

number of its experts as this proceeding has progressed, and none of its remaining experts is cumulative.

Upsher-Smith initially designated three licensing experts, four medical experts, two

[REDACTED]

[REDACTED]

[REDACTED]

Niacor-SR in different patient populations (severe vs. mild dyslipidemia) and distinct geographic markets (United States vs. overseas).

ARGUMENT

1. [REDACTED]

2. [REDACTED]

3. [REDACTED]

4. [REDACTED]

5. [REDACTED]

6. [REDACTED]

7. [REDACTED]

8. [REDACTED]

9. [REDACTED]

10. [REDACTED]

11. [REDACTED]

12. [REDACTED]

13. [REDACTED]

14. [REDACTED]

15. [REDACTED]

16. [REDACTED]

17. [REDACTED]

18. [REDACTED]

19. [REDACTED]

20. [REDACTED]

21. [REDACTED]

22. [REDACTED]

23. [REDACTED]

24. [REDACTED]

25. [REDACTED]

26. [REDACTED]

27. [REDACTED]

28. [REDACTED]

29. [REDACTED]

30. [REDACTED]

31. [REDACTED]

32. [REDACTED]

hearing." Rule 3.41(c) (emphasis added). Due Process requires nothing less. Upsher-Smith is a

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Moreover, exclusion of purportedly cumulative evidence is disfavored where the challenged

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**B. Testimony By Numerous Experts On Related Or Overlapping
Topics Is Commonplace And Not Cumulative In Complex Cases**

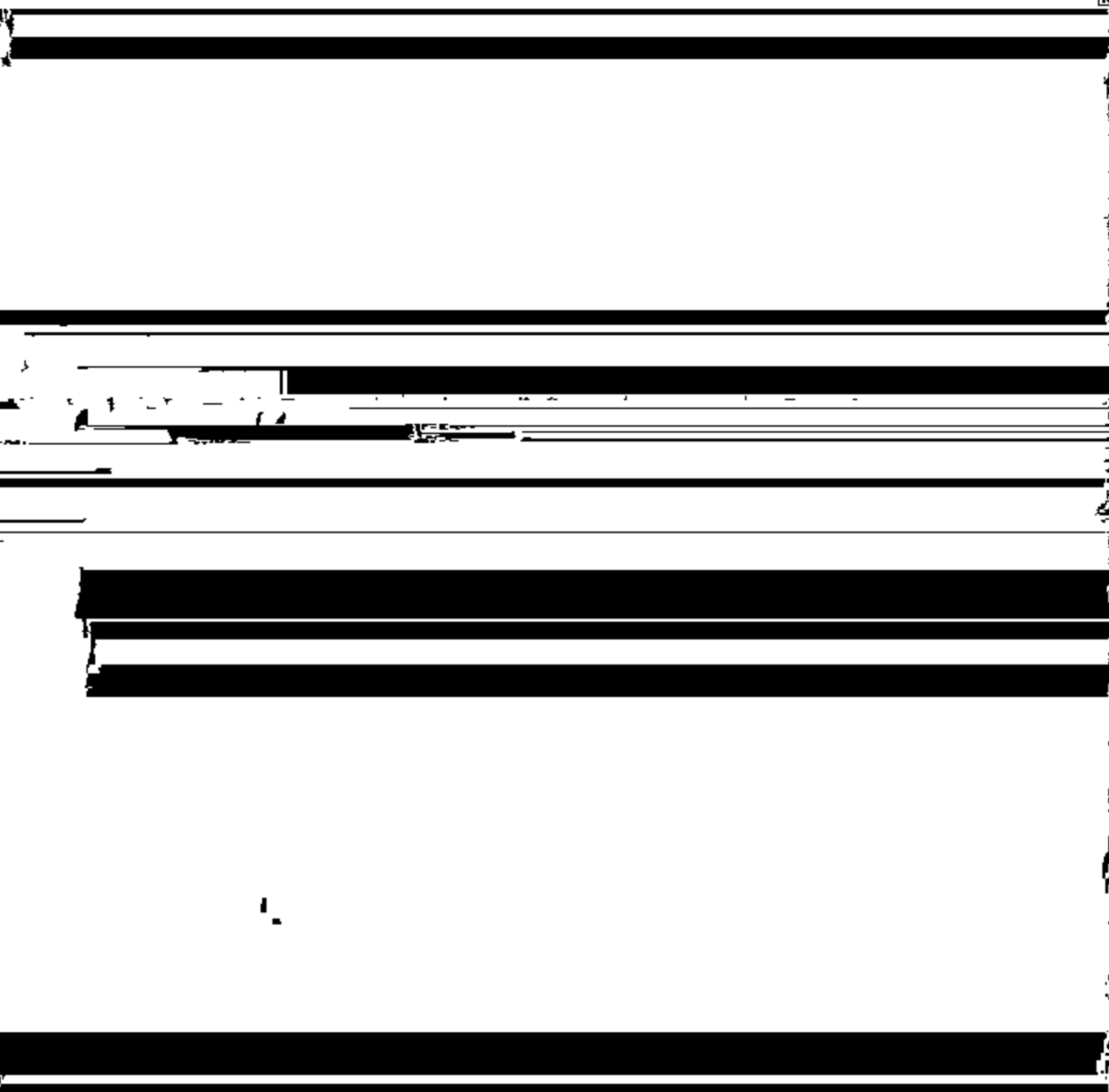
Systems to Control Corporate Operations in complex litigation it is common for

