

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



In the Matter of)
)
)

ASPEN TECHNOLOGY, INC.,)

Respondent.)
_____)

Docket No. 9310

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

I.

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**.

II.

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.

III.

A.

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 draft form), and identify 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 213, *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 LEXIS 213 at *9 (citing *Roviaro v. United States*, 353 U.S. 53, 59 (1957)). The burden for overcoming the privilege against nondisclosure of the identify of informants rests on respondents. *Harper & Row*, 1990 FTC LEXIS 213 at *11. In this case, Respondent has not met its burden.

In addition, Complaint Counsel's summary of interviews with individuals is work product, under *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). See also *In re American Medical Assoc.*, 1976 FTC LEXIS 422, **7-8 (ordering complaint counsel need not provide respondent with names of persons contacted and that memoranda and notes by complaint counsel and their associates of interviews with individuals in connection with the proceeding constitute attorney work product and are not discoverable). Under the Commission's rules, work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." 16 C.F.R. § 3.31(c)(3). Respondent has not made a showing of substantial need.

Respondent asserts that, to the extent that any information responsive to Interrogatory 1 are statements made by witnesses that Complaint Counsel intends to call at the hearing, they are

“Jencks statements” that may be compelled in advance of the hearing. The Jencks rule, codified at 18 U.S.C. § 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 testified.*” *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. 1118, 1120 (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.

B.

Interrogatory Number 2 asks Complaint Counsel to identify 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 LEXIS 20, *1-2 (1990). Here, Respondent has issued one general interrogatory that seeks the detailed factual basis for Complaint Counsel’s case. Although Rule 3.35(b)(2) authorizes an interrogatory to ask for facts supporting a specific contention, an interrogatory asking for all facts supporting the entire claim is impermissible. *Roberts v. Heim*, 130 F.R.D. 424, 427 (N.D. Cal. 1989); *Mort v. A/S/D/S Svendborg*, 41 F.R.D. 225, 226 (E.D. Pa. 1966). Further, a party filing contention interrogatories must show that answers to its “well-tailored questions” clarify issues in the case or narrow the scope of the dispute. *Fischer & Porter Co. v. Tolson, et al.*, 143 F.R.D. 93, 96 (E.D. Pa. 1992).

Respondent’s interrogatory is overbroad and burdensome; it is not well-tailored and fails to narrow the issues. Accordingly, Respondent’s motion to compel Complaint Counsel to respond to Interrogatory Number 2 is denied.

IV.

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

ORDERED:



Stephen J. McGuire
Chief Administrative Law Judge

Date: December 23, 2003