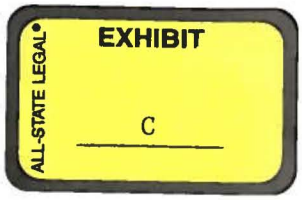


**UNITED STATES OF AMERICA**
**BEFORE THE FEDERAL TRADE COMMISSION**
**OFFICE OF ADMINISTRATIVE LAW JUDGES**

| | | |
|---|---|---|
| In the Matter of | ) | **PUBLIC** |
| THE NORTH CAROLINA [STATE] BOARD OF DENTAL EXAMINERS. | ) | DOCKET NO. 9343 |

**DECLARATION OF ALFRED P. CARLTON, JR.**

Pursuant to 28 U.S.C. § 1746, I hereby make the following statement:

1. I have personal knowledge of the facts set forth in this Declaration and if called as a witness, I could and would testify competently under oath to such facts.
2. I am an attorney with Allen and Pinnix, P.A. and serve as counsel for the Respondent North Carolina State Board of Dental Examiners. Attached to this declaration are Exhibits 1 - 9 supporting Respondent's Application for Review in connection with Respondent's Motion for an Order Compelling Discovery ("Motion") that was filed on January 11, 2011 and denied by Order of Administrative Law Judge D. Michael Chappell January 20, 2011. These Exhibits are true and correct copies of the referenced emails and documents.
3. This Declaration responds to the claims made in Complaint Counsel's Opposition to Respondent's Motion that was filed January 18, 2011 ("Opposition") and the Declaration of William Lanning ("Lanning Declaration") that was included with the Opposition. Although many of the claims made in the Opposition and the Lanning Declaration are truthful, Respondent notes a number of erroneous claims

and noteworthy omissions made by Complaint Counsel in those documents, which are described herein.

**Erroneous Claims in Complaint Counsel's Opposition**

4. Complaint Counsel state in footnote 1 of their Opposition that Respondent has not complied with "the spirit or letter" of Commission Rule 3.22(g), which requires that a "motion to compel or determine sufficiency pursuant to § 3.38(a) . . . shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement." This is not true. In a series of email and telephone communications between January 5 and January 11, Counsel for Respondent sought to engage in efforts in good faith to resolve the issues related to Complaint Counsel's response to the Discovery Requests, as described and thoroughly documented in the Supplemental Statement that accompanied Respondent's Motion to Compel.

5. Complaint Counsel state in footnote 1 of their Opposition that they "never sought a waiver of Respondent's right to petition the court for discovery relief as a condition for negotiating discovery issues." This is an outright falsehood. The pertinent email exchange is as follows:

    - Email from Michael Bloom to Counsel for Respondent on January 10, 2011 at 8:20 pm: "I have been asked to reply to your email, below, on behalf of Complaint Counsel. We are generally amenable to the approach you have suggested [for a proposed January 11, 2011 meeting to discuss the Discovery Requests], **provided that it is agreed as follows**: Neither

party will declare impasse and file a motion to compel with respect to the other party's responses to requests for document production, interrogatories, and requests for admission until we have considered and reached a mutually acceptable agreement to produce or impasse on all of the outstanding discovery issues." (emphasis added)

- Email from A.P. Carlton to Complaint Counsel on January 10, 2011 at 9:28 pm: "Based on Mr. Bloom's email below, we conclude that your proceeding with our call set for tomorrow morning at 10am is **expressly conditioned** upon the parties reaching 'such an agreement' as described by Mr. Bloom in the first paragraph of his email. Is this conclusion correct?" (emphasis added)
- Email from Richard Dagen to Counsel for Respondent on January 10, 2011 at 9:30 pm: "Yes, it is correct."

*See* Emails Sent Between Counsel for Respondent and Complaint Counsel on January 10, 2011 (attached hereto as Exhibit 1). Complaint Counsel clearly demanded that Respondent waive its right to seek to compel discovery as a precondition to any discussion of the Discovery Requests taking place. This outrageous demand was deemed by Counsel for Respondent to be a breakdown of good faith negotiations, and accordingly led to Respondent's declaration of an impasse.

6. Complaint Counsel allege in footnote 1 of their Opposition that there were no meetings to discuss substantive discovery issues. Yet the record clearly belies

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

7. Complaint Counsel state in footnote 1 of their Opposition that Counsel for Respondent "cancelled" the meeting scheduled for January 11, 2011 at 10:00 am. This is not true. Complaint Counsel stated that an express precondition to their conducting the January 11 meeting was Respondent's waiver of its right to seek a motion to compel. Respondent did not agree to this condition and declared an impasse as a result of this demand. The meeting was not "cancelled" by Respondent.

8. Complaint Counsel state in footnote 1 of their Opposition that Counsel for Respondent made a "peremptory impasse declaration." There is no such thing contemplated by the Scheduling Order or Rules. The impasse declared by Counsel for Respondent is just the sort of impasse contemplated by the Scheduling Order. Respondent attempted to negotiate in good faith with Complaint Counsel over the period between January 5 and January 11. Complaint Counsel demanded numerous unacceptable and unconditional preconditions to any meeting between the parties to discuss discovery issues, and further refused to respond to numerous requests from Counsel for Respondent to plan the substance and process of the meeting. *See* Supplemental Statement, Exhibit 1 (listing emails from Mr. Carlton that were not responded to by Complaint Counsel). Upon receipt of Complaint Counsel's non-negotiable precondition for the conference call to proceed, Counsel for Respondent

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

9. Complaint Counsel complain 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 responses to Respondent's Discovery Requests and then summarized the legal arguments in support. These legal arguments were then set forth in greater detail in Respondent's Memorandum in Support. Indeed, Respondent's Motion itself was lengthy not because of the arguments it contained, but because it had to account for the large number of insufficiencies in Complaint Counsel's responses to Respondent's three separate Discovery Requests.

10. Respondent did not "delay" serving its first discovery request, as Complaint Counsel stated on page 1 of their Opposition. This statement is misleading and deceptive. Respondent provided its Discovery Requests to Complaint Counsel within the time allowed under the Scheduling Order and more than thirty days before the close of discovery.

11. Complaint Counsel argue in their Opposition that Respondent's communication with Complaint Counsel on January 5 in an attempt to ensure that Complaint Counsel provided sufficient responses to the Discovery Requests was untimely and violated the Scheduling Order. But the Discovery Requests were served

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 and violates the Scheduling Order, Complaint Counsel in an email sent January 7, 2011 also requested additional responses to its own Requests for Admission that were made to Respondent three months ago on October 12, 2010 (and to which Respondent timely responded on October 22, 2010).

12. Complaint Counsel state on page 4 of their Opposition that Respondent's Motion attempts "to expand the scope of discovery." This is simply not correct and constitutes a misrepresentation by Complaint Counsel. Respondent's Motion merely sought sufficient responses to its original Discovery Requests.

**Erroneous Claims in Lanning Declaration**

13. Complaint Counsel misleadingly state in ¶ 5 of the Lanning Declaration that Respondent "demanded that Complaint Counsel respond to more than 40 discovery demands in 49 hours." Complaint Counsel either misunderstands or misrepresents the nature of Respondent's request to respond to its discovery. First, it was not a "demand," it was a "request." The email sent to Complaint

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 **request** that Complaint Counsel respond to this **request**." Additionally, the request did not demand that Complaint Counsel "respond to more than 40 discovery demands in 49 hours." In fact, it very clearly indicated Counsel for Respondent's availability to negotiate the matter in good faith and requested that the parties do so by noon on January 7 by stating: "We are available to negotiate this matter in good faith in the hopes we can resolve the matter before 12 o'clock noon ET this Friday, January 7. We apologize for the short notice, but find that it is necessitated by our compressed pre-trial schedule." A true and correct copy of this email is attached hereto as Exhibit 2.

14. Complaint Counsel state in ¶ 5 of the Lanning Declaration that Respondent "for the first time demanded that Complaint Counsel 'make available for inspection' documents responsive to each of its RFPs even though Respondent's October 12, 2011 RFP only requested production of documents." The distinction Complaint Counsel attempts to draw here is nonsensical: making documents available for inspection is a form of production of documents.

15. Complaint Counsel state in ¶ 7 of the Lanning Declaration that Counsel for Respondent (Alfred P. Carlton, Jr.) "incorrectly summarized the January 6, 2011 telephone conversation by stating that . . . [Complaint Counsel] did not indicate that [Complaint Counsel's] demand [for discovery] would be immediately forthcoming or that it would be the subject of our call of Tuesday next."

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 would "occupy the entire allocated time for Tuesday's call", "we would respectfully request that we confer and designate another time to jointly address Complaint Counsel's newly received demand for discovery." *Id.*

16. Regardless of the misunderstanding of the January 6, 2011 call described above, Counsel for Respondent stated that Respondent was amenable to discussing Complaint Counsel's newly raised discovery demands on the call scheduled for January 11, 2011. *See* Exhibit 4, Email from Mr. Carlton to Complaint Counsel sent January 10, 2011 at approximately 3:28 pm (agreeing to discuss new Complaint Counsel discovery requests).

17. Complaint Counsel state in ¶ 14 of the Lanning Declaration that "no discussion of the merits or substance of the [sic] either side's discovery requests had taken place." This is not true. Counsel for Respondent had sent its list substantively detailing the insufficiencies of Complaint Counsel's Responses to Respondent's Discovery Requests. *See* Exhibit 5, List of Discovery Items Requested. This List comprehensively detailed each response by Complaint Counsel to Respondent's

Discovery Requests and detailed the substantive basis for the deficiency of each response. Counsel for Respondent provided this List in order to facilitate the substantive discussions between the parties regarding the Discovery Requests. Complaint Counsel would be hard-pressed to ask for a *more* comprehensive and detailed account of the substance of Respondent's views on the insufficiencies of its responses to the Discovery Requests. Respondent accordingly put its best foot forward in trying to advance the substance of the discussions regarding the Discovery Requests. In fact, it was Complaint Counsel that stymied the abilities of the parties to engage in any meaningful discussion through its refusal to discuss its responses to the Discovery Requests until Respondent agreed to Complaint Counsel's unreasonable demands that Respondent waive its right to seek a motion to compel the discovery.

18. Complaint Counsel state in ¶ 15 of the Lanning Declaration that Counsel for Respondent did not "attach the statement required by Rule 3.32(g) to its motion." Since there is no subsection (g) in Rule 3.32, Counsel for Respondent assumes that Complaint Counsel in this statement refer to Rule 3.23(g). As described in Respondent's Application for Review, the Motion did include such a statement and the statement was signed. Respondent shortly thereafter on January 14 provided a more detailed list of the conversations and email exchanges between the parties with its Supplemental Statement.

19. Complaint Counsel state in ¶ 19 of the Lanning Declaration that "Respondent failed to inform the Court that there has been no discussion of the substance or merits of any of Respondent's issues raised in its Motion to Compel." As

discussed above in ¶¶ 6 and 18, Respondent did set forth substantive 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.

