UNITED STATES FEDERAL TRADE COMMISSION

MERGER BEST PRACTICES WORKSHOP

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THE REPORTER: No.

MR. THUMANN: Well, John, Gun-Jumping is one of those classic areas where there is virtually no case law and what little the buyer knows about it comes from agency speeches and consent decrees. And what little case law there is is diametrically contrary with the agency's position, so in thinking of International Travel Associates and the Eighth Circuit, which held that collaboration between two merger partners is subject to -- (inaudible).

It does leave the practitioner, I think, with a couple of theoretical questions. For example, how is it that the Commission and the DOJ are able to apply Section 7A and post signs on pre-closing collaboration on the acquired company when the statute only visits the obtaining or the taking of beneficial control and not the "giving up," so to speak of beneficial control. Equally, I guess, theoretically puzzling is the notion that Section 7A has three Congressional purposes, namely (1) to maintain competition between the putative merger partners while the review process is pending, when the Legislative history only identifies two purposes, one which is to permit a review, and the second which is to provide a basis to collaboration between the merger partners. So a theoretical question is simply how does Section 7A get added to the consent decrees which is done universally as a joint charge of the Section 1 violation and the Section 7A violation in all of the consent decrees -- I think.

More practical is what can the parties do and what can they not do, whether it be Section 1 or Section 7A. There seems to be broad agreement that when -- (inaudible) -- concluding from the speeches and the consent decrees that (1) collaboration between the aborat -28etwvj 15 -12 TD ((3'eiuwhen --

MR. HOFFMAN: Let me answer that two ways. Obviously, I don't think we are going to be able to answer a lot of questions here and, you know, as John indicated, that really isn't the purpose of this. Most of our purpose is to listen to questions and thoughts like that, and to take them back and try to assimilate them and come out with some sort of response.

With that in mind, I would like to say two things: first is, what kind of guideline would you like from us? I mean, in this issue, are you talking about as to published guidelines like the Guidelines on Intellectual Property, or the Health Care Guidelines, or something else? Second, I'd like to open up to anybody else to comment on the question of Gun-Jumping and pre-approval integration, and what kind of experiences everyone has had with that and what kind of thoughts they have on what we could do to maybe alleviate what certainly seems to be a pretty high and pretty well- based level of confusion out there about what the agencies will go after and what they won't.

MR. REDCAY: This is Ron Redcay. I think the answer is we know what guidelines likely you are referring to, but I do think that filling in the space between the speeches -- the two lines in the speeches that Henry referred to -- would be helpful. Specifically, it seems to be that planning has got to be okay; the question is, when the planning goes beyond mere planning and gets into pay announcements and reorganizations, I mean, I think having gone through a fairly large merger which took a long long time from the time it was announced until the time it closed, it certainly was a major concern in all the various businesses what you could do and what you couldn't do.

And there were very few guideposts out there. And so I think someone would like something more definitive than you have, but not all the way to formal guidelines.

MR. SHER: This is Scott Sher. I think it would be helpful to have more decisional law or more public speeches about the topic. I mean, we know from Computer Associates that you can't stall Vice Presidents in target companies to control prices and, you know, deviations from distributor agreements.

But we don't really know whether or not, and this is especially pertinent in the high tech industry, we don't know whether or not it's okay to have joint customer calls to assure customers that the target company, that their product lines, likely will survive in some form post merger. And when you have an investigation that is going to last three months, four months, five months, or six months, and you have a small target company whose product life cycle is short, you know, that type of uncertainty surrounding that company's products is deadly.

That company's products are likely dead in the water and the technology can end up being squandered. So it's more of the ambiguous areas that we really don't have any guidance on. There was a brown bag, I think, two months ago and I don't remember who had made the comment, but someone had made the comment that the merger agreement itself could serve as the basis of an agreement for a conspiracy.

Comments like that are scary and it makes it really difficult counseling the client on what's appropriate in merger integration planning prior to the time of consummation.

