this statement. *See* Supplemental Statement and attached Exhibit 1 documenting good faith discussions between counsel.

[redacted]

concluded that this was a breakdown in good faith negotiations and declared an impasse, according to the Scheduling Order.

Complaint Counsel complains in footnote 1 of their Opposition that Respondent

attempted to "evade" the 2,500 word limit for its Memorandum in Support to its Motion by moving arguments to the Motion itself. Complaint Counsel's complaint is misleading and deceptive. There is no word limit in the Commission

Rules for the Motion to Compel itself, only the memorandum in support.

Respondent's Motion described factual issues with Complaint Counsel's

within the time period specified by the Scheduling Order. Further, the only timing provision in the Scheduling Order addressing motions to compel such discovery states that "[a]ny motion to compel responses to discovery requests shall be filed within 5 days of impasse if the parties are negotiating in good faith and are not able to resolve their dispute." Otherwise, both the Scheduling Order

and the FTC Rules are silent regarding the timeliness of motions to compel. Respondent's Motion is timely because it was filed within 5 days of reaching impasse in its good faith negotiations with Complaint Counsel. Further, despite Complaint Counsel's assertions that seeking discovery at this point is untimely

Counsel on January 5, 2011 at approximately 11:34 am was entitled "Request for Timely Response to Discovery Requests" and in describing the discovery requested states: "The listing references, for each item of discovery, Respondent's

[redacted]

demand that Complaint Counsel "respond to more than 40

Although Mr. Lanning and Mr. Carlton disagreed regarding the gist of the January 6 call, Counsel for Respondent made clear in subsequent emails that it was not Respondent's understanding that the call would also address Complaint Counsel's new demands for discovery. See Exhibit 3, Email from Mr. Carlton to Bill Lanning sent January 7, 2011 at approximately 8:14 pm (Mr. Carlton to Mr. Lanning: "you did not indicate that such a demand would be immediately forthcoming or that it would be the subject of our call of Tuesday next."). Mr. Carlton also stated that because he expected Respondent's Discovery Requests

Discovery Requests and detailed the substantive basis for the deficiency of each response. Counsel for Respondent provided this List in order to facilitate the

Complaint Counsel would be hard-pressed to ask for a *more* comprehensive and

[redacted] Respondent did set forth substantive

[redacted]

communications to Complaint Counsel regarding its Discovery Requests, and as detailed in Respondent's Application for Review and ¶ 19 above, Respondent did inform the ALJ of this.

[redacted] Complaint Counsel states in ¶ 10 of the Lanning Declaration that "Respondent

[redacted]

incorrectly stated that Complaint Counsel failed to meet an alleged January 7, 2011 deadline on January 8, 2011 when Respondent's Counsel was well aware

Statement to negotiate such details as how the parties would go about discussing

the Discovery Requests on January 11 and whether there would be any

inaccurately asserted that 'Complaint Counsel confirmed that their participation in

unconditional preconditions to any meeting between the parties to discuss

impasse, which rendered the call unnecessary.

25. Complaint Counsel state in ¶ 21 of the Lanning Declaration that Respondent

[redacted] between January 7 and January 10 that [redacted]

[redacted] communications were material and relevant attempts by [redacted]

Counsel's insistence on express preconditions to the call between the parties to be

in good faith; and (3) despite Complaint Counsel's rejection of Respondent's offer to engage in "alternative discussions" regarding Respondent's Discovery Requests while the Motion to Compel was pending, Respondent's offer to do so

8.

this email is attached hereto as Exhibit 9.

Pursuant to 28 U.S.C. §1746, I declare, under the penalties of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: January 24, 2011

/s/ Alfred P. Carlton, Jr.

A.P. Carlton. Jr.

Counsel for Respondent
Allen and Pinnix, P.A.