20. Complaint Counsel state in ¶ 19 of the Lanning Declaration that "Respondent 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 that counsel had agreed to discuss the substance and merits of Respondent's January 5, 2011 discovery requests during a conference call on January 11, 2011." Respondent agreed to excuse its January 7, 2011 deadline provided that Complaint Counsel agreed to discuss its responses to Respondent's Discovery Requests on January 11, 2011. Complaint Counsel decided instead to unconditionally state that the evening before the call that their participation was based on express preconditions, which Respondent did not agree to. Accordingly, because Complaint Counsel refused to negotiate in good faith, they failed to meet the January 7 deadline.

21. Complaint Counsel state in ¶ 19 of the Lanning Declaration that "not one of the alleged conferences and/or communications listed [in the chart attached to Respondent's Supplemental Statement] was a discussion of the substance or merits of Respondent's issues raised in its Motion to Compel." This is not true. As discussed above in ¶¶ 6 and 18, Respondent did set forth substantive communications to Complaint Counsel regarding its Discovery Requests and sought through the communications that are described in the Supplemental

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 preconditions to the scheduled discussion.

22. Complaint Counsel state in ¶ 20 of the Lanning Declaration that "Respondent . . . inaccurately asserted that 'Complaint Counsel confirmed that their participation in good faith negotiations was expressly conditioned upon Respondent waiving its rights to seek a determination from the Administrative Law Judge or file a motion to compel.'" This is not true. As detailed above in ¶ 5, Respondent's statement regarding Complaint Counsel's express preconditions is clearly accurate.

23. Complaint Counsel state in ¶ 21 of the Lanning Declaration that Respondent "unilaterally declared impasse." Neither Rule 3.38 nor the Scheduling Order state that the parties must agree that they are at an impasse before a motion to compel may be filed. The Rule is silent regarding declaration of an impasse, and the Scheduling Order merely states that a motion to compel discovery "shall be filed within 5 days of impasse if the parties are negotiating in good faith and are not able to resolve their dispute." Counsel for Respondent rightly deemed that Complaint Counsel was no longer negotiating in good faith because they refused to discuss Respondent's Discovery Requests unless Respondent waived its right to file a motion to compel.

24. Complaint Counsel state in ¶ 21 of the Lanning Declaration that Respondent "refused to participate in the pre-arranged conference call for January 11, 2011." This is both untrue and misleading. Complaint Counsel in fact stated that they would not participate in the call unless Counsel for Respondent agreed to its

unconditional preconditions to any meeting between the parties to discuss discovery issues. As a result of this, Counsel for Respondent declared an impasse, which rendered the call unnecessary.

25. Complaint Counsel state in ¶ 21 of the Lanning Declaration that Respondent "refused to withdraw its declaration of impasse and its Motion to Compel impasse and its Motion to Compel." While it is true that Counsel for Respondent did not agree to withdraw its Motion to Compel, it is misleading for Complaint Counsel to assert that Respondent "refused to withdraw its declaration of impasse." In fact, as detailed below in ¶¶ 27-28, Counsel for Respondent indicated its continuing willingness to engage in good faith "alternative discussions" regarding the Discovery Requests while Respondent's Motion was pending. Complaint Counsel continually refused to engage in such discussions. In an email sent by Mr. Carlton to Complaint Counsel on January 12 at approximately 9:03 am, Counsel for Respondent not only indicated its willingness to engage in such discussions but that "such alternative discussions could conceivably provide us with an effective means by which we can attempt to mitigate, if not resolve, the impasse." A true and correct copy of this email is attached hereto as Exhibit 6.

**Noteworthy Omissions in Opposition and Lanning Declaration**[1]

26. Neither Complaint Counsel's Opposition nor the Lanning Declaration describe a number of communications sent by Mr. Carlton to either Mr. Lanning alone or

[1] Comment [3] of Rule 3.3 of the Model Rules of Professional Conduct ("Candor Toward The Tribunal"), which addresses "Representations by a Lawyer," states that "an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. **There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation**." (emphasis added).

Mr. Lanning and other Complaint Counsel between January 7 and January 10 that were not responded to and were aimed at how the parties would discuss the January 11 call. These communications were material and relevant attempts by Counsel for Respondent to negotiate in good faith, yet no mention is made of them in either the Opposition or the Lanning Declaration. For instance, in one such email, sent by Mr. Carlton to Mr. Lanning on January 9 at approximately 9:16 pm, Mr. Carlton stated: "I believe we can straighten a couple of things out by phone if you are [available] and want to do so. I will respond in good faith whether or not we talk, I just think we will get to where we both want to go if we speak first." Mr. Carlton also provided his cell phone number to facilitate such a telephone call. However Mr. Lanning did not respond to this communication either by email or by telephone call. A true and correct copy of this email is attached hereto as Exhibit 7. Thirteen such emails that were not responded to are listed on Exhibit 1 to Respondent's Supplemental Statement documenting the communications that form the good faith negotiations between counsel for the parties.

27. Neither Complaint Counsel's Opposition nor the Lanning Declaration describe an email sent from Mr. Carlton to Mr. Lanning and Mr. Dagen (among other Complaint Counsel) on January 13, 2011 at approximately 11:02 am. In the email, Mr. Carlton notes (among other things) that (1) Complaint Counsel had rejected Respondent's good faith offer to engage in "alternative discussions" regarding Respondent's Discovery Requests while the Motion to Compel was pending; (2) Respondent declared an impasse because it did not view Complaint

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 remained open. A true and correct copy of this email is attached hereto as Exhibit 8.

28. Neither Complaint Counsel's Opposition nor the Lanning Declaration describe an email sent from Mr. Carlton to Mr. Lanning and Mr. Dagen (among other Complaint Counsel) on January 16, 2011 at approximately 10:53 pm. In the email, Mr. Carlton notes (among other things) that (1) Respondent wished to make sure that the record was clear because Complaint Counsel had in a previous email falsely accused Counsel for Respondent of defamation; (2) Counsel for Respondent did not make a unilateral decision to cancel the January 11 call, but merely declared an impasse, making the call unnecessary; (3) regardless of whether Mr. Carlton and Mr. Lanning previously had discussed Complaint Counsel's insistence that Respondent waive its right to seek a motion to compel before the January 11 call would take place, Mr. Bloom and Mr. Dagen were quite clear in insisting on such an express agreement as a precondition to the call; (4) Complaint Counsel's accusations that Respondent had acted in "bad faith" were totally baseless; (5) Counsel for Respondent's offer to engage in good faith "alternative discussions" regarding its Discovery Requests while its Motion was pending remained open; and (6) there is no such thing as a "mutual impasse"

under either the Scheduling Order or the FTC Rules. A true and correct copy of 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.
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: acarlton@allen-pinnix.com

## CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2011, I electronically filed the foregoing with the Federal Trade Commission using the Federal Trade Commission E-file system, which will send notification of such filing to the following:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room H-159
Washington, D.C. 20580

I hereby certify that the undersigned has this date served a copy of the foregoing upon all parties to this cause by electronic mail as follows:

William L. Lanning
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
wlanning@ftc.gov

Tejasvi Srimushnam
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
tsrimushnam@ftc.gov

Melissa Westman-Cherry
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
westman@ftc.gov

Richard B. Dagen
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-374
Washington, D.C. 20580
rdagen@ftc.gov

Michael J. Bloom
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-374
Washington, D.C. 20580
mjbloom@ftc.gov

Steven L. Osnowitz
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room NJ-6264
Washington, D.C. 20580
sosnowitz@ftc.gov

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

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Room H-113
Washington, D.C. 20580
oalj@ftc.gov

This the 24th day of January, 2011.

/s/ Alfred P. Carlton, Jr.
Alfred P. Carlton, Jr.

**CERTIFICATION FOR ELECTRONIC FILING**

I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and by the adjudicator.

/s/ Alfred P. Carlton, Jr.
Alfred P. Carlton, Jr.


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

Thank you very much.

AP Carlton

---

----- Original Message -----
From: Dagen, Richard B. <RDAGEN@ftc.gov>
To: AP Carlton; Lanning, William <WLANNING@ftc.gov>
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa <MWESTMAN@ftc.gov>; Bloom, Michael <MJBLOOM@ftc.gov>
Sent: Mon Jan 10 21:30:03 2011
Subject: RE: Meet and Confer

Yes, it is correct.

Rick Dagen

---

From: AP Carlton [mailto:acarlton@allenpinnix.com]
Sent: Monday, January 10, 2011 9:28 PM
To: Lanning, William; Dagen, Richard B.
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa; Bloom, Michael
Subject: Immediate Response Requested: Re: Meet and Confer

Mr. Lanning and Mr. Dagen:

This inquiry is submitted to you in your capacity as co-lead Complaint Counsel.

Based on Mr. Bloom's email below, we conclude that your proceeding with our call set for tomorrow morning at 10am is expressly conditioned upon the parties reaching "such an agreement" as described by Mr. Bloom in the first paragraph of his email.

Is this conclusion correct?

A prompt response will be appreciated, and we believe, under the circumstances, in order.

AP Carlton

---

----- Original Message -----
From: Bloom, Michael <MJBLOOM@ftc.gov>
To: AP Carlton
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa <MWESTMAN@ftc.gov>; Lanning, William <WLANNING@ftc.gov>; Dagen, Richard B. <RDAGEN@ftc.gov>
Sent: Mon Jan 10 20:20:00 2011
Subject: Meet and Confer

Mr. Carlton:

I have been asked to reply to your email, below, on behalf of Complaint Counsel. We are generally amenable to the approach you have suggested, provided that it is agreed as follows: Neither party will declare impasse and file a motion to compel with respect to the other party's responses to requests for document production, interrogatories, and requests for admission until we have considered and reached a mutually acceptable agreement to produce or impasse on all of the outstanding discovery issues. Mr. Lanning included the need for such an agreement in his email to you of January 9 at 9:03 p.m. We believe that such an agreement will encourage fairness, flexibility, and speed in the resolution of all of our outstanding discovery issues. In addition, if we do reach an impasse on some of our outstanding discovery issues, it will enable Judge Chappell to make his rulings on any resulting motions with due appreciation for the entirety of the contested issues.

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 improper grounds. Mr. Lanning has discussed these concerns with you and your colleagues on several occasions, including in his letter to Mr. Allen of August 18, 2010, which I incorporate herein by reference. I refer you to that letter's Attachment A for a list of document redactions that we believe are improper. We plan on discussing those redactions with you during our "meet and confer," which will begin tomorrow at 10:00 a.m. Mr. 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 documents by Bates number that were neither produced, nor identified as privileged in your privilege log, nor accounted for in your production log. We plan on discussing the identified documents that were withheld during our meet and confer, as well.

Last, in my earlier email to you identifying problems we have with respect to your responses to Complaint Counsel's Requests for Admission, I inadvertently left off of the list one item: in addition to the items listed, we plan on discussing your response to RFA 37, which is unresponsive and neither specifically admits, denies nor set forth reasons for the failure to admit or deny.

We look forward to speaking with you and your colleagues tomorrow. Thank you.

Michael Bloom

for Complaint Counsel

Michael Bloom

Assistant Director for Policy & Coordination

Bureau of Competition

Federal Trade Commission


## Kathy Gloden

**From:** Kathy Gloden
**Sent:** Wednesday, January 05, 2011 11:34 AM
**To:** Lanning, William
**Cc:** 'Dagen, Richard B.'; Noel Allen; AP Carlton; Jack Nichols; Kathy Gloden; 'Jackson Nichols'
**Subject:** FTC Docket 9343; Request for Timely Response to Discovery Requests
**Attachments:** 2011-0105 Specific Discovery Items Requested.pdf

Mr. Lanning,

AP Carlton asked me forward this email to your attention on his behalf.

