UNITED STATES

ORDER DENYING MOTION TO COMPEL RESPONSES
TO RIESPONDENT'S FIRST SET OF INTERROGATORIES

On December 1,2003, Respondent filed its motion to compel responses by Complaint
Counsel to Respondent's First Set of Interrogatories. Complaint Counsel filed its opposition on December 12, 2003.

For the reasons set forth below, Respondent's motion is DENIED.

Respondent served on Complaint Counsel a set of two interrogatories. The first
interrogatory asked Complaint Counsel to identify individuals with whom Complaint Counsel has communicated and to summarize those conversations. Respondent asserts that Complaint Counsel should provide Respondent with information about Complaint Counsel's contact with third parties because the views of third parties, especially customers, are relevant, and the interrogatory does not seek privileged information.

The second interrogatory asked Complaint Counsel to identify evidence, if any, that Respondent's acquisition of HyproTech has affected pricing, innovation or any other aspect of competition relating to the software products at issue in this case. Respondent asserts that Complaint Counsel should not be allowed to wait until the parties designate trial exhibits after the close of discovery to indicate to Respondent the evidence that supports the charges that Complaint Counsel has made in this case.

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Interrogatory Number 1 seeks the following:

Identify each person with whom you have communicated regarding this
Matter. For each such person, provide a written summary of what was said
by both you and the person, state whether that person has given you a
deposition, affidavit or other written statement (whether in final or drafi
form), and identifjr all documents and things provided to the FTC by that
person and all documents and things provided by the FTC to that person.
For each such person, state who initiated the communication, and, if
initiated by the FTC, state why such communication was initiated.

Complaint Counsel asserts that the identity of persons with whom Complaint Counsel has communicated and does not intend to call at trial is protected by the informer's privilege. The government informer privilege protects from disclosure the identity of confidential government informants. In re Harper & Row, Publishers, Inc., 1990 FTC LEXIS 2 13, * 8-9 (June 27, 1990) (It 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."). The privilege recognizes the public interest in the flow of information to the government concerning law violations, and by preserving the anonymity of the informants, encourages them to come forward. Harper &Row, 1990 FTC LEXS 21 3 at "9 (citing Roviaro v. Uizited States, 353 U. S. 53, 59 (1 957)). The burden for overcoming the privilege against nondisclosure of the identify of informants rests on respondents. Harper &Row, 1990 FTC LEXIS 213 at "1 1. In this case, Respondent has not met its burden.

In addition, Complaint Counsel's summary

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"Jencks statements" that may be compelled in advance of the hearing. The Jencks rule, codified at 18 U.S.C. 5 3500, requires the government to produce statements made by a government witness which relate to the subject matter as to which the witness has testified. "The Commission has previously decided to apply in its proceedings the Jencks Act principle requiring production of certain prior statements by witnesses after they have testrfied." USLIFE Credit Corp., 91 F.T.C. 984, 1037 (1978) (emphasis added). The application of the Jencks Act "is not to be used as a vehicle for general discovery." L.G. Balfour Co., 69 F.T.C. 1 1 18, 1 120 (1966).

The Scheduling Order entered in this case required Complaint Counsel to provide a preliminary witness list with a description of proposed testimony by October 9, 2003. Complaint Counsel is further required by the Scheduling Order to provide a revised witness list, with a description of proposed testimony, by January 6, 2004. Discovery is not scheduled to close until February 17, 2004. Fulfillment of these requirements will provide sufficient information to allow Respondent to prepare for trial.

For the above stated reasons, Respondent's motion to compel Complaint Counsel to
respond to Interrogatory Number 1 is denied.

Interrogatory Number 2 asks Complaint Counsel to identifl and describe all evidence that
the Acquisition has affected, will affect, or is likely to affect, prices, innovation or other aspects of competition in the development, licensing, or sale of any relevant product. Complaint Counsel's answer to the interrogatory referred Respondent to the documents it has produced.

"The purpose of interrogatories is to narrow the issues and thus help determine what
evidence will be needed at trial . . . ." In re TK-7 Corp., 1990 FTC LEXS 20, * 1-2 (1 990). Here, Respondent has issued one general interrogatory that seeks the detailed factual basis for Complaint Counsel's 0 12.625 /e5sj -0.0100u839

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For the above stated reasons, Respondent's motion to compel responses to interrogatories
is DENIED.

ORDERED:

Chief Administrative Law Judge

Date: December 23, 2003