete Automation Br. 5, at ¶ 5, with 16 C.F.R. 3.38a.

A. *Graco's Requests for Documents Are Relevant.*

Graco has tailored each document request to obtain information relevant and vital to its defense in the pending FTC proceeding. [REDACTED]

[REDACTED] Indeed, given that it has no objection to more than half of the document requests, Complete Automation recognizes that it does possess documents generally relevant to the issues in the proceeding.

If compared to the allegations in the Complaint, the Subpoena can be shown to seek documents that may be reasonably expected to yield relevant information. The Complaint alleges that one of the relevant product markets is the "manufacture and sale of circulation pumps for paint systems used in automotive assembly plants" (Compl. ¶¶ 26.d & 30) and that "Graco and ITW are the only providers currently supplying circulation pumps for use in automotive paint circulation systems, making this acquisition a de facto merger to monopoly for new sales in this market." (*Id.* ¶ 37.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Subpoena generally seeks documents related to Complete Automation's sale and purchase of liquid-finishing equipment, marketing of its products and services, competitive market analyses, and plans to expand its finishing business. Documents responsive to Graco's

requests could serve to disprove the FTC's allegations that paint circulation pumps for automotive assembly plants constitute a relevant product market, and that anticompetitive effects will result if Graco acquires ITW's finishing business—especially when viewed in tandem with documents requested from and produced by other integrators, distributors, and end users. For example, responsive documents could demonstrate that Complete Automation or its competitors do or could purchase finishing products from manufacturers other than Graco and ITW, are capable of independently manufacturing these products, or can purchase non-finishing products for use in their systems.

Because the Subpoena's requests are "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent," the requested discovery is permitted by Rule 3.31(c)(1). That Complete Automation is not a party to the litigation does not diminish Graco's right to seek discovery in order to defend against the FTC's attack on the acquisition of the ITW finishing business.

B. Graco's Requests for Documents Are Not Overly Broad or Unduly Burdensome

Complete Automation routinely and without elaboration objects that Graco's requests are "overly broad and unduly burdensome."⁸ In its motion, however, Complete Automation fails to set forth any concrete facts supporting its assertion.

"[T]he public interest requires that once a complaint issues . . . Commission counsel (and respondent's counsel when they put on their defense) be given the opportunity to develop those facts which are essential" to support or undermine the allegations in the pleadings. *In re Gen. Foods Corp.*, No. 9085, 1978 FTC LEXIS 412, at *6 (Apr. 18, 1978). Because of this,

⁸Complete Automation objects on this ground in response to Request Nos. 3, 8, 10, 11, 16, and 24.

fundamental public interest, in order to prevail on its motion to quash or limit the subpoena, Complete Automation bears the burden to show that compliance would seriously disrupt its business operations:

The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose. Broadness alone is not sufficient justification to refuse enforcement of a subpoena. Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.

FTC. v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir. 1977). The burden is no less for a nonparty.

See *In re Flowers Indus., Inc.*, 1982 FTC LEXIS 96, at *14.

Complete Automation, therefore, must put forth specific evidence that demonstrates such disruption; a “general, unsupported claim [of burden] is not persuasive.” *In re Kaiser Aluminum & Chem. Corp.*, 1976 FTC LEXIS 68, at *18. This is especially true where a third party like Complete Automation is in the “very industry” that is the subject of this proceeding, regularly engages in business with Graco, [REDACTED]

[REDACTED] *In re Coca-Cola Bottling Co.*, No. 8992, 1976 FTC LEXIS 33, at *6 (Dec. 7, 1976) (denying motion to quash based on burdensomeness argument).