[REDACTED]

[REDACTED]

[REDACTED]

As Complaint Counsel is forced to acknowledge (Mem. at 6 n.13), Commission precedents confirm that a respondent's experts will not lightly be limited on grounds that they are cumulative. In *In re Natural Organics*, 2001 WL 1478370 *1 (F.T.C. April 5, 2001), the two related respondents (a corporation and its officer) designated 14 experts, 12 of them as "scientific



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

presenting their own experts. Upsher-Smith and Schering did not choose to be sued in the same proceeding.

2. Dr. Ordover's Expert Testimony Regarding The Informational And Business Concerns Of Settlement Is Not Cumulative Of Dr. Kerr's Testimony On The Economic Theory Underlying The Negotiation And Valuation Of Patent Settlements

- Dr. Kerr also

10

- Dr. Kerr also

• Dr. Kerr analyzes his economic policies — [redacted]

enforcement, and his background in the economics of bargaining and litigation settlements to discuss the

Dr. Ordover takes on Dr. Bresnahan's simplistic assumption that

For example, contrary to Dr. Bresnahan's assumptions,

See Ordover Rep. ¶¶

For this reason, Dr. Ordover

Unsher-Smith has not retained a separate

. See Ordover Rep. at ¶¶

. Specifically, Dr. Ordover's report discusses

(Ordover Rep. ¶¶),

Dr. Ordover's report and testimony focus

(Ordover Rep. at ¶)