MR. HIBLER: Don Hibler here. I would look back a few years ago and remember a case called The United States vs. Aqua Media in the 9th Circuit where the proposition that it was appropriate relief to hold in both the acquiring and the acquired company, and I would imagine people would find that to be of some authoritative value. That goes back quite a while ago.

But I would say that the two things that have been most helpful to me are not necessarily the agency speeches, but I think an article by Will Tom on this very topic. And the recent collaboration guidelines, which I think, taken together, will allow me to go through the appropriate qualitative analysis that would solve most of my problems. And I don't know how much better would I feel at the end of the day if I had the Bureau of Competition -- these are hypotheticals. I think maybe on another scope, but not myself.

MR. HOFFMAN: Well, assume there is not a big push out there for us to generate some additional decisional law on this.

MR. HIBLER: Right. Have you seen the Aqua Media decision?

MR. HOFFMAN: I haven't thought at all about this topic prior to coming in here, so I don't really know what -- I know we actually internally are looking at Gun-Jumping in general and there's sort of an overall internal review about what level of planning and actual integration is going to be problematic and what we do about that, but I haven't got a lot

speeches to point to is on the question of what the recommended or acceptable processes are for sharing extremely confidential information. And I know my clients on the whole tend to be a conservative bunch, and yet still, when I tell them that certain things and certain phases may be a little too sensitive to share directly, maybe you better get a consultant to launder it for you, give you a composite of information, there is a certain hesitancy to spend the money.

If there was a speech that said here are some recommended approaches that are likely to be acceptable, it would certainly give me more credibility in telling them I need to spend some extra money.

MR. HOFFMAN: You know, we have heard a little bit about the consultant idea and I would certainly be interested, you know, at some point probably we should turn to talking about the Second Request. I don't mean to drag this topic out indefinitely, but we would like, also, if anybody wants to submit written comments or anything like that to us, this is an area I would be interested in hearing some more about is what people think about the practical utility of conducting your merger through consultants while the agencies are performing their review.

I have some pretty mixed things -- pros and cons about the problems that are involved in doing that. I don't mean to limit submitting information to that topic by any stretch of the imagination. Send us anything or any comments on anything you think we can do better.

Anything else on Initial Waiting Period?

MR. REDCAY: I guess I wanted -- this is Ron Redcay -- in response to Peter's comment. One of the questions I think I have got is, all the discussion we had recently seems to talk about this topic in the context of extreme confidential information. And I guess I wanted to clarify things that for us is to see what are the other objectives or reasons why you're concerned about Gun-Jumping, because I think it is broader than that.

Those are some of the questions that get more complicated -- things like maintaining the vitality of businesses, preserving the ability to have effective merger remedies. It is in that area rather than the exchange of competitive information that I think we may need more guidance because I do think people do a pretty good job through consultants and firewalls and preventing information from going back and forth, but it's these other areas that I think are a little more touchy-feely and need some clarification.

MR. RICHMAN: We have had one Remedy workshop. Others may or may not be in the works, but these issues are specifically addressed, along with the over-arching what are we doing with remedies and buyers in front? And again, Dan Ducore is in charge of those.

MR. WIEGAND: Did anyone have any comments about what the government -- what our agency should be doing during the Initial Waiting Period, whether we are using the time effectively, or whether we are missing opportunities?

MR. SHER: I think it varies from staff to staff. I think some review staff uses the 30-day waiting period very effectively. Some issue fairly boilerplate voluntary request letters and don't really push beyond that. Or, because, maybe it's in part because of the failing of the clearance agreement, it takes too long to get a request for information out and it's already beginning to bump up on the end of the 30-day waiting period by the time an initial 30-day voluntary request letter comes in. So I think it really varies from staff to staff.

We have seen over the past year some really good improvements on the type of information that is asked and the responsiveness of staff. People have been very upfront with us about their concerns, where they're coming from, and what we need to do to address them to make sure that we can either limit the scope of the Second Request or get out of one altogether.

MR. HOFFMAN: Anything specific in mind that we ought to be thinking of in terms of practices that we could implement across the agency to use that period to its best effect?