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2011, I electronically filed the

I also certify that I have sent courtesy copies of the document via Federal Express and electronic mail to:

[redacted]

From: AP Carlton
Sent: Monday, January 10, 2011 9:39 PM
To: 'RDAGEN@ftc.gov'; 'wlanning@ftc.gov'
Cc: Noel Allen; Jack Nichols; 'MWESTMAN@ftc.gov'; 'mjbloom@ftc.gov'
Subject: Re: Meet and Confer

AP Carlton

----- Original Message -----

----- Original Message -----
From: Bloom, Michael <MJBLOOM@ftc.gov>

To: AP_Carlton

Michael Bloom

Assistant Director for Policy & Coordination

Bureau of Competition

Federal Trade Commission

EXHIBIT

-----Original Message-----
From: AP Carlton
Sent: Friday, January 07, 2011 8:14 PM

Subject: Good Faith Negotiation: Purpose of Tuesday Call

acarlton@allenpinnix.com

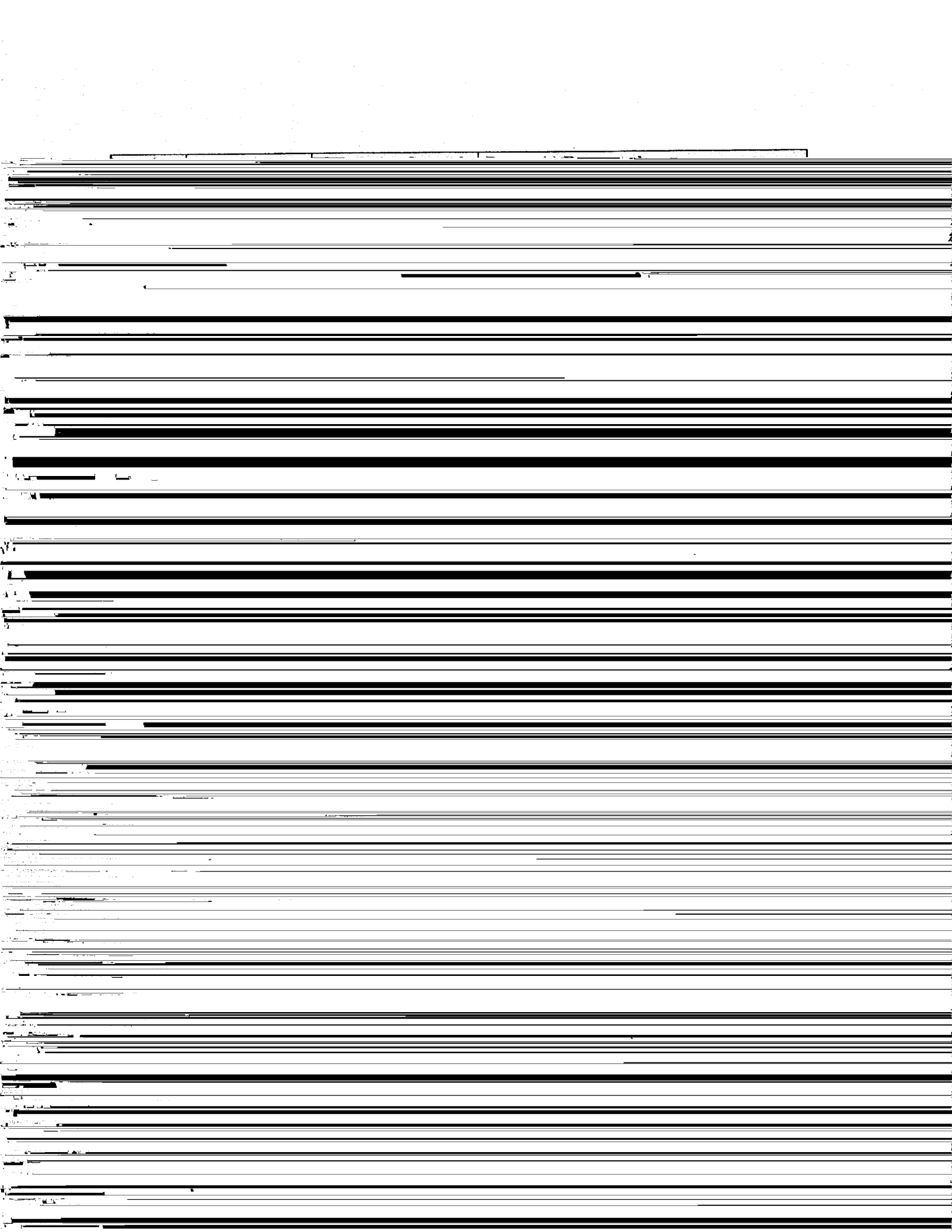
Allen and Pinnix, P.A.
333 Fayetteville St.
Suite 1200
Raleigh, NC 27602