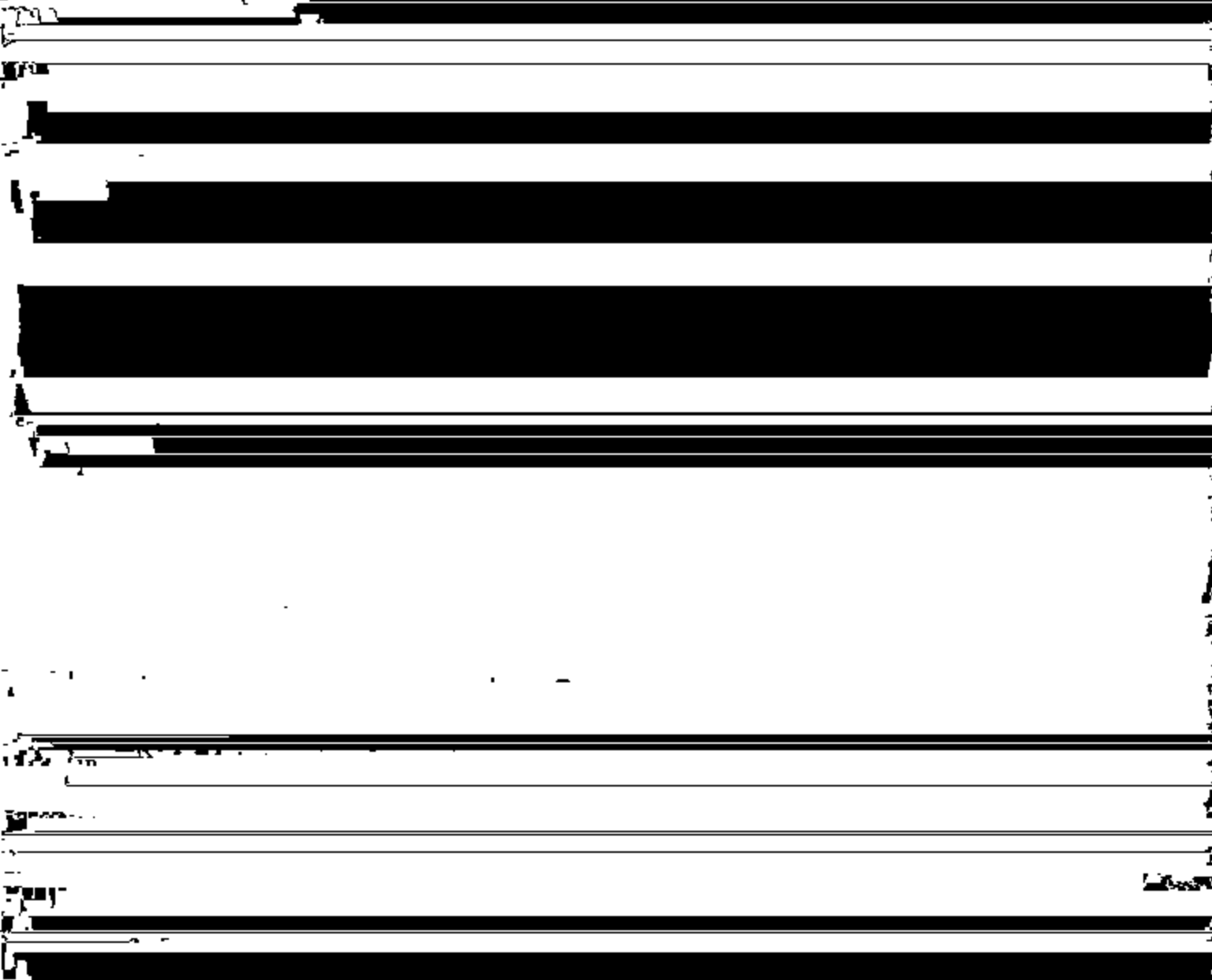
—

In sum, Dr. Kerr draws from his many years of patent litigation and licensing expertise
and

In contrast, Dr. Ordover, an industrial organization economist, provides Upsher-Smith's

Both experts go to the heart of Upsher-Smith's defense and tackle the leading issues addressed by Complaint Counsel's untested legal challenge, using their different approaches and methods.

3 Upsher-Smith's Medical Experts Do Not Challenge the Agency's Finding



Both of these Indian medical concepts were involved in the clinical trials relating to

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

hypercholesterolemia with statins, and so we don't . . . see those patients at all unless it's by some accident." *Id.* at

Dr. Keenan, on the other hand, . . . As he testified, most of his patients present with moderate dyslipidemia: "I would say 75, 80 percent of my patients that present, you know, with a lipid problem are within, let's say, 30 percent above . . . 30 or 40 percent above the normal range of the lipid panel." . . .

only witness in the case-in-chief with first-hand experience on the receptivity of niacin in foreign markets.

CONCLUSION

For all of the foregoing reasons, Complaint Counsel's motion to limit the testimony of Upsher-Smith's experts should be denied.

[REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2002 I caused a paper original and one copy as well as an electronic version of the foregoing to be filed with the Clerk of the Court in the above captioned case.

[Redacted signature]

[Redacted name]

[Redacted address]

[Redacted address]

[Redacted address]

[Redacted address]

[Redacted address]

[Redacted address]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

proceedings related thereto.

employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for the purposes of this Matter.

