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

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

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO COMPEL RESPONSES TO INTERROGATORIES

Respondent's colorful language in its Motion to Compel Responses to Interrogatories ("Motion to Compel") disguises the relevant issues. Far from "stonewalling" or engaging in "concealment" or "manifestly unfair" discovery tactics, Complaint Counsel have properly refused to answer two interrogatories that call for what is, by Respondent's own admission, classic attorney work product. The interrogatories also seek information protected by the informant's privilege and are overbroad. Complaint Counsel's failure to answer over a proper objection reflects no more than a sound application of settled principles of law.

The interrogatories' overbreadth is evident from Respondent's own characterization. Respondent claims that its first interrogatory seeks "a description of what was discussed with *third parties* who have communicated with Complaint Counsel." (Motion to Compel at 1, fn. 2 (emphasis added)). In fact, the interrogatory actually served is far broader, seeking "*each person* with whom you have communicated regarding this matter." (Motion to Compel at 3, (emphasis added)).

Even as narrowed at the last minute, the first interrogatory is improper. Respondent claims not to seek attorneys' "notes of interviews," but Complaint Counsel are unable to provide Respondent with anything more than what Respondent has already received without handing

[4] See December 11, 2003, Letter From Lesli Esposito to Mark Nelson, attached hereto as exhibit C.

[5] Respondent claims that it seeks "only a description of what was discussed with third-parties who have communicated with Complaint Counsel." (Motion to Compel at 1, fn 2)

[6] The date Complaint Counsel's preliminary witness list was due. *See*

[7] The very authority cited by Respondent demonstrates that Complaint Counsel have complied fully with

generally In re Harper & Row, Publishers, Inc., 1990 FTC LEXIS 213, *8-9 (1990) (Informant's privilege allows the government to withhold the identity of persons who either provide information about violations of law or who provide assistance that is necessary for the government to enforce the laws.) (exhibit H). In short, Respondent has been,

[8] In regard to work product privilege, Respondent solicited an agreement with Complaint Counsel stating that both parties were not required to disclose on the privilege schedule internal documents withheld on the basis of work product. *See* October 21, [sic] 2004, Letter from Lesli Esposito to Tanya Dunne, hereto attached as exhibit D.

(D.C. Utah 1964) (holding that an interrogatory asking an adverse party to furnish the names of all persons that provided or were asked to provide statements encroached on the pattern of investigation and *was not a proper subject for discovery*) (emphasis added).

In re Flowers is instructive on this issue. There, an interrogatory required Complaint Counsel to "identify each and every person, not previously identified in response to these Interrogatories, who has or may have knowledge as to the facts and contentions set out in your Complaint and in your response to these Interrogatories." *In re Flowers*, 1981 FTC LEXIS 110, at *4. The Court refused to compel an answer to the interrogatory, finding that it went "too far" and was over-broad. *Id.* at *3-4. The Court quoted *United States v. Loew's, Inc.*, a case interpreting the analogous Rule 33 of the Federal Rules of Civil Procedure, which held that an interrogatory asking the names of every person connected to the case would:

> ...impose an impossible burden on the Government. It would require, for example, that the names of every person who worked upon the case in the anti-trust division, including the lawyers, stenographers, investigators, etc. would have to be furnished, because they all might have received some information about the evidence.

Id. at *4 (*quoting United States v. Loew's, Inc.*, 23 F.R.D. 178, 180 (S.D.N.Y. 1959)). Here,

Respondent's interrogatory number two is equally overbroad because it asks Complaint Counsel to detail every piece of evidence in Complaint Counsel's possession showing that the acquisition has some effect on competition. This interrogatory fails to satisfy the primary goal of discovery, which is to determine the key issues for trial. *In re TK-7 Corp.*, 1990 FTC LEXIS 20, *1-2. Instead, it asks Complaint Counsel to provide every piece of information that may relate to the acquisition's affect on competition, regardless of the document's relevance to the contested issues.

To be sure, there is plenty of material that would be responsive to this interrogatory. Some of the relevant documents, including those already provided to Respondent during investigational hearings, state that the acquisition would allow Respondent to [REDACTED - SUBJECT TO PROTECTIVE ORDER][9] and that the acquisition would [REDACTED].[10] But in light of the volume of responsive information, to provide a full and complete response would overwhelm Complaint Counsel. The very point of its ongoing trial preparation is to compile and present at trial all of the non-cumulative evidence that would be responsive. To do so before trial in an interrogatory response would be even more daunting in light of Complaint Counsel's duty to supplement, as depositions are proceeding daily.

Courts recognize that a party cannot be required to "write basically a portrait of their trial." *Roberts v. Heim*, 130 F.R.D. 424, 427 (N.D. Cal. 1989);

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[9] [REDACTED - SUBJECT TO PROTECTIVE ORDER], hereto attached as exhibit E.