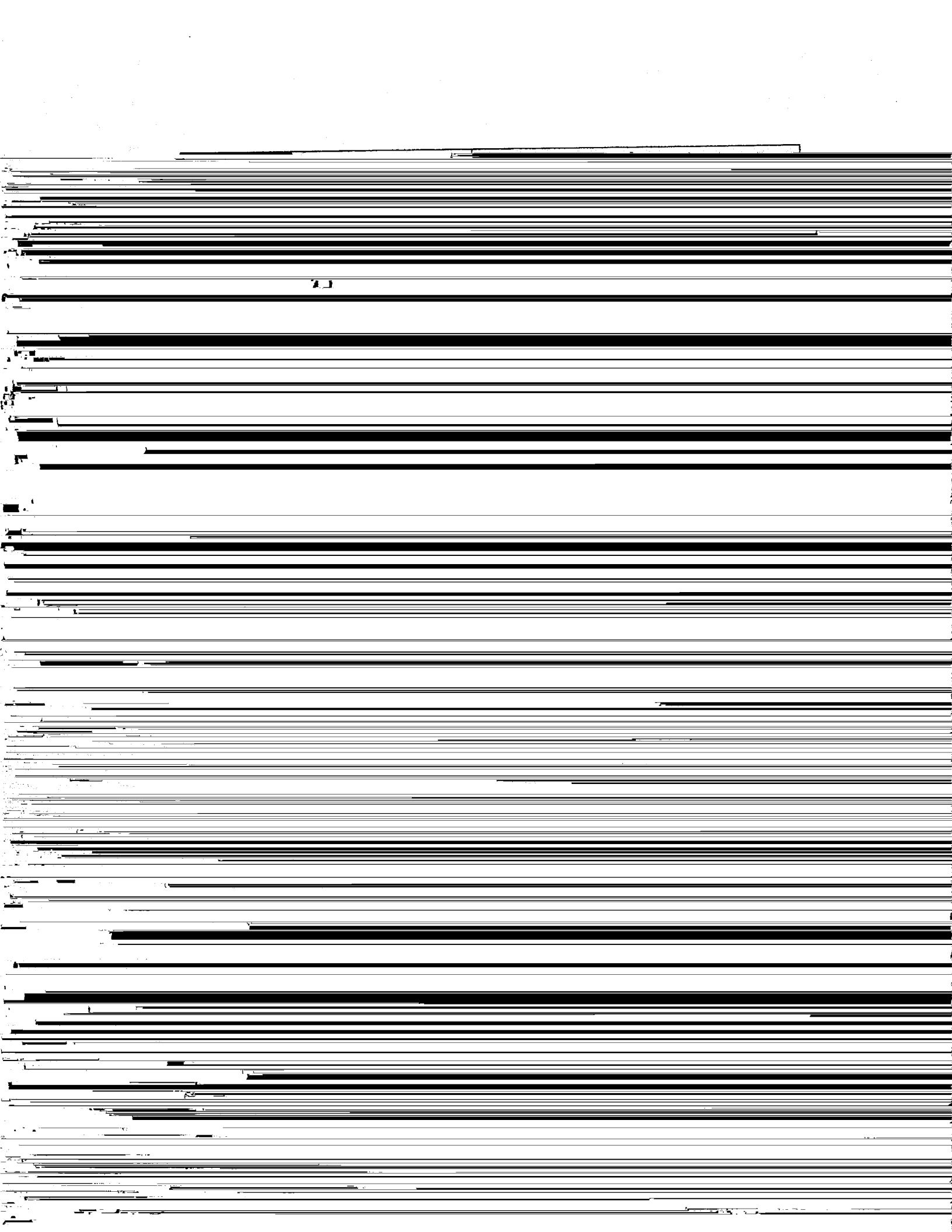
Office 919-755-0505

Mobile 919-749-8229

SPECIFIC DISCOVERY ITEMS REQUESTED

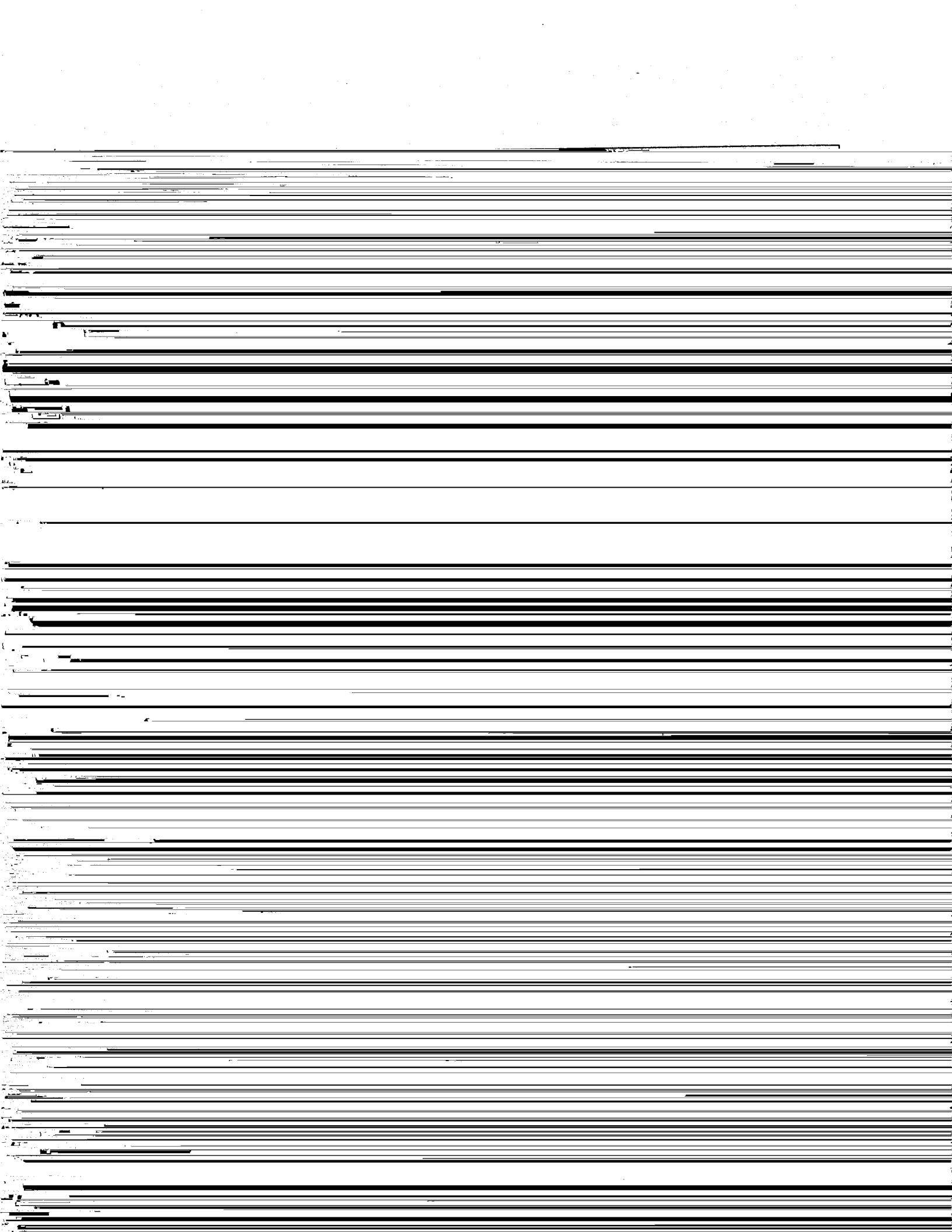
Requests for Admission

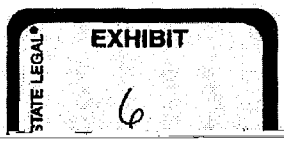




Requests for Production

Request	Action	Complaint Counsel	Reason(s) Requested





-----Original Message-----
From: AP Carlton
Sent: Wednesday, January 12, 2011 9:03 AM