9. "Producing Party" means a Party or Third Party that produced or intends to produce Confidential Discovery Material to any of the Parties. For purposes of Confidential Discovery Material of a Third Party that either is in the possession, custody or control of the FTC or has been produced by the FTC in this Matter, the Producing Party shall mean the Third Party that

originally provided the Confidential Discovery Material to the FTC. The Producing Party shall

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

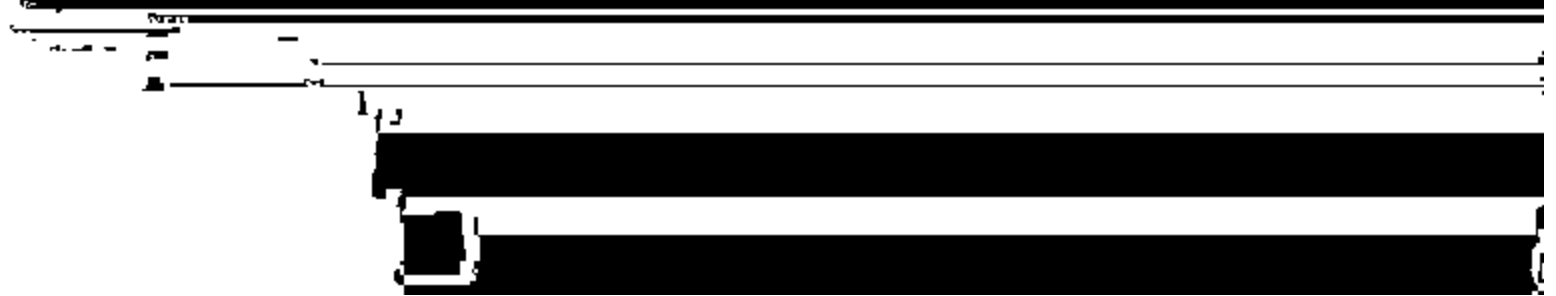
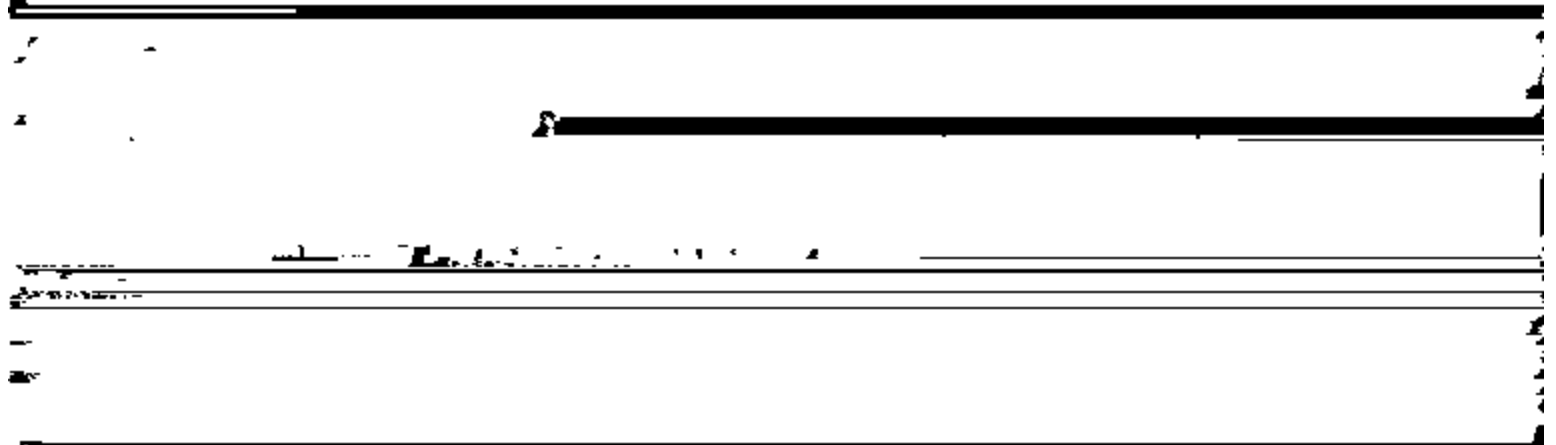
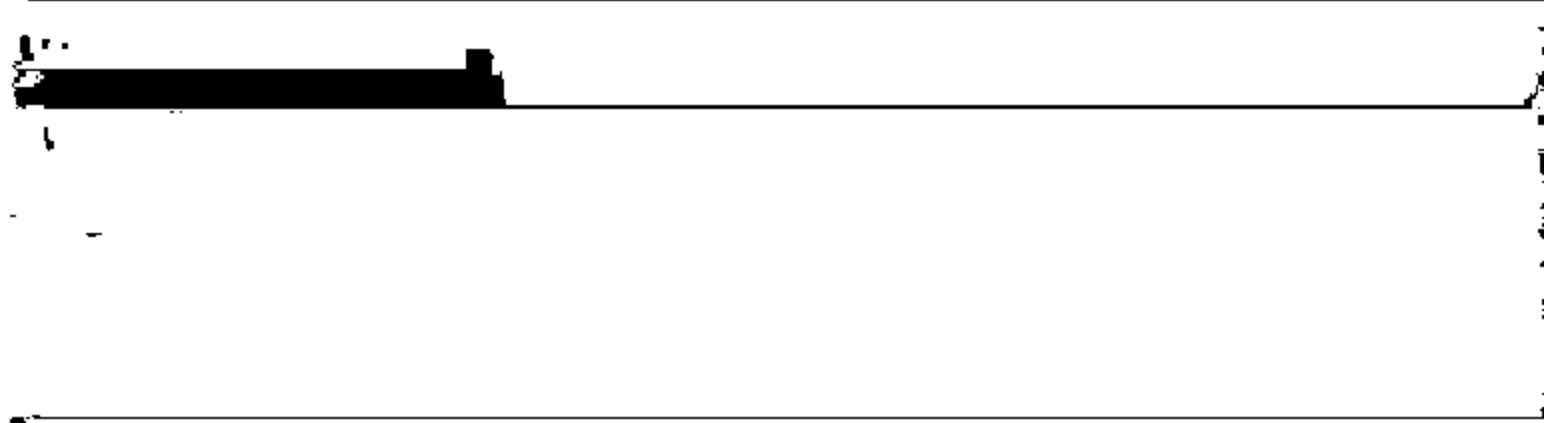
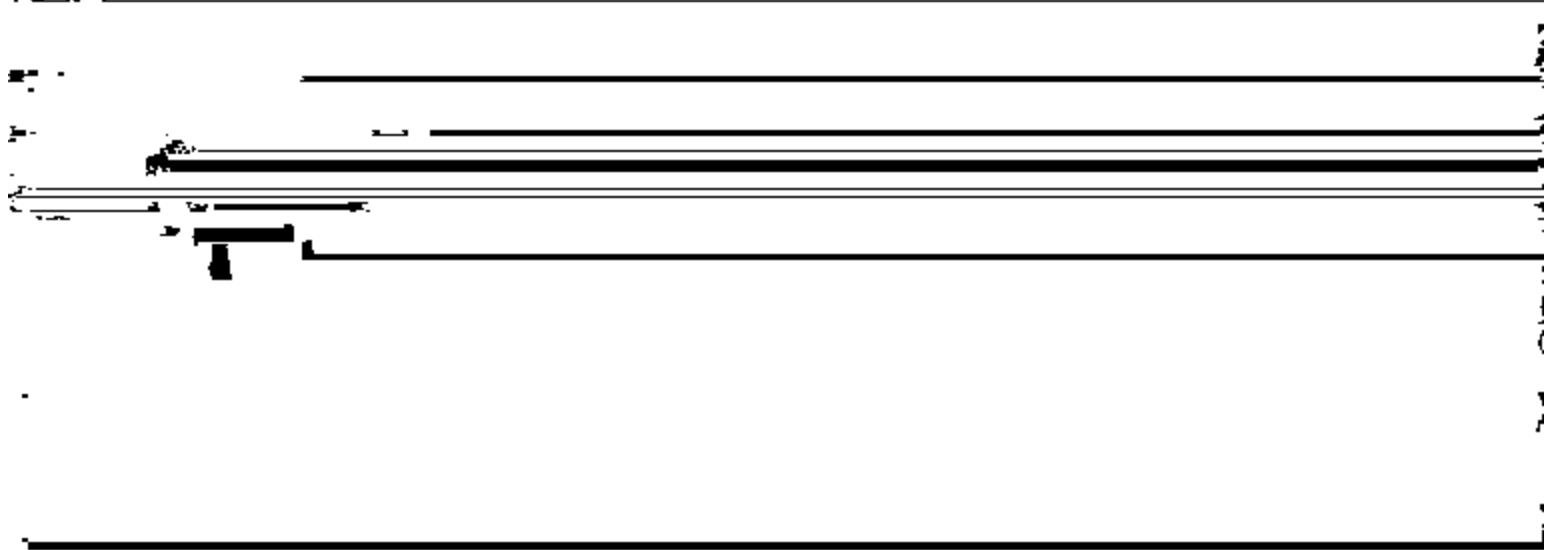
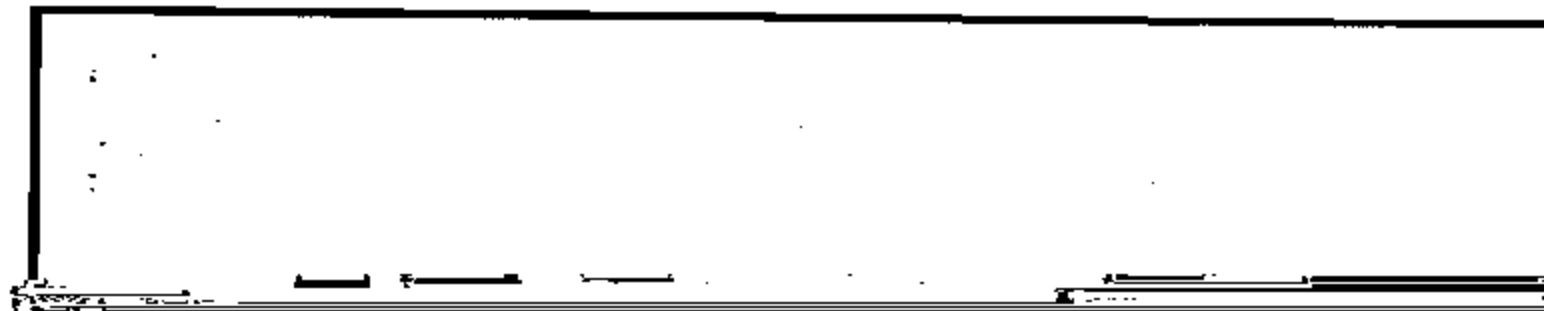
be obtained and includes all drafts and all copies of every such writing prepared that contain any