MR. SHER: Scott Sher again. I think personally from my view point, it would be very helpful to actually set forth information that, depending upon the industry, that you would find most helpful to review the industry because, for some industries, some of the initial 30-day Waiting Period information that you guys ask for is very broad, very general, and doesn't really have to do with the transaction. A general

interested in folks' thoughts on those issues or really anything else having to do with what the second request looks like and how you get it changed during the course of an investigation. So, now let me just turn it over to Marty and then Ron. And then everybody.

actually has an amazing amount of detail even getting into the Second Request and what is expected of the agencies, and maybe that is a reflection of some of the consternation earlier.

Just looking at what changed with reform and the changes in the rules, I thought one of the interesting things that didn't change -- one of the oddities has always seemed to me about the Second Request -- was the rule that requires the poor administrative assistant that gives you telephonic notice to also offer to read the thing to you on the phone.

Now, you know, this day of e-mails and faxes, I've always said no because there's just -- it's not fun to make an administrative assistant read a 40-page document to you on Friday afternoon. But when you're looking at opportunities, I think, to streamline the process, I've always thought that if the person who had to offer to read it on the phone was the lawyer who drafted it you would see much shorter Second Requests!

MR. HOFFMAN: I think Peter should definitely have something to say about that one.

MR. RICHMAN: I just edit, I don't draft.

MR. THOMPSON: The other area where I find that there might still be a real opportunity for major savings is one in which I know you don't have complete control. And John and I went through an experience last year where -- and it's pretty common these days -- you're getting a Second Request that the

FTC or DOJ is investigating a merger, and more or less concurrently you're getting a CID from a State AG. And they're investigating the same merger under state law which is probably just about identical. This wasn't in California, this was in a different state that John and I did recently.

Now, in that instance, I know that John went to great lengths to minimize the differences between the approaches of the two agencies, and yet it was impossible to eliminate the differences. When you go through documents more or less the same day and one says, "Go back three years," and one says, "Go back five years," and one says, "You've got a 100-mile radius," and one says, "You've got a 200-mile radius," and one says, "Here's the format for your electronic data," and one says, "Here's a different format for the electronic data," it's inherently sort of cumbersome.

And the clients, I think, tend to lose a little respect for the process when they say, "Why couldn't you guys work it out?" And even when we eventually did work it out on the substance, which we eventually did, the numbering was different. Now, that caused the paralegals all kinds of consternation and I hadn't even thought about that as something to worry about.

But if it were possible, and recognizing the states have the right to make their own decisions on what could be substantive in the end, but just on a procedural level, if you could get one point person who would have the power to speak for both, so we didn't have e-mails going back and forth that were inconsistent on the resolution of this or that nicety in the language, and we could just do it once -- I can't believe the states have that strong an interest on these minor procedural details that they couldn't agree to give John their power of attorney or whatever to resolve those minor differences.

It would save a lot of time. And there is a way to coordinate that better. That is one area which doesn't seem to be addressed in the reform.

MR. RICHMAN: Can I ask a question? Has anybody else had the experience where the state issued a CID that was different in the details, if not substantially different from the FTC Second Request?

MR. THOMPSON: Like I said, it's not enough from which to draw a valid sample, obviously.

MR. RICHMAN: No, no, I'm not trivializing the issue. I --

MR. THUMANN: There is some additional or supplemental that you could, in my experience, accept as --

MR. RICHMAN: Right and it's broad. What they want is everything that was given to the FTC. That's the general experience we've had.

MR. HOFFMAN: So it might be a little bit logistically easier in terms of that kind of problem.

MR. HIBLER: This is Don Hibler. I've found that to be basically livable.

MR. HOFFMAN: Okay. Ron, did you have any specific thoughts on Second Requests, negotiating them, modifications to issues?

MR. REDCAY: I mean, yeah, actually my hopes were dashed when you said earlier that you weren't here to answer questions about how you negotiate a Second Request, probably most people in this room would like to know what it is you're willing to negotiate away and that is the question that we'd like to have answered. I think it actually would be better to hear from a wide range of people in the room than to have somebody talk generally about the topic.