Sincerely,

Kathy Gloden

---

Dear Mr. Lanning:

Please find attached a listing of "Specific Discovery Items Requested". This listing details responses by Complaint Counsel to specific items of Respondent's Requests for Admissions, Interrogatories and Requests for Production which Respondent finds to be inadequate or unacceptable. The listing references, for each item of discovery, Respondent's request that Complaint Counsel respond to this request for a response by taking the "Action Required" for the "Reason(s) Requested" in the listing.

We are available to negotiate this matter in good faith in the hopes we can resolve the matter before 12 o'clock noon ET this Friday, January 7. We apologize for the short notice, but find that it is necessitated by our compressed pre-trial schedule.

Sincerely,

AP Carlton

**Alfred P. Carlton, Jr.**
acarlton@allenpinnix.com

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

Office 919-755-0505
Fax 919-829-8098
Mobile 919-749-8229


-----Original Message-----
From: AP Carlton
Sent: Friday, January 07, 2011 8:14 PM
To: 'wlanning@ftc.gov'
Cc: 'RDAGEN@ftc.gov'; Noel Allen; Jack Nichols; 'mjbloom@ftc.gov'
Subject: Good Faith Negotiation: Purpose of Tuesday Call

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 to our demand for specific discovery responses submitted to you on Wednesday January 5 together with a request that we together begin negotiations in good faith regarding those demands.

Although you indicated we could expect a demand for discovery from Complaint Counsel at some point in time, 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.

We expect that consideration of Respondent Counsel's demands will occupy the entire allocated time for the Tuesday call. We agreed to waive our deadline for a response to our demand and agreed to the Tuesday call on that basis. Thus, we would respectfully request that we confer and designate another tIme to jointly address Complaint Counsel's newly received demand for discovery.

Sincerely,

AP Carlton

----- Original Message -----
From: Bloom, Michael <MJBLOOM@ftc.gov>
To: AP Carlton
Cc: Lanning, William <WLANNING@ftc.gov>; Dagen, Richard B. <RDAGEN@ftc.gov>; Noel Allen; Jack Nichols
Sent: Fri Jan 07 18:14:52 2011
Subject: For Meet and Confer

Mr. Carlton:

William Lanning has asked me to send you this to you.

We appreciate your confirming the availability of Respondent's Counsel for our January 11, 2010 meeting.

As discussed, we are setting forth Complaint Counsel's rationale for requesting that Respondent submit more complete answers than previously provided in their response to our Request for Admissions. However, this listing should not be construed as a waiver of any further claims that Complaint Counsel may raise in a Motion to Compel filed with the Court in the event that the parties cannot resolve these matters. In that sense, they are

provided to facilitate our planned discussion scheduled for 10:00AM on January 11, 2010.

Please be further advised that we will not be discussing your Interrogatory Responses at this time or on January 11, 2011.

Requests For Admission

RFA 2 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.

RFA 3 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.

RFA 7 Rule 3.32 (b) - response is a refusal to answer because the response does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the response fails to specify which matter is denied or admitted.

RFA 12 Rule 3.32 (b) - response is inadequate because the response does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the response fails to specify which matter is denied or admitted.

RFA 13 Rule 3.32 (b) - response is inadequate because the response does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the response fails to specify which matter is denied or admitted.

RFA 14 Rule 3.32 (b) - response is inadequate because the response does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the response fails to specify which matter is denied or admitted.

RFA 16 Rule 3.32 (b) - response is inadequate because the response does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the response fails to specify which matter is denied or admitted.

RFA 17 Rule 3.32 (b) - response is inadequate because the response does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the response fails to specify which matter is denied or admitted.

RFA 21 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.

RFA 34 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.

RFA 35 Rule 3.34(b): response is a refusal to answer because it does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the objection is an improper claim of lack of relevance and improper RFA subject matter.

RFA 36 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.

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.

RFA 44 Rule 3.32 (b) - response is inadequate because the response does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the response fails to specify which matter is denied or admitted.

In addition, interspersed throughout the Board's Response are instances in which the Board "admits" a matter that is not within the scope of the RFA addressed. These are not admissions. They are unsolicited averrals of the Board's positions on various matters, to which the Board has appended the word "admit." As such, they are not entitled to the evidentiary admissibility or weight that might be afforded true admissions. They should be stricken. These occur in the Board's responses to RFAs 17, 18, 22, 30, 31, 32, 33, 34, 37, 40, and 41.

Thank you and have a good weekend.

Michael Bloom

Michael Bloom

Assistant Director for Policy & Coordination

Bureau of Competition

Federal Trade Commission


**From:** AP Carlton
**Sent:** Monday, January 10, 2011 3:28 PM
**To:** 'Lanning, William'; 'Dagen, Richard B.'
**Cc:** Noel Allen; Jack Nichols; 'Jackson Nichols'; Kathy Gloden; 'Westman-Cherry, Melissa'; 'Bloom, Michael'
**Subject:** FW: FTC Docket 9343; Tuesday 1/11 Call: Request for Timely Response to Discovery Requests

Mr. Lanning and Mr. Dagen:

Further to our discussions regarding Discovery Requests:

We are willing to proceed with our planned conference call at 10am on Tuesday 1/11 (tomorrow) provided as follows:

One: The submission of the list of "Specific Discovery Items Requested" submitted to you by the email below on January 5, 2011 (and attached hereto), and our participation in good faith negotiations to date and with respect to our conference call planned for tomorrow should not be construed as a waiver of any further claims that Respondent's Counsel may raise in a Motion to Compel filed with the Court in the event that the parties cannot resolve these matters. In particular, the list of Specific Discovery Items Requested is for the express purpose of facilitating good faith negotiations, including, but not limited to, the conference call planned for tomorrow.

Two: As suggested by Mr. Lanning's email to me of 8:03pm Sunday, January 9, 2011, we are amenable to extending the time allotted for the conference call for an additional hour, until 1pm, provided that: we first address Complaint Counsel's response to the list of "Specific Discovery Items Requested" submitted to Complaint Counsel by Respondent's Counsel on January 5, 2011 (see "Third" below for further provisions); we second address, if necessary, Items 1. And 3. raised in Mr. Lanning's email to me of January 9 (see my email of earlier today to Mr. Lanning regarding the same); we third address any miscellaneous discovery issues either raised by Mr. Lanning in his telephone conference with me on Thursday, January 6, 2011, his 8:03pm email to me dated Sunday January 9, 2011, and any other matter regarding discovery that has not heretofore been addressed and needs to be; and, we fourth address Complaint Counsel's request that Respondent submit more complete answers to Respondent's Responses to Complaint Counsel's Request for Admissions, as set forth in Mr. Bloom's email to me of Friday, January 7, 2011.

Three: With respect to addressing Complaint Counsel's response to the list of "Specific Discovery Items Requested", we will proceed as follows: We will address the individual specific items requested one by one, beginning with Item 1. On page 1 (in the section entitled "Requests for Admission") and then proceed on an item by item basis through the sections entitled "Interrogatories" (page 4.) and "Requests for Production" (page 7.) until we reach the end on page 12. With respect to each item addressed, we will expect Complaint Counsel to be prepared to respond to each item with either a "yes

we will provide the item requested"; "no we will not provide the item requested" (together with an explanation of why not); or, "we do not know how we wish to respond to the request and wish to offer an alternative or discuss the matter" (with discussion and immediate and final resolution of the request being addressed to follow).

Four: We expect that Complaint Counsel will provide us with a list in advance of the call of the items Complaint Counsel wishes to discuss in connection with matters to be addressed numbers second and third, set forth in Section Two above. We will first respond to each item and will be willing to then discuss each item in turn.

Five: With respect to addressing Complaint Counsel's request that Respondent submit more complete answers to Respondent's Responses to Complaint Counsel's Request for Admissions: We will follow the same procedure as outlined in Section Three above set forth for Complaint Counsel's response to Respondent's list of "Specific Discovery Items Requested", except that the roles of Complaint Counsel and Respondent's Counsel will be reversed in addressing the specific items set forth in Mr. Bloom's email to me of January 7, 2011.

Please advise if you wish to discuss these matters further.

Further, please advise that you have received this email.

AP Carlton

**From:** Kathy Gloden
**Sent:** Wednesday, January 05, 2011 11:34 AM
**To:** Lanning, William
**Cc:** 'Dagen, Richard B.'; Noel Allen; AP Carlton; Jack Nichols; Kathy Gloden; 'Jackson Nichols'
**Subject:** FTC Docket 9343; Request for Timely Response to Discovery Requests

Mr. Lanning,

AP Carlton asked me forward this email to your attention on his behalf.

Sincerely,

Kathy Gloden

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Dear Mr. Lanning:

Please find attached a listing of "Specific Discovery Items Requested". This listing details responses by Complaint Counsel to specific items of Respondent's Requests for Admissions, Interrogatories and Requests for Production which Respondent finds to be inadequate or unacceptable. The listing references, for each item of discovery, Respondent's request that Complaint Counsel respond to this request for a response by taking the "Action Required" for the "Reason(s) Requested" in the listing.

We are available to negotiate this matter in good faith in the hopes we can resolve the matter before 12 o'clock noon ET this Friday, January 7. We apologize for the short notice, but find that it is necessitated by our compressed pre-trial schedule.

Sincerely,

AP Carlton

**Alfred P. Carlton, Jr.**

acarlton@allenpinnix.com

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

Office 919-755-0505
Fax 919-829-8098
Mobile 919-749-8229


## SPECIFIC DISCOVERY ITEMS REQUESTED
**January 5, 2011**

**Requests for Admission**

| Request No. | Action Required | Complaint Counsel Objection(s) | Reason(s) Requested |
|---|---|---|---|
| 1 | Please respond to this request | Calls for legal conclusion | **No response received.** Objection is inadequate under clear language of 16 C.F.R. § 3.32(b).[1] Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." |
| 9 | Please respond to this request | "irrelevant" and "beyond the scope" of Rule 3.32 | **No response received.** Objection is inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." |
| 10 | Please respond to this request | "irrelevant" and "beyond the scope" of Rule 3.32 | **No response received.** Objection is inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." |
| 11 | Please respond to this request | Calls for legal conclusion | **No response received.** Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." |

[1] 16 C.F.R. § 3.32(b) states that "[a] party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may deny the matter or set forth reasons why the party cannot admit or deny it."