Complete Automation has failed to meet its burden. It relies on nothing more than conclusory assertions that requests are “overly broad and unduly burdensome.” This is manifestly insufficient to support a limitation of the subpoena. As stated in *In re Kaiser Aluminum & Chemical Corp.*, 1976 LEXIS FTC 68, at *18, “Even where a subpoenaed third

party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding.” As demonstrated above, the Subpoena requests seek information relevant to the issues raised in the Complaint. Complete Automation’s lack of evidence of burden does not begin to show that compliance would “seriously hinder normal operations” of its business.¹⁰

Finally, Complete Automation objects to some requests as overly broad or unduly burdensome because they call for documents from January 1, 2007, to the present. This objection, however, fails to apprehend the scope of the Complaint’s allegations. In its pre-Complaint investigation, the FTC identified the relevant time period for responsive documents back to January 1, 2007. The documents and data produced by Graco to the FTC from this time period not only informed Complaint Counsel’s decision to issue a Complaint, [REDACTED] and generally continue to inform both the FTC’s litigation strategy and Graco’s defense. Graco cannot effectively defend itself and respond to the allegations set forth in the complaint if it does not collect relevant information from the entirety of this time period. Furthermore, economic analysis of industry data and trends necessitates the collection of data from a year unaffected by the economic downturn that began in 2008. Therefore, Graco must collect data from 2007 in order to capture at

¹⁰ Complete Automation’s burdensome argument is also undermined by the fact that Graco has been willing to alleviate the burden through compromise. Graco not only agreed to withdraw several requests, but also proposed various means by which Complete Automation could limit the burden of compliance. In light of Graco’s efforts, Complete Automation’s claims of burden cannot be used to limit the subpoena. “[A] Federal Trade Commission subpoena seeking relevant data will not be quashed on the grounds that a burden is imposed on a third party, especially where the party initiating the subpoena has expressed a willingness to mitigate whatever burden may exist by negotiation and compromise.” *In re General Motors Corp.*, No. 9077, 1977 FTC LEXIS 18, at *1 (Nov. 25, 1977); *see also In re R.R. Donnelley & Sons Co.*, No. 9243, 1991 FTC LEXIS 272, at *2 (June 12, 1991) (refusing to quash or limit subpoena “in light of complaint counsel’s offer to modify some of the subpoena’s specifications”).

least one pre-recession year. *See, e.g., id.* (rejecting motion to limit a ten-year time period covered by subpoena requests because of need for evidence on long-term trends in industry).

C. *The December 16, 2011 Protective Order Is Sufficient to Protect Complete Automation's Interests.*

Complete Automation also complains that the Subpoena seeks sensitive and confidential information relating to its business.¹¹ The December 16, 2011 Protective Order entered in this matter addresses this concern. Paragraph 3 of the Protective Order in this action provides Complete Automation the ability to designate produced documents as “Confidential,” a designation that precludes their disclosure to anyone employed by the parties, including even inside counsel. (Protective Order ¶ 7.) If Graco or the FTC plans to introduce into evidence at the hearing any document containing information designated as confidential by Complete Automation, the party must notify Complete Automation for the purpose of allowing it to seek an order for *in camera* treatment. (*See id.* ¶ 10.) These protections continue to prohibit the disclosure of confidential information in perpetuity. (*See id.* ¶ 13.) Furthermore, given the large amount of its own confidential information that has been disclosed to the FTC, Graco has a strong interest in ensuring that all parties abide by the Protective Order and that all provisions are diligently enforced.

Despite the fact that the Protective Order was attached to the Subpoena (and is, in fact, attached to Complete Automation's motion), Complete Automation does not substantively address why the Protective Order fails to protect its interests. Instead, Complete Automation vaguely alleges that “some of the documents to be produced are confidential and proprietary and/or are considered trade secrets,” and that such information “should be subject to a protective

¹¹ Complete Automation objects on this ground in response to Request Nos. 1, 2, 5, 8, 14, 16, 17, 18, and 24.

order more narrow than the one already in effect.” (Complete Automation Br. 1, 11.) At no point in its motion does Complete Automation make any specific allegation of harm stemming from the disclosure of relevant documents.