Confidential Discovery Material.

TERMS AND CONDITIONS OF PROTECTIVE ORDER

1. Discovery Material, or information derived therefrom, shall be used solely by the Parties for purposes of this Matter, and shall not be used for any other purpose, including without limitation any business or commercial purpose, except that with notice to the Producing Party, a Party may apply to the Administrative Law Judge for approval of the use or disclosure of any

of page 10 (attch) to the first page of a document containing 1. C. 1. 1. 1. 1.



shall not disclose the Restricted Confidential, Attorney Eyes Only material to the identified individual, absent a written agreement with the Producing Party, order of the Administrative Law Judge or ruling on appeal. The Producing Party lodging an objection and the disclosing Party shall meet and confer in good faith in an attempt to determine the terms of disclosure to the identified individual. If at the end of five business days of negotiating the parties have not resolved their differences or if counsel determine in good faith that negotiations have failed, the disclosing Party may make written application to the Administrative Law Judge as provided by paragraph 7(c) of this Protective Order. If the Producing Party does not object to the disclosure of Restricted Confidential, Attorney Eyes Only material to the identified individual within five

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3. All documents heretofore obtained by the Commission through compulsory process

~~regardless of whether designated confidential source~~

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(h) any author or recipient of the Confidential Discovery Material (as indicated on

the face of the document, record or material) and any individual who was in the direct chain of

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Appendants' Outside Counsel, as appropriate, upon the conclusion of the Event/Concurrence.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

the Confidential Discovery Material within five business days of receiving notice of an intent to

~~Disclose the Confidential Discovery Material to the Identified Person or Entity.~~

[REDACTED]

[Redacted]

67 [Redacted]

[Redacted]

[Redacted]

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[Redacted]

have failed to resolve outstanding issues. The Producing Party and any other Parties shall have five business days to respond to the application. While an application is pending, the Parties shall maintain the pre-application status of the Confidential Discovery Material. Nothing in this Protective Order shall create a presumption or alter the burden of persuasion that a determination

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

1

[REDACTED]

[REDACTED]

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[REDACTED]

Confidential from the time the Producing Party advises Complaint Council and Respondents'

[Redacted]

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[Redacted]

[Redacted]

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[Redacted]

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[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

whom the Discovery Material was provided—unless the Party asked to return the Discovery

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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_____)

promptly return all Confidential Discovery Material, and all notes,
~~_____~~ _____ containing Confidential Discovery Material