But a couple of observations, and I think that one of the things that people in business, particularly big businesses, would be more interested in is the scope, the breadth and the depth of the search than they are with the particular categories because then you don't really particularly care about the breadth of the language of the scope of a particular request. What you care about is how many places you have to go look and how far down an organization chart do you have to look?

And that is one of the things I think people are very interested in -- how you can negotiate limitations on that.

And that segues or ties into another thing that I think all practitioners think about when you think about a Second Request. And some of the statute may be beyond your ability to change it, but is that there is a difference between a Second Request and a -- there are many differences. You could write an article on the differences between a Second Request and either a CID or a document request in litigation.

But one of the things that is a big difference is the interrelationship between the Second Request process and the ability to certify substantial compliance and the timing of your ability to close the merger. And we've heard all kinds of behavior affecting conduct that might not occur if, in fact, the Second Request was cumulatively an informational thing and it was unrelated, or the completion of it was unrelated, to the timing that goes into the merger because I think a lot of us think that, you know, you give us some leverage that we don't have and we think if you're worried that if we're playing games with what the timing is and it seemed to me it ought to be divorced of as much as one can through private agreement, given the statutory scheme, as you can, so that both sides don't think there's some game playing going on related to your making a broad Second Request so that you have got a lot of time to consider it, an hour of filling things in compliance and trying to negotiate it, maybe you could have a shorter time.

I think that is a big concern that I know practitioners talk about. Other than that, let me open it up to people to talk about it.

MR. HOFFMAN: Well, let me, just on the timing issue because that is the topic I'd like to hear more about, you know, timing agreements are things that we see many different variants of and there's different ways that you can structure a Second Request in terms of the actual production.

You know, one way that some folks have used it is to say, you know, "Okay, here's your second request, but let's just first search only the top 10 -- these 10 people. And we'll take a look at that and if we don't find anything worth investigating, we'll just stop at that point. If we do, though, we may ask you to search the next group of 10 or 20." In other words, it's sort of like a rolling production, but you're actually structuring your searches with agency input.

Now the down-side to that is that, in the worse case scenario, you're going to have a substantially extended period before you can certify and I've heard some mixed things about that. I mean, some people in the private bar take the position that their hope and dream is to never certify, you know, in that they will either determine that the deal was okay and they're going to -- maybe something needs to be resolved, or maybe they can just get the investigation closed.

Or they're going to find out that the agency is going to challenge the deal, at which point they drop it anyway and they're not going to ever certify. On the other hand, some people say, "Our goal when we walk in the door is to certify on the earliest day possible so that the timing shoe is on the other foot and we're very, as a result, reluctant to enter into these kinds of structured or phased searches because that extends our period."

And I don't know if there's any sense out there of which approach you all take or what is the preferable approach, or is this something that varies case by case, or by the philosophy of the lawyer? But if anybody wants to address that issue or timing in any of its forms, I'd certainly like to hear some more about that.

MR. REDCAY: Well, that is one of the concerns I think that we have and it does vary from client to client, deal to deal, and probably lawyer to lawyer. But in those kinds of negotiations where you're deferring some production, in the back of your mind is that concern that we've got that by deferring this mail, putting yourself in a position where you can't certify in a timely basis, and I guess one of the things you have to think about are the ways that one can not have a deferral but rather have -- what's the best way one can have some agreements of -- people realize they only have to go this deep or you only have to go to a place and it's not a deferral, it's off the table. That's a good example of the situation where the timing aspect is a constant overhang to the negotiation and the production of --

MR. HOFFMAN: Well, let me -- I think it's almost universally the case that we'll do drastic organizational chart cuts, you know, if people come in, particularly really early, and I would say preferably in the first 30 days, with org charts and start showing us or talking to us about who we ought problem in the market post-merger, then that will be the end of the investigation.