| Request No. | Action Required | Complaint Counsel Objection(s) | Reason(s) Requested |
|---|---|---|---|
| 12 | Please respond to this request | Calls for legal conclusion | **No response received.** Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." |
| 13 | Please respond to this request | Calls for legal conclusion | **No response received.** Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." |
| 14 | Please respond to this request with respect to Board members Sadler, Howdy & Sheppard | States that Complaint Counsel "cannot truthfully admit or deny this Request" with respect to three of the board members | **No response received** with respect to Board members Sadler, Howdy and Sheppard. Response is inadequate with respect to these Board members under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." |
| 18 | Please respond to this request | Calls for legal conclusion | **No response received.** Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." |
| 19 | Please respond to this request | Calls for legal conclusion | **No response received.** Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." |

| Request No. | Action Required | Complaint Counsel Objection(s) | Reason(s) Requested |
|---|---|---|---|
| 20 | Please respond to this request | Calls for legal conclusion | **No response received.** Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." |
| 21 | Please respond to this request | Calls for legal conclusion | **No response received.** Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." |
| 22 | Please respond to this request | Calls for legal conclusion | **No response received.** Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." |
| 23 | Please respond to this request | Calls for legal conclusion | **No response received.** Objection is inadequate under clear language of 16 C.F.R. § 3.32(b). Objection is also inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." |
| 24 | Please respond to this request | "irrelevant" and "beyond the scope" of Rule 3.32 | **No response received.** Objection is inadequate under 16 C.F.R. § 3.32(b) because it does not state any reasons for the objection and does not "set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." |

**Interrogatories**

| Request No. | Action Required | Complaint Counsel Objection(s) | Reason(s) Requested |
|---|---|---|---|
| 1 | Please respond to this request | Unduly burdensome; Seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Board; Masks multiple interrogatories | **No response received.** Response is insufficient because it does not even attempt to respond to the Board's Interrogatory. |
| 2 | Please respond to this request with sufficient detail to identify individual documents | Overbroad; Unduly burdensome; Seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Board | **Insufficient response.** Response is insufficient under 16 C.F.R. § 3.35(c) because it fails to "include sufficient detail to permit the interrogating party to identify readily the **individual documents** from which the answer may be ascertained." |
| 3 | Please respond to this request with sufficient detail to identify individual documents | Overbroad; Unduly burdensome; Seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Board | **Insufficient response.** Response is insufficient under 16 C.F.R. § 3.35(c) because it fails to "include sufficient detail to permit the interrogating party to identify readily the **individual documents** from which the answer may be ascertained." |
| 4 | Please respond to this request with sufficient detail to identify individual documents | Overbroad; Unduly burdensome; Seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Board | **Insufficient response.** Response is insufficient under 16 C.F.R. § 3.35(c) because it fails to "include sufficient detail to permit the interrogating party to identify readily the **individual documents** from which the answer may be ascertained." |

| Request No. | Action Required | Complaint Counsel Objection(s) | Reason(s) Requested |
|---|---|---|---|
| 5 | Please respond to this request with sufficient detail to identify individual documents | Overbroad; Unduly burdensome; Seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Board | **Insufficient response.** Response is insufficient under 16 C.F.R. § 3.35(c) because it fails to "include sufficient detail to permit the interrogating party to identify readily the **individual documents** from which the answer may be ascertained." |
| 6 | Please respond to this request with sufficient detail to identify individual documents | Overbroad; Unduly burdensome; Seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Board | **Insufficient response.** Response is insufficient under 16 C.F.R. § 3.35(c) because it fails to "include sufficient detail to permit the interrogating party to identify readily the **individual documents** from which the answer may be ascertained." |
| 9 | Please respond to this request | Vague and ambiguous; Irrelevant; Duplicative | **Insufficient response**. Complaint Counsel served deposition notices and subpoenas on numerous persons in connection with this matter, but refuses to provide the names of the attorneys who spoke with each person served. Complaint Counsel is obligated to provide this information to the Board. |
| 11 | Please respond to this request with sufficient detail to identify individual documents | Overbroad; Unduly burdensome; Seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Board | **Insufficient response.** Response is insufficient under 16 C.F.R. § 3.35(c) because it fails to "include sufficient detail to permit the interrogating party to identify readily the **individual documents** from which the answer may be ascertained." |
| 12 | Please respond fully to this request with sufficient detail, and include **all** sources, data, documents, etc. responsive to the request | The Board allegedly already has the responsive documents | **Insufficient response.** Response is insufficient because it only cites certain exemplary documents responsive to the request, but does not state whether the response addresses all such documents or whether there are other responsive documents. The Interrogatory sought "*all sources, data, documents, expert opinion, and any other information, including dates*" related to the request. |

| Request No. | Action Required | Complaint Counsel Objection(s) | Reason(s) Requested |
|---|---|---|---|
| 13 | Please respond fully to this request with sufficient detail, and include **all** sources, data, documents, etc. responsive to the request | The Board allegedly already has the responsive documents | **Insufficient response.** Response is insufficient because it only cites certain exemplary documents responsive to the request, but does not state whether the response addresses all such documents or whether there are other responsive documents. The Interrogatory sought "*all sources, data, documents, expert opinion, and any other information, including dates*" related to the request. |
| 14 | Please respond fully to this request with sufficient detail, and include **all** sources, data, documents, etc. responsive to the request | The Board allegedly already has the responsive documents | **Insufficient response.** Response is insufficient because it only cites certain exemplary documents responsive to the request, but does not state whether the response addresses all such documents or whether there are other responsive documents. The Interrogatory sought "*all sources, data, documents, expert opinion, and any other information, including dates*" related to the request. |

**Requests for Production**

| Request No. | Action Required | Complaint Counsel Objection(s)/ Privileges Claimed | Reason(s) Requested |
|---|---|---|---|
| 1 | Please make available for inspection all materials responsive to this request | "Beyond the scope" of discovery<br><br>**Privileges:**<br>--government deliberative process<br>--law enforcement investigation<br>--work product doctrine<br>--government informer | **Insufficient response.** Response supplies no specific detail in support of objection.<br><br>**Improper privilege claim.** Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context.[2] |
| 2 | Please make available for inspection all materials responsive to this request | "Beyond the scope" of discovery<br><br>**Privileges:**<br>--government deliberative process<br>--law enforcement investigation<br>--work product doctrine<br>--government informer | **Insufficient response.** Response supplies no specific detail in support of objection.<br><br>**Improper privilege claim.** Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context. |

[2] "To fall within the deliberative process privilege, materials must bear on the formulation or exercise of agency policy-oriented *judgment*. The deliberative process privilege, we underscore, is essentially concerned with protecting the process by which policy is formulated." *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992) (internal citations omitted) (emphasis in the original). *See also Playboy Enter. v. Dep't of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982) (holding that fact report was not within privilege because compilers' mission was simply "to investigate the facts," and because report was not "intertwined with the policy-making process").

| Request No. | Action Required | Complaint Counsel Objection(s)/ Privileges Claimed | Reason(s) Requested |
|---|---|---|---|
| 3 | Please make available for inspection all materials responsive to this request | "Beyond the scope" of discovery<br><br>**Privileges:**<br>--government deliberative process<br>--law enforcement investigation<br>--work product doctrine<br>--government informer | **Insufficient response.** Response supplies no specific detail in support of objection.<br><br>**Improper privilege claim.** Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context. |
| 4 | Please make available for inspection all materials responsive to this request | "Beyond the scope" of discovery<br><br>**Privileges:**<br>--government deliberative process<br>--law enforcement investigation<br>--work product doctrine<br>--government informer | **Insufficient response.** Response supplies no specific detail in support of objection.<br><br>**Improper privilege claim.** Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context. |
| 5 | Please make available for inspection all materials responsive to this request | **Privileges:**<br>--government deliberative process<br>--law enforcement investigation<br>--work product doctrine<br>--government informer | **Improper privilege claim.** Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context. |
| 6 | Please make available for inspection all materials responsive to this request | **Privileges:**<br>--government deliberative process<br>--law enforcement investigation<br>--work product doctrine<br>--government informer | **Improper privilege claim.** Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context. |

| Request No. | Action Required | Complaint Counsel Objection(s)/ Privileges Claimed | Reason(s) Requested |
|---|---|---|---|
| 7 | Please make available for inspection all materials responsive to this request | "Beyond the scope" of discovery<br><br>**Privileges:**<br>--government deliberative process<br>--law enforcement investigation<br>--work product doctrine<br>--government informer | **Insufficient response.** Response supplies no specific detail in support of objection.<br><br>**Improper privilege claim.** Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context. |
| 8 | Please make available for inspection all materials responsive to this request | "Beyond the scope" of discovery | **Insufficient response.** Response supplies no specific detail in support of objection. |
| 9 | Please make available for inspection all materials responsive to this request | "Beyond the scope" of discovery<br><br>**Privileges:**<br>--government deliberative process<br>--law enforcement investigation<br>--work product doctrine<br>--government informer | **Insufficient response.** Response supplies no specific detail in support of objection.<br><br>**Improper privilege claim.** Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context. |
| 10 | Please make available for inspection all materials responsive to this request | "Beyond the scope" of discovery<br><br>**Privileges:**<br>--government deliberative process<br>--law enforcement investigation<br>--work product doctrine<br>--government informer | **Insufficient response.** Response supplies no specific detail in support of objection.<br><br>**Improper privilege claim.** Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context. |

| Request No. | Action Required | Complaint Counsel Objection(s)/ Privileges Claimed | Reason(s) Requested |
|---|---|---|---|
| 11 | Please make available for inspection all materials responsive to this request | "Beyond the scope" of discovery | **Insufficient response.** Response supplies no specific detail in support of objection. |
| 12 | Please make available for inspection all materials responsive to this request | Calls for legal conclusion; "Beyond the scope" of discovery<br><br>**Privileges:**<br>--government deliberative process<br>--law enforcement investigation<br>--work product doctrine<br>--government informer | **Insufficient response.** Response supplies no specific detail in support of objection.<br><br>**Improper privilege claim.** Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context. |
| 13 | Please make available for inspection all materials responsive to this request | "Beyond the scope" of discovery<br><br>**Privileges:**<br>--government deliberative process<br>--work product doctrine | **Insufficient response.** Response supplies no specific detail in support of objection.<br><br>**Improper privilege claim.** Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context. |
| 14 | Please make available for inspection all materials responsive to this request | "Beyond the scope" of discovery | **Insufficient response.** Response supplies no specific detail in support of objection. |
| 15 | Please make available for inspection all materials responsive to this request | "Beyond the scope" of discovery | **Insufficient response.** Response supplies no specific detail in support of objection. |

| Request No. | Action Required | Complaint Counsel Objection(s)/ Privileges Claimed | Reason(s) Requested |
|---|---|---|---|
| 16 | Please make available for inspection all materials responsive to this request | "Beyond the scope" of discovery | **Insufficient response.** Response supplies no specific detail in support of objection. |
| 17 | Please make available for inspection all materials responsive to this request | "Beyond the scope" of discovery<br><br>**Privileges:**<br>--government deliberative process<br>--law enforcement investigation<br>--work product doctrine<br>--government informer | **Insufficient response.** Response supplies no specific detail in support of objection.<br><br>**Improper privilege claim.** Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context. |
| 18 | Please make available for inspection all materials responsive to this request | "Beyond the scope" of discovery<br><br>**Privileges:**<br>--government deliberative process<br>--law enforcement investigation<br>--work product doctrine<br>--government informer | **Insufficient response.** Response supplies no specific detail in support of objection.<br><br>**Improper privilege claim.** Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context. |

| Request No. | Action Required | Complaint Counsel Objection(s)/ Privileges Claimed | Reason(s) Requested |
|---|---|---|---|
| 19 | Please make available for inspection all materials responsive to this request | Calls for legal conclusion<br><br>**Privileges:**<br>--government deliberative process<br>--law enforcement investigation<br>--work product doctrine<br>--government informer | **Insufficient response.** Assertion that request "calls for a legal conclusion" is not a meaningful objection under Rule 3.37, and further is irrelevant to Complaint Counsel's obligation to search for responsive documents.<br><br>**Improper privilege claim.** Complaint Counsel has not made a sufficiently detailed showing to sustain its burden in asserting a privilege with respect to the requested documents, nor has it made any arguments as to why the privilege applies other than conclusory statements. Further, the government deliberative process privilege is completely inapplicable in this context. |


-----Original Message-----
From: AP Carlton
Sent: Wednesday, January 12, 2011 9:03 AM
To: 'wlanning@ftc.gov'; 'RDAGEN@ftc.gov'
Cc: Noel Allen; Jack Nichols; 'MWESTMAN@ftc.gov'; 'mjbloom@ftc.gov'; Catherine E. Lee; Brie Allen; 'jackson.nichols@gmail.com'; Kathy Gloden
Subject: Re: FTC Docket #9343: Good Faith Alternative Discussions Offer.