Sent: Tuesday, January 11, 2011 11:02 AM

2. We note that you have raised the discovery issues in a vastly

untimely manner. We too had discovery issues. However, in an effort to address your concerns, Complaint Counsel agreed to address your untimely discovery issues at the same [redacted] issues were addressed. In this regard, Mr. Lanning in his

[redacted]

[redacted] whether or not to keep the call-in conference line open [redacted]

Sincerely,

Bill Lanning

From: AP Carlton [mailto:acarlton@allenpinnix.com]
Sent: Tuesday, January 11, 2011 9:49 AM
To: Dagen, Richard B.; Lanning, William
[redacted] Bloom, Michael; Catherine E. Lee; [redacted]

From: AP Carlton [mailto:acarlton@allenpinnix.com]

Sent: Monday, January 10, 2011 9:28 PM
To: Lanning, William; Dagen, Richard B.
[redacted]

Mr. Lanning and Mr. Dagen:

[redacted] submitted to you in your capacity as co-lead Complaint Counsel.

[redacted] conclude that your proceeding with our call set for

Lanning's letter to Mr. Allen also identified exemplars of documents entirely withheld based on insufficient claims of privilege (see, e.g., notes 6, 9, 10, and 18 of that letter). To provide you with greater detail for our meet and confer, I am appending hereto a list of documents you have withheld entirely based on claims of privilege that we believe inadequate, together with a statement of at least some of the reasons each such claim of privilege is inadequate. In addition, our attachment identifies certain [redacted] Bates number that were neither produced, nor identified as privileged in your

understanding, based upon your representations, that Respondent's Counsel was in the process of gathering said materials and would provide them. Respondent's Counsel has yet to do so.

[redacted]

Mr. Lanning:

As I understood our conversation yesterday, the purpose of our call scheduled for 10am on Tuesday, January 11 was for Respondent's Counsel to entertain Complaint Counsel's response

Rule 3.12(b) - response is inadequate because it does not specifically

RFA 39 Rule 3.32(b) - response is inadequate because it does not specifically deny or set forth reasons for the failure to admit or deny the request.

[redacted]

-----Original Message-----
From: AP Carlton
Sent: Thursday, January 13, 2011 11:02 AM
To: 'wlanning@ftc.gov'; 'RDAGEN@ftc.gov'
[redacted]

[redacted] "Under either scenario, both sides would [redacted]

We appreciate your offer to continue negotiating with respect to our discovery requests.

Subject: RE: FTC Docket #9343: Declaration of Impasse

[redacted]

Complaint Counsel remain confident that outstanding discovery issues can be resolved,

[redacted]

[redacted] we understand by your email that [redacted]

[redacted] the meet and confer [redacted]

scheduled for this morning at 10 am. for which Complaint Counsel [redacted]

established a call-in number (at Respondent's request), and for which Complaint Counsel had assembled staff prepared to address Respondent's issues in good faith.

2. We note that you have raised the discovery issues in a vastly [redacted] in an effort to address your

6. As our email of several minutes ago indicated, we do not believe we are at impasse insofar as Respondent has simply refused to discuss its demands. We stand ready, willing and able to negotiate with Respondent.

with Respondent's discovery responses. Is Respondent ready, willing and able to do so at this time?

Please respond promptly so we know whether or not to keep the call-in conference line open

[redacted]

From: Dagen, Richard B. <RDAGEN@ftc.gov>

[redacted]

In addition, we must reserve our right to take up our issues in such order as we deem

best.

You asked that we provide you with further information regarding the problems we have with your document production, i.e., the redacting and withholding of documents based on

-----Original Message-----
From: AP Carlton
Sent: Sunday, January 16, 2011 10:53 PM
To: 'wlanning@ftc.gov'; 'RDAGEN@ftc.gov'
Cc: Noel Allen; Jack Nichols; Catherine E. Lee; Brie Allen; 'jacson.nichols@gmail.com'; Kathy Gloden; 'MWESTMAN@ftc.gov'; 'mjbloom@ftc.gov'
Subject: FTC Docket #9343:"For the Record" Reply To 10:43am January 11 Email ("Record email")

Dear Complaint Co-Lead Counsel:

("the undertaking agreement") waiving the rights of its clients to seek