I know my question is hard on your side to be able to make that type of commitment, but if there was a general feeling among the private bar that if we did a quick production of the top 15 people of high level executives and we're confident that there are no documents in there that are going to suggest that this merger is going to be a problem, that that will be the end of the investigation.

If it's the type of situation where you are using the rolling production as a way to be able to get more time and, you know, you have a fairly good inkling that, at the end of the production the first 15 people that you're going to ask for the remaining 25, then there's no point then doing a rolling production.

So as long as the government is receptive and truly receptive to the idea that a rolling production is going to be something that could satisfy your concerns, then I think it's a very good idea.

MR. HOFFMAN: I mean, the one downside to that, I guess, is if you look at it from our side, you know, the incentive you're suggesting is somewhat unilateral and, you know, the way I've seen this work to some extent is where what the particular shop the staff have told the parties is, "Look, we're going to look at these first 10 or first 15, or whatever,

MR. THOMPSON: One of the other things that might be either formalized or explained in advance more often is it seems like there is a way in which data is, for lack of a better word, dumped on you, is always an issue. It seems like there are always questions that seem they're taken literally to require the data to be put in some format that the client stated, "We can't do that."

And my best luck is just having the experts, the data people, talk to your data people, and the lawyers kind of stand aside even though it smells like malpractice, unless you're really confident. But if there was something spelled out about how you would recommend that be done and what protections there might be in such an issue where you don't have quite the malpractice fear about letting the data people talk to your people with minimal lawyer involvement. Like I say, I've done it and you sort of take the chance.

MR. HOFFMAN: Is there something we could put into the model Second Request or somewhere else that would help with that problem? Because that is a suggestion we've heard from quite a few people that, you know, there are these fundamental disconnects on data which are exacerbated by the fact that the parties negotiating them, the lawyers on both sides rarely understand what they're talking about. So if they are constantly going back to their data people and by the time the translations go up and down and back and forth, no one knows what they're doing. So getting the data people together seems like a great idea. But I hadn't heard before about this particular aspect of the problems with it. But that is certainly something we could think about trying to do something. More on Second Requests? Data issues? Any other problems or thoughts on data?

MS. SCHECHTER: Translation.

MR. HOFFMAN: Translation. Go ahead. Introduce yourself.

MS. SCHECHTER: I'm Minda Schechter, I represent foreign companies. And a Second Request for translations ends the deal. It's just too burdensome. And I was just wondering, if you mentioned that, I wonder if you had anything.

MR. HOFFMAN: Well, let me outline for you sort of the pro's and con's. I mean, on the one hand, we don't have the resources or the ability to engage in wholesale translation of foreign language documents, particularly today where major companies are located all over the world and might have documents in literally any language. And it frankly is not possible for us to review transactions where if we didn't have the ability to shift that cost to the parties, it's impossible for us to review transactions. So it would be a real problem.

On the other hand, you know, I can certainly see the problem where if you're a foreign company and you have a huge number of documents and translations are really expensive. The model Second Request and the various guidelines on practice in this area suggest some ways around that. There are a lot of things parties can do.

I've seen this come up recently and this is one of the issues that's actually now been twice appealed to the General Counsel constituting two of the two appeals to the General Counsel's office; some other issues came up in both of those, but this was the common theme. But there's a lot of things you can do in terms of proposing summaries of documents, getting together to meet with the agencies outlining who, what kinds of documents relevant to U.S. markets or U.S. consumers will be found where and what might be done to translate those.

I mean, it's a lot of things you can propose. Have you tried to explore those sorts of things? Or is that something we should provide some more formal guidance on?

MS. SCHECHTER: Yeah. In my experience, the requests were still too broad to translate. Like we have the soft summary and so forth, but the part -- I mean, we have to know it all in the documents, so we have to get it translated to know. But if the summaries were still perhaps a little less work, you know, if your Second Request is comprehensive for a foreign language company, but it's just so burdensome. It's an interesting phenomenon because you're dealing with a lock of merger by requesting a translation of it.