Dear Mr. Lanning,

As we indicated to you yesterday, counsel for Respondent stands ready at any time to enter into good faith "alternative discussions" as you have described them. We are willing to do so without requesting Complaint Counsel's agreement to forego their right to object to our Motion to Compel, or to file a Motion to Compel on their own motion.

This offer is part of our effort to continue to pursue the discussions and negotiations regarding our Requests for Discovery in good faith. Our declaration was based on our judgment that Complaint Counsel had failed to pursue our negotiations in good faith. It had nothing to do with our good faith efforts to continue those negotiations, efforts which continue. We made it clear that we were continuing to pursue the negotiations in good faith at that time. We wish continue to pursue the negotiations related to our Discovery Requests through such alternative discussions.

We see no conflict or procedural impediment for either party in doing so. As a matter of fact, we believe that if Complaint Counsel wishes to pursue these matters such alternative discussions could conceivably provide us with an effective means by which we can attempt to mitigate, if not resolve, the impasse.

Sincerely,

AP Carlton

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----- Original Message -----
From: Lanning, William <WLANNING@ftc.gov>
To: AP Carlton; Dagen, Richard B. <RDAGEN@ftc.gov>
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa <MWESTMAN@ftc.gov>; Bloom, Michael <MJBLOOM@ftc.gov>; Catherine E. Lee; Brie Allen; 'jackson.nichols@gmail.com' <jackson.nichols@gmail.com>; Kathy Gloden
Sent: Tue Jan 11 13:10:49 2011
Subject: RE: FTC Docket #9343: Declaration of Impasse

Dear Mr. Carlton,

Complaint Counsel remain confident that outstanding discovery issues can be resolved, narrowed, or appropriately brought to impasse. We proposed, and you appear to find agreeable, a format for doing so, alternating Respondent's and Complaint Counsel's objections to one another's discovery responses (e.g., discuss Respondent's issues with Complaint Counsel's RFA responses followed by discussion of Complaint Counsel's RFA responses, etc.). This further reflects the fact that we are not at impasse, as we have advised you. Our position is that we will go forward in that way (alternating objections) provided that you first withdraw your claim of impasse and motion to compel. The pursuit

of such a motion while substantive discussions are ongoing suggests a lack of commitment to the success of such substantive discussions, and an imposition on the court, which you ask to resolve issues that are not ripe and which may be resolved or at least narrowed by talks using a format that appears mutually acceptable—we are not at impasse. All you need to do is withdraw your declaration of impasse and motion to compel so that we can both, in good faith, try to narrow and resolve our respective issues.

Not mentioned in your email below, we also indicated to you that right now we stood ready, willing, and able to discuss Complaint Counsel's concerns regarding Respondent's discovery responses, with respect to which we have not declared impasse. As we indicated, we would work with you to resolve or narrow these issues whether or not you withdraw your own declaration of impasse and motion.

Sincerely,

Bill Lanning

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From: AP Carlton [mailto:acarlton@allenpinnix.com]
Sent: Tuesday, January 11, 2011 12:23 PM
To: Lanning, William; Dagen, Richard B.
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa; Bloom, Michael; Catherine E. Lee; Brie Allen; jackson.nichols@gmail.com; Kathy Gloden
Subject: RE: FTC Docket #9343: Declaration of Impasse

Mr. Lanning:

Further to our call of this morning between you, me, Mr. Nichols and Mr. Bloom: We (Respondent's Counsel) is amenable to and offered to consider the withdrawal of its Motion to Compel (as we offered), provided that Complaint Counsel and Respondent's Counsel enter into "alternating discussions" as to our respective Discovery Requests (as you offered). Our offer remains outstanding.

Our understanding is that, it is Complaint Counsel's position that there will be no further discussions unless we withdraw our Motion to Compel. Our position is that we are willing to consider withdrawing our Motion to Compel provided we enter into alternating discussions.

Sincerely,

AP Carlton.

From: AP Carlton

Sent: Tuesday, January 11, 2011 11:02 AM
To: 'Lanning, William'; Dagen, Richard B.
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa; Bloom, Michael; Catherine E. Lee; Brie Allen; 'jackson.nichols@gmail.com'; Kathy Gloden
Subject: RE: FTC Docket #9343: Declaration of Impasse

Dear Mr. Lanning:

On behalf of Respondent's Counsel, we are indeed available to discuss these matters as you suggest. I would suggest a preliminary conference between you, Mr. Dagen, Jack Nichols and I to see where we stand. We are available immediately. As you no doubt have determined by now, we have filed a Motion to Compel. Without agreeing to any of the unilateral terms offered by Complaint Counsel as to how we proceed, if we do proceed we will do so only on the basis that we revisit the entire matter from a zero based perspective and in good faith. And that we do so not in groups but with one or two of the respective Counsel groups' lead members.

In addition, we categorically reject as baseless all of the characterizations of our conduct and the many, many misrepresentations of very simple and straightforward facts with respect to this matter contained in your email. If we are to go forward, we will not do so if Complaint Counsel insists on continuing its propaganda campaign for the record. It belies good faith, and is one of the many reasons we find that there are a number of indicators of Complaint Counsel's failure to proceed in good faith.

Sincerely,

AP Carlton

From: Lanning, William [mailto:WLANNING@ftc.gov]
Sent: Tuesday, January 11, 2011 10:43 AM
To: AP Carlton; Dagen, Richard B.
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa; Bloom, Michael; Catherine E. Lee; Brie Allen; 'jackson.nichols@gmail.com'; Kathy Gloden
Subject: RE: FTC Docket #9343: Declaration of Impasse

Dear Counsel,

1. To make sure the record is clear, we understand by your email that Respondent has made a unilateral decision to cancel the meet and confer scheduled for this morning at 10 am, for which Complaint Counsel 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 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 time that Complaint Counsel's issues were addressed. In this regard, Mr. Lanning in his email of January 9, 2011 stated that we would move forward with these discussions on condition that both sides issues were addressed before either side could declare impasse. This offer was made without prejudice to our right to oppose any motion to compel as stale.

3. As a result, your assertion that we have held the negotiations hostage is totally baseless; in fact it is Respondent who has attempted to hold these negotiations hostage by forcing Complaint Counsel to accede to the unilateral terms set out by Mr. Carlton in his email - terms that would have ensured that Respondent's issues were promptly addressed without any assurance that Complaint Counsel's issues would be promptly addressed.

4. Indeed, given that Mr. Lanning's email of January 9, 2011 indicated that Complaint Counsel would only proceed on the terms that you have now rejected 10 minutes before the conference, it is clear that Respondent has engaged in bad faith negotiations, which have caused a significant disruption in Complaint Counsel's trial preparation and expert discovery. Discovery deadlines are imposed precisely to avoid such maneuvering so close to trial.

5. That said, we stand ready, and would have so informed Respondent had Respondent dialed in as planned rather than sending an email, that Complaint Counsel are willing to consider other alternatives that would achieve the same objective of parity in the negotiation process. For example, one possibility would be to alternate discussion by type of discovery request. The point was to achieve parity and Complaint Counsel was and is prepared Respondent to air its issues first, so long as Complaint Counsel is not prejudiced.

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.

7. We are available right now to discuss Complaint Counsel's issues 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 as we have several attorneys on the call.

Sincerely,

Bill Lanning

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From: AP Carlton [mailto:acarlton@allenpinnix.com]
Sent: Tuesday, January 11, 2011 9:49 AM
To: Dagen, Richard B.; Lanning, William
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa; Bloom, Michael; Catherine E. Lee; Brie Allen; jackson.nichols@gmail.com; Kathy Gloden
Subject: FTC Docket #9343: Declaration of Impasse

Gentlemen:

Based on the failure of Complaint Counsel to negotiate our Discovery Requests in good faith, we hereby declare an impasse.

In response to your email of last evening (see below), we can only say that we have continued to be available to negotiate in good faith and have actually been engaged in negotiating in good faith since making our Requests for Discovery on January 5, at all times leaving both parties unhampered by any restrictions on their respective rights to seek redress in appropriate circumstances.

Our declaration of impasse is based upon several indicators of Complaint Counsel's failure to negotiate in good faith. However, holding negotiations hostage to "such an agreement" as proposed by Complaint Counsel below is not negotiating in good faith in and of itself.

If you have any questions regarding these matters, I am available to discuss them with you.

There is no response necessary. However, due to recent FTC computer difficulties, we request that you do acknowledge receipt of this message.

Sincerely,

AP Carlton
---

----- Original Message -----
From: Dagen, Richard B. <RDAGEN@ftc.gov>
To: AP Carlton; Lanning, William <WLANNING@ftc.gov>
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa <MWESTMAN@ftc.gov>; Bloom, Michael <MJBLOOM@ftc.gov>
Sent: Mon Jan 10 21:30:03 2011
Subject: RE: Meet and Confer

Yes, it is correct.

Rick Dagen

From: AP Carlton [mailto:acarlton@allenpinnix.com]
Sent: Monday, January 10, 2011 9:28 PM
To: Lanning, William; Dagen, Richard B.
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa; Bloom, Michael
Subject: Immediate Response Requested: Re: Meet and Confer

Mr. Lanning and Mr. Dagen:

This inquiry is submitted to you in your capacity as co-lead Complaint Counsel.

Based on Mr. Bloom's email below, we conclude that your proceeding with our call set for tomorrow morning at 10am is expressly conditioned upon the parties reaching "such an agreement" as described by Mr. Bloom in the first paragraph of his email.

Is this conclusion correct?

A prompt response will be appreciated, and we believe, under the circumstances, in order.

AP Carlton

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----- Original Message -----
From: Bloom, Michael <MJBLOOM@ftc.gov>
To: AP Carlton
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa <MWESTMAN@ftc.gov>; Lanning, William <WLANNING@ftc.gov>; Dagen, Richard B. <RDAGEN@ftc.gov>
Sent: Mon Jan 10 20:20:00 2011
Subject: Meet and Confer

Mr. Carlton:

I have been asked to reply to your email, below, on behalf of Complaint Counsel. We are generally amenable to the approach you have suggested, provided that it is agreed as follows: Neither party will declare impasse and file a motion to compel with respect to the other party's responses to requests for document production, interrogatories, and requests for admission until we have considered and reached a mutually acceptable agreement to produce or impasse on all of the outstanding discovery issues. Mr. Lanning included the need for such an agreement in his email to you of January 9 at 9:03 p.m. We believe that such an agreement will encourage fairness, flexibility, and speed in the resolution of all of our outstanding discovery issues. In addition, if we do reach an impasse on some of our outstanding discovery issues, it will enable Judge Chappell to make his rulings on any resulting motions with due appreciation for the entirety of the contested issues.