While Complete Automation may feel that it should not have to produce some allegedly confidential documents, “it is clear that relevant confidential business information may properly be called for in subpoenas issued in Commission proceedings.” *In re Coca-Cola Bottling Co.*, 1976 FTC LEXIS 33, at *3-4. Thus, “[t]he fact that information sought by a subpoena may be confidential does not excuse compliance.” *In re Kaiser Aluminum & Chem. Corp.*, 1976 FTC LEXIS 68, at *9. Moreover, under the Commission Rules, “a showing of general relevance is sufficient to justify production of documents containing confidential business information and no further showing of ‘need’ is necessary.” *Id.* at *10-11; *see also In re Flowers Indus., Inc.*, 1982 FTC LEXIS 96, at *8 (same).

In any event, the Protective Order ameliorates Complete Automation’s concerns. “[P]rotective orders are routinely issued” to prevent the type of misuse of confidential information that Complete Automation posits. *In re Coca-Cola Bottling Co.*, 1976 FTC LEXIS 33, at *4. Complete Automation has pointed to nothing that would undermine the necessary assumption that “the protective order will work.” *Id.* Indeed, Complete Automation does nothing more than assert that disclosure to “either Graco or Illinois Tool Works can provide either of them with an unfair business and development advantage over Complete [Automation], a nonparty to this matter” (Complete Automation Br. 5)—the very type of argument routinely rejected in light of the existence of a protective order. *See, e.g., In re Coca-Cola Bottling Co.*,

1976 FTC LEXIS 33, at *4-5 (rejecting an argument that industry experts should not receive competitively sensitive information subject to protective order).¹²

IV. COMPLETE AUTOMATION IS NOT ENTITLED TO REIMBURSEMENT OF COSTS INCURRED TO COMPLY WITH THE SUBPOENA.

In agency actions,¹³ “[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.” *Intel Corp.*, No. 9341, Order on Mot. to Quash, at 3 (quoting *Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at *13). The Commission has held that a “subpoenaed party is expected to absorb the reasonable expenses of compliance as a cost of doing business, but reimbursement by the proponent of the subpoena is appropriate for costs shown by the subpoenaed party to be unreasonable.” *In re Int’l Tel. & Tel. Corp.*, No. 9000, 1981 FTC LEXIS 75, at *3 (Mar. 13, 1981); *see also In re N. Tex. Specialty Physicians*, No. 9312, 97 F.T.C. 202, 2004 FTC LEXIS 18, at *7 (Feb. 4, 2004) (denying cost reimbursement because the subpoena did not impose an undue burden on the non-party); *In re R.R. Donnelley & Sons Co.*, No. 9243, 1991 FTC LEXIS 268, at *1-2 (June 6, 1991) (holding that subpoenaed party “can be required to bear reasonable costs of compliance with the subpoena”).

¹² The fact that Complete Automation is a third party does not diminish these principles, especially given Graco’s need to obtain the requested information for its defense and “the public interest in seeking the truth in every litigated case.” *In re Kaiser Aluminum & Chem. Corp.*, 1976 FTC LEXIS 68, at *15.

¹³ In support of its argument that Graco be required to cover the cost of compliance with the Subpoena, Complete Automation cites to Federal Rule of Civil Procedure 45 and case decided by the U.S. Court of Appeals for the District of Columbia Circuit. (*See* Complete Automation Br. 11-12 (citing *Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001) (“Under . . . Rule 45, the questions before the district court are whether the subpoena imposes expenses on the non-party, and whether those expenses are ‘significant.’ If they are, the court must protect the non-party by requiring the party seeking discovery to bear at least enough of the expense to render the remainder ‘non-significant.’”)). The standard here, however, is whether the expenses incurred to comply with the Subpoena are “reasonable,” and, if they are reasonable, then Complete Automation must absorb them as a cost of doing business. *See In re Int’l Tel. & Tel. Corp.*, No. 9000, 1981 FTC LEXIS 75, at *3 (Mar. 13, 1981).

Graco has no duty to reimburse Complete Automation for the reasonable expenses Complete Automation may incur in complying with the Subpoena. In determining whether expenses are “reasonable,” a court “should compare the costs of compliance in relation to the size and resources of the subpoenaed party.” *In re Int’l Tel. & Tel. Corp.*, 1981 FTC LEXIS 75, at *3 (citing *SEC v. OKC Corp.*, 474 F. Supp. 1031 (N.D. Tex., 1979)). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Complete

Automation also fails to provide any estimation of cost for compliance in its motion,¹⁴ but instead merely states that the “cost of production will be substantial, requiring the work of numerous employees reviewing, organizing, and copying thousands and thousands of documents.” (Complete Automation Br. 11.) Given [REDACTED] an absence of any estimation of cost, it is impossible to assess the burden of compliance. As such, Complete Automation has failed to carry its burden in demonstrating that the costs of compliance with the subpoena would be unreasonable.