MR. HOFFMAN: I wouldn't say that that's an okay outcome. I mean, I don't think the agency would take that position. But we have to be able to review deals. And if we get a deal where the vast bulk of the significant documents are in a foreign language, it really puts a significant institutional strain on us.

In other words, we simply do not have the capability to do mass wholesale translation of documents produced to us in any language, let alone multiple languages. I mean, I would love to hear suggestions on the ultimate mechanisms we could employ to reduce the burden in that because I think it's a really real burden. And the fact that our two appeals to General Counsel both involve that issue suggests that this is a real problem.

MS. SCHECHTER: But you do have some other agency guidelines or whatever acceptable --

MR. HOFFMAN: The main ones that I'm aware of and I think Peter, John, or Norris could probably speak to this better than I could, but the ones I'm aware of are first of all coming in and explaining to the staff, you know, kind of who, what and where, sort of a modified version of the org chart reviews where you explain what it is and what kind of documents and which people in the foreign offices, including foreign headquarters, are likely to have documents relevant to the issues that we'd be interested in, and on which particular topics and which specifications, for example, might now have any relevance to documents that would be maintained abroad or in a foreign language, or if they were, you know, as a needle in a haystack thing that likely is low, that would be significant.

And the second issue, I've had people come back to me and say it is a modification, like a subsiding modification.

Here is what the sub does, here is who they communicate to, and here is the high level communication document that goes into the strategic planning or the competition arm or the sales arm of this transaction. Do you really want it? And with very few exceptions, I've gotten high level strategic documents and when you have them search, very limited search that way, rather than a broad-based search from foreign headquarters and try to work it out that way. But usually the negotiations -- it's usually an understanding of how the company works and who the people report to, and then you try to narrow it down.

MR. HOFFMAN: Let me say institutionally and to some extent, especially if you don't do this kind of stuff where there is a whole lot, our internal practices might be a little bit okay, but it is not just the first staff attorney that you work with. That is who you do your initial negotiation with, but there is a lead attorney on the investigation, then there is the director or deputy assistant director of the shop, and you can talk to those people. You can also talk, again informally, to the Bureau. And the Bureau of Competition has -- or at the Bureau Director level has gotten directly involved in cases where the negotiation process broke down. And often it is simply because the parties just have lost the ability to

together because I think that's the most accessible electronic information.

Number 2 is native format spreadsheet database files and ownership and control of those. There are ways to track who the last person was, who the initial author was who touched a document. But the relevance is high. Our reliance on them is not as sound as we might wish it to be because we don't know who owns the stuff that we're getting. From the private party's perspective, what keeps coming back to me is there is no way for you to track it once we've got it because you can't Bates stamp an Excel file.

If we actually can and we come up with some novel way of doing that, but they involve long discovery depositions, "Did you write it? Did this come from your file?" And it's a waste of a lot of your clients' money and everyone's time.

The third issue that keeps coming up is shared server space where companies don't have good document tracking policies imposed on the employees and you may have an entire Department or division sharing a server drive. And everyone is certain about their own sub-directories but anybody can use anybody's -- anything anybody else wrote. And then you run into software that is actually meant to have people share files and jointly develop electronic production.

And finally Archives. Of all of the above, how do we get what we need? How do we know whether we need any of it?

And how is it kept? And in this post-Year 2000 world, how do we know what burden we're actually imposing when we're asking somebody to re-create a legacy system in order to get data that wasn't migrated forward? That is my sorted list. Adam, did you want to talk to any of this?

MR. BENDELL: Yeah, though I'm going to add to it. I have been the President of SV Technology. We help companies and law firms cope with large civil discovery and Second Requests and special electronic media, so that's where we're coming from, the logistical problems of doing that. And I thought I'd pick up a few different problems, Peter.

One is the standard definitions of a couple of anachronistic things that I'd love to see you folks give some attention to. The first one is the spec that calls for the

production to the government. We recently did a production on behalf of Hewlett Packard in the Compaq merger, which was what is now a very large technology merger, where the production was made to the government in electronic format in a system that we hosted -- the company hosted for the government.