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 improper grounds. Mr. Lanning has discussed these concerns with you and your colleagues on several occasions, including in his letter to Mr. Allen of August 18, 2010, which I incorporate herein by reference. I refer you to that letter's Attachment A for a list of document redactions that we believe are improper. We plan on discussing those redactions with you during our "meet and confer," which will begin tomorrow at 10:00 a.m. Mr.

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 documents by Bates number that were neither produced, nor identified as privileged in your privilege log, nor accounted for in your production log. We plan on discussing the identified documents that were withheld during our meet and confer, as well.

Last, in my earlier email to you identifying problems we have with respect to your responses to Complaint Counsel's Requests for Admission, I inadvertently left off of the list one item: in addition to the items listed, we plan on discussing your response to RFA 37, which is unresponsive and neither specifically admits, denies nor set forth reasons for the failure to admit or deny.

We look forward to speaking with you and your colleagues tomorrow. Thank you.

Michael Bloom

for Complaint Counsel

Michael Bloom

Assistant Director for Policy & Coordination

Bureau of Competition

Federal Trade Commission


-----Original Message-----
From: AP Carlton
Sent: Sunday, January 09, 2011 9:16 PM
To: 'wlanning@ftc.gov'
Subject: Re: Docket #9343; RE: Good Faith Negotiation: Purpose of Tuesday Call

Before I respond to this I believe we can straighten a couple of things out by phone if you are availabale and want to do so. I will respond in good faith whether or not we talk, I just think we will get to where we both want to go if we speak first. Cell is 919-749-8229.

Please advise.
---

----- Original Message -----
From: Lanning, William <WLANNING@ftc.gov>
To: AP Carlton
Cc: Dagen, Richard B. <RDAGEN@ftc.gov>; Noel Allen; Jack Nichols; Bloom, Michael <MJBLOOM@ftc.gov>; Westman-Cherry, Melissa <MWESTMAN@ftc.gov>
Sent: Sun Jan 09 21:03:26 2011
Subject: Docket #9343; RE: Good Faith Negotiation: Purpose of Tuesday Call

Dear Mr. Carlton,

I received your email sent after 8PM on Friday, January 7, 2011 and was surprised by its content because our respective understandings of our discussion of January 6, 2011 are vastly different.

As I understood our discussion, there was no agreement on Complaint Counsel's part to limit our discussion to Respondent's discovery requests without discussion of Complaint Counsel's outstanding discovery requests. In fact, I raised several outstanding discovery requests that were made by Complaint Counsel well in advance of Respondent's January 5, 2010 requests as matters to discuss on January 11, 2011.

For instance,

1. I raised Complaint Counsel's discovery demand of August 18, 2010 regarding Respondent's inadequate claims of attorney client and work product privileges on hundreds of documents. Although Mr. Allen represented that he would respond to those matters during a phone conversation of August 30, 2010, he has yet to respond.

2. In addition, I have twice requested that Respondent provide the transcripts listed on Mr. Baumer's report that Respondent was required to produce under Paragraph 16 of the Scheduling Order when Respondent listed Mr. Baumer as an expert. Although Respondent indicated that Mr. Baumer's copies of said material were destroyed in a flood, it was my

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.

3. I also referenced the fact that Respondent's Counsel had represented that it would certify its response to Complaint Counsel's Request for Production on November 30, 2010, but has yet to do so.

While I indicated that Complaint Counsel would be glad to discuss Respondent's discovery requests on Tuesday, January 11, 2011 in our telephone conversation of January 6, 2011, I was very clear that Complaint Counsel intended to discuss Complaint Counsel's outstanding discovery requests, as noted above, as well as Respondent's responses to Complaint Counsel's Admissions and Interrogatories. At your request, Complaint Counsel sent you an email on Friday, January 7, 2011 setting forth issues relating to Respondent's Admissions. Complaint Counsel also indicated that we would not discuss Respondent's Interrogatory responses at this time. Complaint Counsel remain willing to discuss both Respondent's and Complaint Counsel's outstanding discovery demands on January 11, 2011. However, your email of Friday evening suggests that Respondent's Counsel would prefer to postpone any discussion of Complaint Counsel's outstanding discovery requests to a later unspecified date because "consideration of Respondent's Counsel's demands will occupy the entire allotted time for Tuesday's call."

Unfortunately, Complaint Counsel finds your proposal to limit the January 11, 2011 telephone conference to Respondent's discovery demands unacceptable and contrary to my understanding. In an effort to move forward in good faith, I suggest that we agree to extend the time allotted for the January 11, 2011 telephone conversation. Alternatively, we could agree to address our respective discovery demands in turn and mutually agree to complete the process during another call scheduled for another day later in the week. Under either scenario, both sides would agree not to file any motions with the court relating to these outstanding issues until impasse or agreement has been reached relating to these issues.

At present, I will not be in the office on Monday, January 10, 2011 due to a pressing matter out-of- town that requires my direct attention and cannot be delayed. Please feel free to forward your written response to me, Mr. Dagen, Mr. Bloom, and Ms. Westman-Cherry. We will get back to you as soon as practicable.

Sincerely,

Bill Lanning

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From: AP Carlton [mailto:acarlton@allenpinnix.com]
Sent: Friday, January 07, 2011 8:14 PM
To: Lanning, William
Cc: Dagen, Richard B.; Noel Allen; Jack Nichols; Bloom, Michael
Subject: Good Faith Negotiation: Purpose of Tuesday Call

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 to our demand for specific discovery responses submitted to you on Wednesday January 5 together with a request that we together begin negotiations in good faith regarding those demands.

Although you indicated we could expect a demand for discovery from Complaint Counsel at some point in time, 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.

We expect that consideration of Respondent Counsel's demands will occupy the entire allocated time for the Tuesday call. We agreed to waive our deadline for a response to our demand and agreed to the Tuesday call on that basis. Thus, we would respectfully request that we confer and designate another tIme to jointly address Complaint Counsel's newly received demand for discovery.

Sincerely,

AP Carlton

----- Original Message -----
From: Bloom, Michael <MJBLOOM@ftc.gov>
To: AP Carlton
Cc: Lanning, William <WLANNING@ftc.gov>; Dagen, Richard B. <RDAGEN@ftc.gov>; Noel Allen; Jack Nichols
Sent: Fri Jan 07 18:14:52 2011
Subject: For Meet and Confer

Mr. Carlton:

William Lanning has asked me to send you this to you.

We appreciate your confirming the availability of Respondent's Counsel for our January 11, 2010 meeting.

As discussed, we are setting forth Complaint Counsel's rationale for requesting that Respondent submit more complete answers than previously provided in their response to our Request for Admissions. However, this listing should not be construed as a waiver of any further claims that Complaint Counsel may raise in a Motion to Compel filed with the Court in the event that the parties cannot resolve these matters. In that sense, they are provided to facilitate our planned discussion scheduled for 10:00AM on January 11, 2010.

Please be further advised that we will not be discussing your Interrogatory Responses at this time or on January 11, 2011.

Requests For Admission

RFA 2 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.

RFA 3 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.

RFA 7 Rule 3.32 (b) - response is a refusal to answer because the response does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the response fails to specify which matter is denied or admitted.

RFA 12 Rule 3.32 (b) - response is inadequate because the response does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the response fails to specify which matter is denied or admitted.

RFA 13 Rule 3.32 (b) - response is inadequate because the response does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the response fails to specify which matter is denied or admitted.

RFA 14 Rule 3.32 (b) - response is inadequate because the response does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the response fails to specify which matter is denied or admitted.

RFA 16 Rule 3.32 (b) - response is inadequate because the response does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the response fails to specify which matter is denied or admitted.

RFA 17 Rule 3.32 (b) - response is inadequate because the response does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the response fails to specify which matter is denied or admitted.

RFA 21 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.

RFA 34 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.

RFA 35 Rule 3.34(b): response is a refusal to answer because it does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the objection is an improper claim of lack of relevance and improper RFA subject matter.

RFA 36 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.

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.

RFA 44 Rule 3.32 (b) - response is inadequate because the response does not specifically deny or set forth reasons for the failure to admit or deny the request. In addition, the response fails to specify which matter is denied or admitted.

In addition, interspersed throughout the Board's Response are instances in which the Board "admits" a matter that is not within the scope of the RFA addressed. These are not admissions. They are unsolicited averrals of the Board's positions on various matters, to which the Board has appended the word "admit." As such, they are not entitled to the evidentiary admissibility or weight that might be afforded true admissions. They should be stricken. These occur in the Board's responses to RFAs 17, 18, 22, 30, 31, 32, 33, 34, 37, 40, and 41.

Thank you and have a good weekend.

Michael Bloom

Michael Bloom

Assistant Director for Policy & Coordination

Bureau of Competition

Federal Trade Commission


-----Original Message-----
From: AP Carlton
Sent: Thursday, January 13, 2011 11:02 AM
To: 'wlanning@ftc.gov'; 'RDAGEN@ftc.gov'
Cc: Noel Allen; Jack Nichols; 'MWESTMAN@ftc.gov'; 'mjbloom@ftc.gov'; Kathy Gloden; 'jackson.nichols@gmail.com'; Catherine E. Lee; Brie Allen
Subject: Re: FTC Docket #9343: Good Faith Alternative Discussions Offer: Response to Rejection .

Dear Mr. Lanning,

First: We can only take your response in the email below rejecting our good faith offer to engage in "alternative discussions" as a further indication of Complaint Counsel's refusal to negotiate our Discovery Requests in good faith. Our offer stands.

Second: We have indeed filed a Motion to Compel on behalf of our client. It is our client's right to seek that remedy in just such a case as here, where an impasse was reached and opposing counsel has sought to subvert the discovery process by failing to sufficiently respond responsibly to discovery requests and claiming numerous privileges that are clearly not available because they do not apply (see the Motion to Compel and accompanying Memorandum in Support). In fact, the entire pattern of Complaint Counsel's response to all of our discovery requests is a further indication of Complaint Counsel's failure to negotiate in good faith with respect to discovery in general and our Discovery Requests in particular.

Third: We are unaware that there is any FTC Rule, Regulation or Policy restricting or directing FTC Complaint Counsel's efforts and time in prosecuting any action brought by the Commission, especially where the Commission's Complaint Counsel must carry forward the Commission's burden of proof. We certainly do not accept any responsibility for your admitted lack of time and resources to respond to our good faith offer to participate in alternating discussions and view it as yet another indication of your refusal to negotiate our Discovery Requests in good faith. We find any suggestion that we might in some way be responsible for your own inability to assemble the necessary resources to undertake such an effort as purely preposterous posturing, and, outside of FTC proceedings, unheard of as a rational (or irrational) basis upon which to object to any litigation endeavor.