Even if the Complete Automation had shown that its costs of compliance are unreasonable, “where the non-party is in the industry in which the alleged acts occurred and the non-party has [an] interest in the litigation and would be affected by the judgment, only the cost of copying, and no other costs of the search, need be reimbursed.” *In re Flowers Indus., Inc.*,

¹⁴ After Graco had offered to narrow the scope of its requests and accept an initial production of the most critical documents prior to Complete Automation’s deposition, Complete Automation estimated the cost of compliance with this first phase at [REDACTED]. (See Duncan Aff. Ex. E.) Complete Automation never provided an estimate of the cost of compliance with the second phase of the negotiated production or with Graco’s complete document requests as originally set forth in the Subpoena.

1982 FTC LEXIS 96, at *16-17. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] There can be no question that Complete Automation [REDACTED]

[REDACTED] at most would be entitled to be reimbursed for copying charges.

Complete Automation has not demonstrated that its costs to comply with the subpoena would be unreasonable. Accordingly, it is due no reimbursement for its costs and expenses incurred in complying with the Subpoena.

CONCLUSION

The Court should deny Complete Automation's motion in its entirety, and direct full production in response to the Subpoena within ten days, given the limited time remaining for pre-hearing discovery in this matter.

fb.us.8022301.03

Dated: January 30, 2012

Respectfully submitted,

s/ Richard G. Parker

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Katrina M. Robson
O'MELVENY & MYERS LLP
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and

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(612) 766-7000
(612) 766-1600 (fax)

**Attorneys for Respondent
Graco Inc.**

CERTIFICATE OF SERVICE

I certify that on January 31, 2012, I have caused the foregoing Public versions of Graco's Memorandum in Opposition to Complete Automation's Motion to Quash and/or Limit Subpoena *Duces Tecum*, Affidavit of Richard A. Duncan, and Motion to File *In Camera* Graco's Memorandum in Opposition to Complete Automation's Motion to Quash and/or Limit Subpoena *Duces Tecum* and the Affidavit of Richard A. Duncan to be served by email upon Phillip Broyles (pbroyles@ftc.gov), Peter Richman (prichman@ftc.gov), Marc Schneider (mschneider@ftc.gov), and Amanda Hamilton (ahamilton1@ftc.gov) of the Federal Trade Commission; and upon J. Robert Robertson (robby.robertson@hoganlovells.com), Logan Breed (Logan.Breed@hoganlovells.com), Meghan Edwards-Ford (Meghan.Edwards-Ford@hoganlovells.com) of Hogan Lovells US LLP, counsel for Illinois Tool Works Inc. and Illinois Tool Works Finishing LLC, and Daniel E. Chapman (dchapman@troylawfirm.com), counsel for Complete Automation, Inc.

I also emailed a copy of the foregoing to secretary@ftc.gov, oalj@ftc.gov, and caused a copy to be filed via ECF.

s/ Matthew M. Martin
Matthew M. Martin (MNBN 989341)

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(612) 766-1600 (fax)

Attorney for Graco Inc.

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

In the Matter of)	
)	Docket No. 9350
)	
Graco Inc., et al.)	PUBLIC
)	

AFFIDAVIT OF RICHARD A. DUNCAN

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

I, RICHARD A. DUNCAN, being duly sworn, state as follows:

1. I am a partner at the law firm of Faegre Baker Daniels LLP in Minneapolis, Minnesota. I am one of the attorneys representing Respondent Graco Inc. ("Graco") in the above-captioned matter.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4. Attached as Exhibit C are true and correct copies of the Affidavits of Service for the Subpoena *Ad Testificandum* and Subpoena *Duces Tecum* served on Complete Automation on January 5, 2012.