[10] [REDACTED - SUBJECT TO PROTECTIVE ORDER], hereto attached as exhibit F.

329 U.S. 495, 508 (1947) (holding that an attorney can prepare a litigation strategy without intrusion from adversaries). Although Rule 3.35 (b)(2) authorizes an interrogatory to ask for the facts supporting a specific contention, an interrogatory asking for all facts supporting the entire claim is impermissible. *Id.* at 427 (distinguishing between proper and improper use of contention interrogatories); *see also Mort v. A/S D/S Svendborg*, 41 F.R.D. 225, 226 (E.D. Pa. 1966) (sustaining an objection to an interrogatory that called for all "information the defendant possessed relating to the accident").

Respondent's reliance on *Sargent-Welch Scientific Co. v. Ventron Corp.* and *In re Flowers*, is misplaced. 59 F.R.D. 500 (N.D. Ill. 1973); 1981 FTC LEXIS 110 (1981). In both of those cases, the parties propounded multiple interrogatories that inquired about specific allegations within their adversary's complaint.[11] Here, Respondent has issued one general contention interrogatory that seeks the detailed factual basis for Complaint Counsel's entire case-in-chief. Respondent's use of *Convergent Business Systems, Inc. v. Diamond Reporting, Inc.*disticaespo threthose casy feks tingupporting a specifinswers to 21 interroga Repo/TT

[11] For example, in *Sargent-Welch*, one of the interrogatories sought the factual basis for Plaintiff's allegation that Defendant had maintained market power; another inquired into the factual basis of exclusive dealing practices. 59 F.R.D. at 503, fn. 1. In *In re Flowers*, Respondent moved to compel answers to 21 interrogatories that sought a factual basis for specific contentions. 1981 FTC LEXIS 110, at *1-2.

use of it is premature. The Commission Rules of Practice provide "the Administrative Law Judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time." Rule 3.35(b)(2). The Advisory Notes accompanying the identically worded rule 33(c) of the Federal Rules of Civil Procedure recognize that contention interrogatories are often "best resolved after much or all of the other discovery has been completed." Fed. R. Civ. P. 33(c) (found in subdivision (b) of advisory committee note to 1970 amendment).

Federal courts interpreting analogous rule 33(c) of the Federal Rules of Civil Procedure have concluded that contention interrogatories are more appropriate at the end of the discovery period. *See McCarthy v. Paine Webber Group, Inc.*, 168 F.R.D. 448, 450 (D. Conn. 1996) (denying motion to compel responses to interrogatories because substantial discovery remained to be completed); *Nestle Food Corp. v. Aetna Casualty and Surety Co.*, 135 F.R.D. 101 (D.N.J. 1990) (contention interrogatories are more appropriate after a substantial amount of discovery has been conducted). Respondent filed its contention interrogatory barely one month into the discovery period and before many of the documents had been read or any depositions taken.

The party filing contention interrogatories before discovery is complete has the burden of showing why early answers are required. *Fischer & Porter Co. v. Tolson*, 143 F.R.D. 93, 96 (E.D. Pa. 1992). To meet this burden, the party must show that answers to its "well-tailored questions" clarify issues in the case or narrow the scope of its dispute. *Id.* at 96 (*quoting In re Convergent Technologies Securities Litigation*, 108 F.R.D. 328, 340 (N.D. Cal. 1985)). Respondent's interrogatory is not well-tailored and fails to clarify the issues or narrow the scope of the dispute because it asks for every piece of information within Complaint Counsel's possession.

Conclusion

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

Respectfully Submitted,

/s/

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Peter Richman
John S. Martin
Lesli C. Esposito
Mary N. Lehner

Counsel Supporting the Complaint

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

Dated: December 12, 2003

Attachments

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

In the Matter of	)	
ASPEN TECHNOLOGY, INC.,	)	Docket No. 9310
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COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
MOTION TO COMPEL RESPONSES TO INTERROGATORIES

ATTACHMENT A - WITHHELD SUBJECT TO PROTECTIVE ORDER

UNITED STATES OF AMERICA
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COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
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ATTACHMENT C

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ATTACHMENT D

UNITED STATES OF AMERICA
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COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
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ATTACHMENT E - WITHHELD SUBJECT TO PROTECTIVE ORDER

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COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
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ATTACHMENT H

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COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S
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ATTACHMENT I

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UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

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

Two copies by hand delivery:

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

By electronic mail and by hand delivery:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-159
Washington, DC 20580

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/s/

_____

Evelyn J. Boynton
Merger Analyst
Federal Trade Commission

Dated: December 12, 2003