Fourth: The Motion to Compel was timely filed. See the Scheduling Order, your FTC Rules, the Federal Rules of Civil Procedure and our Memorandum in Support of the Motion (Page 2, Section I. "The Motion is Timely"). We are prepared to respond to whatever fiction Complaint Counsel submits in response to this, just as we will respond or have responded to you with respect to: your unlawfully asserted and unlawful authority to order and compel a witness who resides in Florida to travel to Washington, DC for a deposition (see the entirety of applicable case law); and, the wholly fictional assertion created out of thin air that any licensing board (not just the defendant Board here) has somehow committed a wrong by issuing cease and desist letters (see Item #55 of our Counter Statement of Material Facts). We are becoming accustomed to responding to non-law law, so we should be able to respond to you in this context as well.

Fifth: Our "actions" of Tuesday followed the following "actions" on Complaint Counsel's part: A failure to respond to numerous emails responding to your dIscovery concerns sent in good faith by us on Friday, Saturday and Sunday; "Demand emails" sent by you or at your behest on Friday and Sunday evenings; and, yet another "Demand email" sent on your behalf Monday evening.

Your Demand email of 9:02pm ET Sunday contained the following in outlining how Complaint

Counsel wished to proceed with the Tuesday call: "Under either scenario, both sides would agree not to file any motions with the court relating to any issues until impasse or agreement has been reached relating to these issues."
This email did not specify when or how such an agreement was to be reached, leading us to conclude that it might well be one of the subjects addressed on the Tuesday call.

Your Demand email of 8:19pm ET Monday, indicating how you wished to proceed with the call generally, contained the following: "...provided that it is agreed as follows: Neither party will declare impasse and file a motion to compel with respect to...(multiple discovery requests).....until we have considered and reached a mutually acceptable agreement to produce or impasse on all of the outstanding discovery issues."

I forwarded an email to you and Mr. Dagen at 9:28pm ET on Monday that posed the following inquiry based on your Monday email referenced above: ".....we conclude that your (Complaint Counsel) proceeding with our call set for tomorrow morning at 10am is expressly conditioned upon the parties reaching 'such an agreement' as described..." in your Monday email (see above), and continued, "Is this conclusion correct?"

At 9:30pm ET Monday, Mr. Dagen replied (by email): "Yes, it is correct".

As I indicated in my email declaring impasse at 9:49am ET Monday, holding our discovery negotiations hostage to "such an agreement" is ipso facto a failure to negotiate in good faith.

You may not have the emails I am referring to. I will provide you with copies for the record.

Sixth: Did we "refuse to participate in the conference call"? No we did not. We declared an impasse, which rendered the call unnecessary. If any inconvenience was visited upon Complaint Counsel, it was by virtue of its failure to proceed in good faith--its own intransigence and its unreasonable insistence on a non-negotiable demand made either 12 or 36 hours (take your pick) before the call. And I do not know where the notion that Complaint Counsel was inconvenienced for "an hour and a half" came from. Our notice of declaration of impasse was forwarded to you at 9:49am ET Tuesday, sufficient time in which to cancel the call.

Seventh: At approximately 11:30pm on Tuesday on a conference call with you, we did indeed refuse to withdraw our Motion to Compel. But, as is usually the case with matters asserted by Complaint Counsel, there is more to the story. We also then immediately offered to engage in alternating discussions and consider withdrawing the Motion. You rejected that offer out of hand. We have withdrawn our offer to consider withdrawing our Motion, but our offer to enter into alternating discussions stands (see One above and email below).

Eighth: Our offer to continue to address your Discovery Requests in good faith stands, along with our offer to enter into alternating discussions (see One above). We take your withdrawal of your offer to address your Discovery Requests with us as another indication of your failure to proceed in good faith, as well as further proof of your intention to subvert the entire discovery process.

Sincerely,

AP Carlton

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----- Original Message -----
From: Lanning, William <WLANNING@ftc.gov>
To: AP Carlton; Dagen, Richard B. <RDAGEN@ftc.gov>
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa <MWESTMAN@ftc.gov>; Bloom, Michael <MJBLOOM@ftc.gov>; Kathy Gloden
Sent: Wed Jan 12 16:13:56 2011
Subject: RE: FTC Docket #9343: Good Faith Alternative Discussions Offer.

Dear Mr. Carlton,

We appreciate your offer to continue negotiating with respect to our discovery requests. However, given your actions of yesterday including your declaration of impasse, refusal to participate in a pre-arranged telephone conference between the parties, your filing of a motion to compel and subsequent refusal to withdraw it once filed, we have proceeded with drafting our opposition, which we will file in a timely manner. Prior to your actions yesterday, we had decided to engage in voluntary negotiations with respect to your untimely discovery request so that Complaint Counsel might avoid spending significant time on an opposition to the anticipated motion to compel from Respondent. Much of that time has now been spent. Consequently, we are withdrawing our request to negotiate our discovery requests pending the Court's ruling on our opposition. Should the Court rule that Respondent's Motion to Compel is timely, we will at that time decide whether to pursue outstanding discovery issues with Respondent's response to our discovery request.

Sincerely,

Bill Lanning

---

From: AP Carlton [mailto:acarlton@allenpinnix.com]
Sent: Wednesday, January 12, 2011 9:03 AM
To: Lanning, William; Dagen, Richard B.
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa; Bloom, Michael; Catherine E. Lee; Brie Allen; jackson.nichols@gmail.com; Kathy Gloden
Subject: Re: FTC Docket #9343: Good Faith Alternative Discussions Offer.

Dear Mr. Lanning,

As we indicated to you yesterday, counsel for Respondent stands ready at any time to enter into good faith "alternative discussions" as you have described them. We are willing to do so without requesting Complaint Counsel's agreement to forego their right to object to our Motion to Compel, or to file a Motion to Compel on their own motion.

This offer is part of our effort to continue to pursue the discussions and negotiations regarding our Requests for Discovery in good faith. Our declaration was based on our judgment that Complaint Counsel had failed to pursue our negotiations in good faith. It had nothing to do with our good faith efforts to continue those negotiations, efforts which continue. We made it clear that we were continuing to pursue the negotiations in good faith at that time. We wish continue to pursue the negotiations related to our Discovery Requests through such alternative discussions.

We see no conflict or procedural impediment for either party in doing so. As a matter of fact, we believe that if Complaint Counsel wishes to pursue these matters such alternative discussions could conceivably provide us with an effective means by which we can attempt to mitigate, if not resolve, the impasse.

Sincerely,

AP Carlton

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----- Original Message -----
From: Lanning, William <WLANNING@ftc.gov>
To: AP Carlton; Dagen, Richard B. <RDAGEN@ftc.gov>
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa <MWESTMAN@ftc.gov>; Bloom, Michael <MJBLOOM@ftc.gov>; Catherine E. Lee; Brie Allen; 'jackson.nichols@gmail.com' <jackson.nichols@gmail.com>; Kathy Gloden
Sent: Tue Jan 11 13:10:49 2011

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

Dear Mr. Carlton,

Complaint Counsel remain confident that outstanding discovery issues can be resolved, narrowed, or appropriately brought to impasse. We proposed, and you appear to find agreeable, a format for doing so, alternating Respondent's and Complaint Counsel's objections to one another's discovery responses (e.g., discuss Respondent's issues with Complaint Counsel's RFA responses followed by discussion of Complaint Counsel's RFA responses, etc.). This further reflects the fact that we are not at impasse, as we have advised you. Our position is that we will go forward in that way (alternating objections) provided that you first withdraw your claim of impasse and motion to compel. The pursuit of such a motion while substantive discussions are ongoing suggests a lack of commitment to the success of such substantive discussions, and an imposition on the court, which you ask to resolve issues that are not ripe and which may be resolved or at least narrowed by talks using a format that appears mutually acceptable—we are not at impasse. All you need to do is withdraw your declaration of impasse and motion to compel so that we can both, in good faith, try to narrow and resolve our respective issues.

Not mentioned in your email below, we also indicated to you that right now we stood ready, willing, and able to discuss Complaint Counsel's concerns regarding Respondent's discovery responses, with respect to which we have not declared impasse. As we indicated, we would work with you to resolve or narrow these issues whether or not you withdraw your own declaration of impasse and motion.

Sincerely,

Bill Lanning

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From: AP Carlton [mailto:acarlton@allenpinnix.com]
Sent: Tuesday, January 11, 2011 12:23 PM
To: Lanning, William; Dagen, Richard B.
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa; Bloom, Michael; Catherine E. Lee; Brie Allen; jackson.nichols@gmail.com; Kathy Gloden
Subject: RE: FTC Docket #9343: Declaration of Impasse

Mr. Lanning:

Further to our call of this morning between you, me, Mr. Nichols and Mr. Bloom: We (Respondent's Counsel) is amenable to and offered to consider the withdrawal of its Motion to Compel (as we offered), provided that Complaint Counsel and Respondent's Counsel enter into "alternating discussions" as to our respective Discovery Requests (as you offered). Our offer remains outstanding.

Our understanding is that, it is Complaint Counsel's position that there will be no further discussions unless we withdraw our Motion to Compel. Our position is that we are

willing to consider withdrawing our Motion to Compel provided we enter into alternating discussions.

Sincerely,

AP Carlton.

From: AP Carlton
Sent: Tuesday, January 11, 2011 11:02 AM
To: 'Lanning, William'; Dagen, Richard B.
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa; Bloom, Michael; Catherine E. Lee; Brie Allen; 'jackson.nichols@gmail.com'; Kathy Gloden
Subject: RE: FTC Docket #9343: Declaration of Impasse

Dear Mr. Lanning:

On behalf of Respondent's Counsel, we are indeed available to discuss these matters as you suggest. I would suggest a preliminary conference between you, Mr. Dagen, Jack Nichols and I to see where we stand. We are available immediately. As you no doubt have determined by now, we have filed a Motion to Compel. Without agreeing to any of the unilateral terms offered by Complaint Counsel as to how we proceed, if we do proceed we will do so only on the basis that we revisit the entire matter from a zero based perspective and in good faith. And that we do so not in groups but with one or two of the respective Counsel groups' lead members.

In addition, we categorically reject as baseless all of the characterizations of our conduct and the many, many misrepresentations of very simple and straightforward facts with respect to this matter contained in your email. If we are to go forward, we will not do so if Complaint Counsel insists on continuing its propaganda campaign for the record. It belies good faith, and is one of the many reasons we find that there are a number of indicators of Complaint Counsel's failure to proceed in good faith.

Sincerely,

AP Carlton

From: Lanning, William [mailto:WLANNING@ftc.gov]
Sent: Tuesday, January 11, 2011 10:43 AM
To: AP Carlton; Dagen, Richard B.
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa; Bloom, Michael; Catherine E. Lee; Brie Allen; 'jackson.nichols@gmail.com'; Kathy Gloden
Subject: RE: FTC Docket #9343: Declaration of Impasse

Dear Counsel,

1. To make sure the record is clear, we understand by your email that Respondent has made a unilateral decision to cancel the meet and confer scheduled for this morning at 10 am, for which Complaint Counsel 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 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 time that Complaint Counsel's issues were addressed. In this regard, Mr. Lanning in his email of January 9, 2011 stated that we would move forward with these discussions on condition that both sides issues were addressed before either side could declare impasse. This offer was made without prejudice to our right to oppose any motion to compel as stale.