5. Attached as Exhibit D is a true and correct copy of the January 26, 2012 e-mail from Complete Automation's counsel, Daniel E. Chapman, to Graco's counsel, Emily E. Chow,

with the subject line "RE: FTC v. Graco: agreement re: Subpoena Duces Tescum of Complete Automation."

6. Attached as Exhibit E is a true and correct copy of the January 27, 2012 e-mail from Complete Automation's counsel, Daniel E. Chapman, to Graco's counsel, Emily E. Chow, with the subject line "RE: Graco matter."

FURTHER AFFIANT SAYETH NOT.

s/ Richard A. Duncan
Richard A. Duncan

Subscribed and sworn to before me on
January 30, 2012.

s/ Megan E. Froelke
Notary Public

fb.us.8031502.01

EXHIBIT A

CONFIDENTIAL—FTC Docket No. 9350 – Subject to Protective Order

EXHIBIT B

CONFIDENTIAL—FTC Docket No. 9350 – Subject to Protective Order



Serial # FAEBE 95995 5002



Re: 32460/401526

372252

STATE OF MICHIGAN

AFFIDAVIT OF SERVICE

COUNTY OF MACOMB

ERICS GOODWIN / COURT OFFICER being duly sworn, on oath says that on
(Name of Server)

1 / 5 /2012 at 1 : 55 P M
(Date of Service) (Time of Service)

s(he) served the attached: Subpoena Duces Tecum; Exhibit A; Protective Order Governing
Discovery Material; Attachment A

upon: Complete Automation, Inc.

therein named, personally at: 1776-D West Clarkston Road
Lake Orion, MI 48362

by handling to and leaving with:

[X] someone who is authorized to accept service on behalf of Complete Automation, Inc.

ROBERT B. LIGHT
(Name of the Person with whom the documents were left)

CORPORATE CONTROLLER
(Title or Relationship)

a true and correct copy thereof.

Subscribed and Sworn to before me

1 / 10 /2012.
Christina Puckett
(Signature of Notary)

[Signature]
(Signature of Server)



* Service was completed by an independent contractor retained by Metro Legal Services, Inc.



Serial # FAEBE 95994 5001



Re: 32460/401526

STATE OF MICHIGAN

AFFIDAVIT OF SERVICE

COUNTY OF MACOMB

BRUCE GIDDAMON / COURT OFFICER
(Name of Server)

being duly sworn, on oath says that on

1 / 5 /2012 at 1 : 55 P M
(Date of Service) (Time of Service)

s(he) served the attached: Subpoena Ad Testificandum Deposition; Exhibit 1; Protective Order
Governing Discovery Material; Attachment A

upon: Kenneth Matheis, Jr.

therein named, personally at: 1776-D West Clarkston Road
Lake Orion, MI 48362

by handling to and leaving with:

[X] someone who is authorized to accept service on behalf of Kenneth Matheis, Jr.

ROBERT B. LIGHT
(Name of the Person with whom the documents were left)

CORPORATE CONTROLLER
(Title or Relationship)

a true and correct copy thereof.

Subscribed and Sworn to before me

Bruce Giddamon
(Signature of Server)

1 / 10 /2012.
Christina Puckett
(Signature of Notary)

 **CHRISTINA PUCKETT**
Notary Public, State of Michigan
County of Macomb
My Commission Expires Nov 21, 2018
Acting in the County of Macomb

* Service was completed by an independent contractor retained by Metro Legal Services, Inc.

Chow, Emily E.

From: Daniel E. Chapman [dchapman@troylawfirm.com]
Sent: Thursday, January 26, 2012 1:45 PM
To: Chow, Emily E.
Subject: RE: FTC v. Graco: agreement re: Subpoena Duces Tecum of Complete Automation

Emily,

See my comments below.....

The Troy Law Firm
Daniel E. Chapman, Attorney/Member
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Thank you.