3. As a result, your assertion that we have held the negotiations hostage is totally baseless; in fact it is Respondent who has attempted to hold these negotiations hostage by forcing Complaint Counsel to accede to the unilateral terms set out by Mr. Carlton in his email - terms that would have ensured that Respondent's issues were promptly addressed without any assurance that Complaint Counsel's issues would be promptly addressed.

4. Indeed, given that Mr. Lanning's email of January 9, 2011 indicated that Complaint Counsel would only proceed on the terms that you have now rejected 10 minutes before the conference, it is clear that Respondent has engaged in bad faith negotiations, which have caused a significant disruption in Complaint Counsel's trial preparation and expert discovery. Discovery deadlines are imposed precisely to avoid such maneuvering so close to trial.

5. That said, we stand ready, and would have so informed Respondent had Respondent dialed in as planned rather than sending an email, that Complaint Counsel are willing to consider other alternatives that would achieve the same objective of parity in the negotiation process. For example, one possibility would be to alternate discussion by type of discovery request. The point was to achieve parity and Complaint Counsel was and is prepared Respondent to air its issues first, so long as Complaint Counsel is not prejudiced.

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.

7. We are available right now to discuss Complaint Counsel's issues

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 as we have several attorneys on the call.

Sincerely,

Bill Lanning

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From: AP Carlton [mailto:acarlton@allenpinnix.com]
Sent: Tuesday, January 11, 2011 9:49 AM
To: Dagen, Richard B.; Lanning, William
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa; Bloom, Michael; Catherine E. Lee; Brie Allen; jackson.nichols@gmail.com; Kathy Gloden
Subject: FTC Docket #9343: Declaration of Impasse

Gentlemen:

Based on the failure of Complaint Counsel to negotiate our Discovery Requests in good faith, we hereby declare an impasse.

In response to your email of last evening (see below), we can only say that we have continued to be available to negotiate in good faith and have actually been engaged in negotiating in good faith since making our Requests for Discovery on January 5, at all times leaving both parties unhampered by any restrictions on their respective rights to seek redress in appropriate circumstances.

Our declaration of impasse is based upon several indicators of Complaint Counsel's failure to negotiate in good faith. However, holding negotiations hostage to "such an agreement" as proposed by Complaint Counsel below is not negotiating in good faith in and of itself.

If you have any questions regarding these matters, I am available to discuss them with you.

There is no response necessary. However, due to recent FTC computer difficulties, we request that you do acknowledge receipt of this message.

Sincerely,

AP Carlton
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----- Original Message -----
From: Dagen, Richard B. <RDAGEN@ftc.gov>
To: AP Carlton; Lanning, William <WLANNING@ftc.gov>
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa <MWESTMAN@ftc.gov>; Bloom, Michael <MJBLOOM@ftc.gov>
Sent: Mon Jan 10 21:30:03 2011
Subject: RE: Meet and Confer

Yes, it is correct.

Rick Dagen

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From: AP Carlton [mailto:acarlton@allenpinnix.com]
Sent: Monday, January 10, 2011 9:28 PM
To: Lanning, William; Dagen, Richard B.
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa; Bloom, Michael
Subject: Immediate Response Requested: Re: Meet and Confer

Mr. Lanning and Mr. Dagen:

This inquiry is submitted to you in your capacity as co-lead Complaint Counsel.

Based on Mr. Bloom's email below, we conclude that your proceeding with our call set for tomorrow morning at 10am is expressly conditioned upon the parties reaching "such an agreement" as described by Mr. Bloom in the first paragraph of his email.

Is this conclusion correct?

A prompt response will be appreciated, and we believe, under the circumstances, in order.

AP Carlton

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----- Original Message -----
From: Bloom, Michael <MJBLOOM@ftc.gov>
To: AP Carlton
Cc: Noel Allen; Jack Nichols; Westman-Cherry, Melissa <MWESTMAN@ftc.gov>; Lanning, William <WLANNING@ftc.gov>; Dagen, Richard B. <RDAGEN@ftc.gov>
Sent: Mon Jan 10 20:20:00 2011
Subject: Meet and Confer

Mr. Carlton:

I have been asked to reply to your email, below, on behalf of Complaint Counsel. We are generally amenable to the approach you have suggested, provided that it is agreed as follows: Neither party will declare impasse and file a motion to compel with respect to the other party's responses to requests for document production, interrogatories, and requests for admission until we have considered and reached a mutually acceptable agreement to produce or impasse on all of the outstanding discovery issues. Mr. Lanning included the need for such an agreement in his email to you of January 9 at 9:03 p.m. We believe that such an agreement will encourage fairness, flexibility, and speed in the resolution of all of our outstanding discovery issues. In addition, if we do reach an impasse on some of our outstanding discovery issues, it will enable Judge Chappell to make his rulings on any resulting motions with due appreciation for the entirety of the contested issues.

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 improper grounds. Mr. Lanning has discussed these concerns with you and your colleagues on several occasions, including in his letter to Mr. Allen of August 18, 2010, which I incorporate herein by reference. I refer you to that letter's Attachment A for a list of document redactions that we believe are improper. We plan on discussing those redactions with you during our "meet and confer," which will begin tomorrow at 10:00 a.m. Mr. 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 documents by Bates number that were neither produced, nor identified as privileged in your privilege log, nor accounted for in your production log. We plan on discussing the identified documents that were withheld during our meet and confer, as well.

Last, in my earlier email to you identifying problems we have with respect to your responses to Complaint Counsel's Requests for Admission, I inadvertently left off of the list one item: in addition to the items listed, we plan on discussing your response to RFA 37, which is unresponsive and neither specifically admits, denies nor set forth reasons for the failure to admit or deny.

We look forward to speaking with you and your colleagues tomorrow. Thank you.

Michael Bloom

for Complaint Counsel

Michael Bloom

Assistant Director for Policy & Coordination

Bureau of Competition

Federal Trade Commission


-----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:

This email is in response to the email received by Counsel for Respondent addressed to "Dear Counsel" at 10:43am on January 11, 2011 ( the "Record email"). The email began "To make sure the record is clear.....".

Counsel for Respondent do indeed wish to see that the record is clear. However, having been falsely accused of defaming Complaint Counsel heretofore (see October 28, 2010 10:22am email To AP Carlton From Bill Lanning), Counsel for Respondent wishes to go "on the record" by first reminding Complaint Counsel that, as we all were taught (or at least Counsel for Respondent was taught and learned) in first year Torts that there is a complete defense to charges of slander and defamation: the truth. We further remind Complaint Counsel that the response to Complaint Counsel's email by Counsel for Respondent (see October 28, 2010 6:05pm email To BIll Lanning From AP Carlton) declined to personalize a discovery dispute (and bemoaned Complaint Counsel's attempt to do so), rejected the defamation charge (and others) out of hand and noted (among other things), quoting John Adams, that "Facts are stubborn things". We will provide record copies of the emails referenced above upon request.

However stubborn facts may be, Counsel for Respondent stubbornly cling to the precept that, however difficult to discern, facts and its companion concept, truth, are not convenient and relative concepts, available for manipulation and misrepresentation, or to ignore completely for the purpose of honest disagreement and argument. Further, in the main, the world in which Counsel for Respondent practices law operates upon this precept. After reviewing the Record email and other subsequent communications from Complaint Counsel (along with Complaint Counsel's Statement of Material Facts As To Which There Is No Issue, previously filed in this matter), it appears to be an less than open question as to whether or not Complaint Counsel operates upon that precept.

So, in proceeding, we take that handicap to this communication into account and recognize that, aside from being accused of bad faith in the Record email, we risk being accused (again) of defamation (or being accused of something else in some future communication). Nonetheless, we wish proceed to make the record clear, as we have been endeavoring to do since the moment we received the Record email:

(Numbered paragraphs correspond to those in the Record email. References to "subsequent emails" are to emails regarding the matters addressed in the Record email addressed to Complaint Counsel between 10:43am Tuesday, January 11 and the date and time of this email, all of which are incorporated herein by reference, for the record. Copies are available upon request.)

1. Complaint Counsel did not make a unilateral decision to cancel the 10am conference call scheduled for January 11. We did make a unilateral decision to declare an impasse prior to the call. One of the reasons we declared the impasse was Complaint Counsel's express condition and demand that, in order for the call to go forward, Counsel for Respondent

enter into an agreement ("the waiver agreement") waiving the rights of its clients to seek redress of egregious conduct just such as the assertion contained in paragraph 1. of the Record memo. Thus, it can be asserted that Complaint Counsel unilaterally canceled the call by making a non-negotiable demand to Respondent that it must meet certain unilateral conditions imposed on the call actually taking place. Respondent had nothing to do with canceling the call. See subsequent emails.

2. Our Motion to Compel is timely. See the Scheduling Order, your FTC Rules, the Federal Rules of Civil Procedure and our Memorandum in Support of the Motion to Compel. If we were not timely in submitting our demand and filing the Motion to Compel, why did Complaint Counsel see fit to raise discovery issues as well, subsequent to our demand but prior to the filing of our Motion to Compel? Regardless of what Mr. Lanning offered on January the 9th, on January 10 Mr. Bloom and Mr. Dagen made it very clear that something else was being offered and that negotiations would not go forward without the waiver agreement (referenced above). See subsequent emails.

3. Any emails Counsel for Respondent sent to Complaint Counsel prior to 10am on January 11 regarding "terms" proposed for the 10am Tuesday call were couched as suggestions. They were certainly not couched as "unilateral terms" , and most clearly did not precondition going forward with the Tuesday call on reaching any agreements--including the terms of the call, let alone a waiver agreement. We will be happy to supply Complaint Counsel with copies of our numerous emails (many which went unreturned) regarding the Tuesday call and its content which occurred prior to 10am Tuesday, January 11. Thus, Complaint Counsel indeed held the Tuesday call hostage to the waiver agreement. See subsequent emails.

4. We categorically deny that we have engaged in bad faith negotiations. We stand "on the record", as set forth in this email and all of those emails regarding these matters that have preceded and followed this email. To use one of Complaint Counsel's favorite words, such a claim is "baseless".

If these events have caused a significant disruption in Complaint Counsel's trial preparation and expert discovery, it is not the responsibility or concern of Counsel for Respondent, but Complaint Counsel's own problem. Indeed, Complaint Counsel's responsibility to proceed with the action brought by its client is Complaint Counsel's alone. We find it very interesting, almost amusing, after the time, money and effort expended by Complaint Counsel in this matter to date that Complaint Counsel, with the abundant resources available to it, is complaining at all.

5. We have made it clear that we stand ready to enter into "alternating discussions" or, in the event such discussions are unacceptable, are willing to enter into negotiations with Complaint Counsel regarding their (belated) discovery demands. See our Supplement to the Motion to Compel, filed Friday afternoon, January 14 and subsequent emails.

6. As to whether or not Impasse existed as of the transmission of the Record email, please see subsequent emails. There is no such thing under the Scheduling Order or your FTC Rules as a "mutual impasse".

7. We continue to proceed in good faith to negotiate these matters (see 5.above).

In view of Complaint Counsel's questionable conduct with regard to these matters and other matters, we find the charge of bad faith almost actionable, if it were not so laughable. We offer Complaint Counsel our counsel that it more deliberately approach these matters going forward.

Sincerely,

AP Carlton

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