From: Chow, Emily E. [mailto:Emily.Chow@faegrebd.com]
Sent: 01/26/2012 2:36 PM
To: 'Daniel E. Chapman'
Subject: RE: FTC v. Graco: agreement re: Subpoena Duces Tecum of Complete Automation

Dear Dan:

Thanks for your quick response. I think we're close. Let's work out the issues you raised below, and I'll send a clean revised version later (for your review and confirmation). Please see my comments below in red.

Best,
Emily

Emily E. Chow
Associate
emily.chow@FaegreBD.com

Direct: +1 612 766 8012

FaegreBD.com Download vCard

FAEGRE BAKER DANIELS LLP

2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901, USA

From: Daniel E. Chapman [<mailto:dchapman@troylawfirm.com>]
Sent: Thursday, January 26, 2012 1:04 PM
To: Chow, Emily E.
Subject: RE: FTC v. Graco: agreement re: Subpoena Duces Tecum of Complete Automation

Emily,

Please see my comments below.....

And I am still waiting on my client's response for available dates for deposition on the 14th, 15th, 16, or 17th.

Thanks

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Thank you.

From: Chow, Emily E. [<mailto:Emily.Chow@faegrebd.com>]
Sent: 01/26/2012 1:43 PM
To: 'dchapman@troylawfirm.com'

Cc: Duncan, Richard A.; Coleman, Craig S.

Subject: FTC v. Graco: agreement re: Subpoena Duces Tecum of Complete Automation

Dear Dan:

Thank you for your time this morning.

This e-mail confirms the agreement we reached to limit the scope of the Subpoena Duces Tecum served on Complete Automation. Pursuant to our agreement, Complete Automation will produce documents responsive to the following requests contained in Exhibit A of the Subpoena as modified below:

[D. Chapman] Requests that have been deleted, also need to be identified as being deleted. [E. Chow] Sure, I will edit this in the "final" clean version for your review and confirmation.

Request No.	Date Range	Request as Modified	Production
2	2007	<p>Not modified. This is modified.... This is requested for five years [five years is 2007, see column to the left], and is only a summary of sales, and does not include names of customers, end users, or otherwise [I don't read Request No. 2 as seeking the identification of customers or end users. Are you suggesting that redaction of your client's records is necessary?]. However, they would like to know if such sales can be geographically identified by U.S. and International. Can we agree to the following?</p> <p>"Annual or quarterly sales summaries, aggregating sales of liquid or powder finishing systems, lines, or products (1) in the United States, and (2) globally from January 1, 2007, to the present in the format and to the extent this information is kept in the ordinary course of Complete Automation's business." YES</p>	By Feb. 10*
3	2007	<p>This has been modified as follows: Regarding applicators, pumps, proportioners, ovens, spray booths, gear pumps, electrostatic atomizers, and accessories or spare parts with respect thereto, list such items and who you buy them from for the last five years [five years is 2007, see column to the left]. No other items, and no rebates, discounts or otherwise. We would at least want some aggregated purchase data on a yearly basis. I envision five spreadsheets (one for each year) with a listing of the items, the manufacturers that Complete purchases the item from, and a total dollar amount attributable to each manufacturer for that item. Can we agree to the following?</p> <p>"Regarding applicators, pumps, proportioners, ovens, spray booths, gear pumps, electrostatic atomizers, and accessories or spare parts with respect thereto, list any such items purchased, from whom you purchased those items, and the total dollar amount purchased from each manufacturer/supplier on an annual basis from January 1, 2007 to present." YES</p>	By Feb. 10*
4	2010	Not modified other than date range for production.	TBD after depo
5	2010	This has been modified as follows: Okay. In the last five years, any prepared internal or commissioned studies of ITW, Graco, Exel, Nordson, Ingersoll-Rand (ARO), 3M, Wagner, Anest Iwata, or Sata YES	By Feb. 10*
6	2010	Not modified other than date range for production.	TBD after depo
7	2010	Not modified other than date range for production.	TBD after depo
11	2010	All documents related to any communication between you and any of the following entities: Exel, Nordson, Ingersoll-Rand (ARO), Wagner, Anest Iwata, Sata, and/or 3M. This remains an open item. Okay, I will note this.	TBD after depo

12	2010	Not modified other than date range for production.	TBD after depo
13	2010	Not modified other than date range for production.	TBD after depo
15	2010	Not modified other than date range for production.	TBD after depo
19	2010	Not modified other than date range for production.	TBD after depo
20	2010	Not modified other than date range for production.	TBD after depo
21	2010	Not modified other than date range for production.	TBD after depo
22	2010	Not modified other than date range for production.	TBD after depo
23	2010	Not modified other than date range for production.	TBD after depo
24	2010	This has been modified as follows: Okay. For last 2 years, any marketing materials, presentations, or videos prepared by Complete and presented to an end user of your systems. YES	By Feb. 10*
25	2010	Not modified other than date range for production.	TBD after depo

*Complete Automation has agreed to produce documents responsive to requests with a February 10 production date on a rolling basis and as they are available.

[D. Chapman] We also discussed my client being reimbursed for all costs and fees incurred in producing this document request. This is something that needs to be raised with Graco. I can add a sentence representing that I will raise the issue with Graco. [D. Chapman] As a third party we will require that these be reimbursed. Please acknowledge that it will. My client really is not concerned with whom or how you have to go about doing it. And I don't want to have my client being producing until this issue is addressed.

Please confirm that the above reflects your understanding of our discussion, or let me know what you believe I have inadvertently omitted. In light of our agreement—as memorialized herein—I would again request that you withdraw your pending motion to quash. Also, please send me date(s) between February 14 and 17 on which Complete Automation is available for deposition.

Best,
Emily

Emily E. Chow

Associate
emily.chow@FaagreBD.com

Direct: +1 612 766 8012

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Chow, Emily E.

From: Daniel E. Chapman [dchapman@troylawfirm.com]
Sent: Friday, January 27, 2012 10:15 AM
To: Chow, Emily E.
Subject: RE: Graco Matter

Emily, please see below.....

The Troy Law Firm
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Thank you.

From: Chow, Emily E. [mailto:Emily.Chow@faegrebd.com]
Sent: 01/27/2012 11:05 AM
To: 'Daniel E. Chapman'
Cc: Colemar, Craig S.
Subject: RE: Graco Matter

Dear Dan:

This is not acceptable to Graco.

First, the estimate you provided appears to include costs that are not at issue in your motion to quash—e.g., costs and fees associated with compliance with the Subpoena Ad Testificandum—so it is unclear how much of the [REDACTED]

[REDACTED] is a result of compliance with Request Nos. 2, 3, 5, and 24 as modified [D. Chapman] app 3 hours of attorney time.

Second, we believe that the cost of collection and production of the limited documents responsive to Request Nos. 2, 3, 5, and 24 is minima [D. Chapman] it is not, and would reimburse \$500 for this cost. We would not expect Complete Automation to proceed with the collection or production of the second phase of production until after the deposition [D. Chapman] this is as we understood and such costs and fees have not be considered, as the deposing attorney may determine that it is unnecessary to pursue the remainder of the documents. We had intended to file a "response" stating that a hearing on the motion was unnecessary because the parties came to an agreement limiting the scope of the requests and establishing a schedule for production, and that Complete Automation reserved its right to seek reimbursement for costs associated with compliance. It seems, however, that our proposal is unacceptable to Complete Automation.

I am sorry that we were unable to resolve this issue, especially given how close we were to reaching an agreement. [D. Chapman] It is a shame.

Best,

Emily

Emily E. Chow

Associate

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From: Daniel E. Chapman [<mailto:dchapman@troylawfirm.com>]

Sent: Friday, January 27, 2012 9:30 AM

To: Chow, Emily E.

Subject: Graco Matter

Emily,

Hello. I am out of the office this morning, but I wanted to touch base with you concerning the estimate of the costs and fees to produce the first phase of documents [REDACTED]

[REDACTED] all as outlined in our emails of yesterday [REDACTED]

[REDACTED]

If this is acceptable to your client, please advise accordingly, and I will have my client begin this project with a target date of completion for this phase of February 10, 2012.

Thank you.

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Thank you.