And I think, Norris, you were involved in that. And I would be interested in your feedback on how it works from the government's perspective.

MR. WASHINGTON: Well, I mean, from our perspective, it worked very nicely. It meant fewer amounts of paper to handle, yet a way of sorting and organizing the data, the structures of the data, based on how you actually produced the information. So in that way, it was very beneficial. I mean, there is a little bit of a learning curve, but really not that high.

MR. BENDELL: So I predict that we will see more of this now that we have gotten the precedent of you folks accepting this in very large scale. We have done it in smaller scale situations before, but as the bulk of the production, there are enormous advantages of both size and folks will be able to navigate their halls without banging into all the boxes that typically line them.

One issue there that relates to the timing of production if you're negotiating Rolling Production, there are some differences in the characteristics of that if things are being handled electronically. These processes are less flexible than a purely paper-based human process. You have to kind of queue things up. It takes a long time to get stuff in to fill the pipeline with documents that need to be electronically collected or electronically converted, and so forth.

Once the pipeline is filled, we can deliver an enormous number of documents on an ongoing basis. But changes in, for example, who we are collecting from are more difficult to accommodate in that process. And so there's kind of the idea of taking people from an org chart sequentially, sort of the first 15, and then we'll look at that for 20 days and decide if we want to go over.

It is more difficult than a purely electronic production because it takes time to sort of fill the pipeline and it's easier to just sort of rev the engines and go.

In terms of the Native Format issue, we think it more efficient for everyone to convert to some kind of uniform format in files or PDF, rather than trying to produce everything in Native Format, produce to you folks the strange viewers that you might need or applications to look at, odd files.

I think it's reasonable for you folks to request specific documents in Native Format if you need them. I think that's a much more expeditious approach than trying to review everything in Native Format. So if you need the actual spreadsheets that we're going to formulate, the result itself isn't self-explanatory --

MR. RICHMAN: Let me ask you a question on that. When you say that we should request specific documents you are talking about a specific spreadsheet? Or all Excel spreadsheets?

MR. BENDELL: No, specific spreadsheets. In other words, I would contemplate some kind of -- and this is only going to work, I think, in the context of a Rolling Production, but some kind of back and forth where you reserve the right to request the Native Format for specific documents. I'm not referring entire class of documents, but for specification.

MR. RICHMAN: And the company can't certify until we're done? I mean, that's the question really that comes up there is, you know, no matter how good a job we all do at winnowing these things down to the documents that are actually -- it's not just relevant, but of importance -- we're not going to get to all of them, even on a Rolling Production, in perhaps the timely fashion that might allow us to say, "Okay, work product aside, give us these 22 spreadsheets." And I've had folks suggest that to me and I come back with, "Then you're willing to not certify until we're done." And the response that I got from the room which is just, "You must be kidding!"

So that is something that I would be very interested in understanding how we could speed that process up. I don't want every spreadsheet that a company keeps. I mean, the benefits of a paperless office are lost if you look at it in the entirety of how much data is being kept. I don't want 30 drafts of a spreadsheet because somebody doesn't save over the old file. It makes my review hard and it makes your privilege review harder. It just doesn't work out.

So do you have any specifics that might make it easier to get to the endpoint that you're suggesting, but make it work within our time frame and our very real need to evaluate the information for making recommendations?

MR. BENDELL: I guess I would ask you how often you really need to look at the Native Format. My sense is that it is a fear factor that if you don't have it, you will be hindered in some way; but the number of times you really need it is actually pretty small compared to if you can actually look at the output of the document.

MR. RICHMAN: It depends on the investigation and it depends on the industry. You know, where econometric data is important, those files are critical.

MR. BENDELL: But that's a very specific band of data. It's not the entire request.

MR. RICHMAN: I'm possibly the wrong person to ask. My last four or five cases were made on spreadsheets.

MS. LLEWELLYN: Hi. My name is Virginia Llewellyn and I'm with a company called Applied Discovery. I would second everything Adam just said and we actually worked on the other side of the HP/Compaq process, so I think everyone learned a lot from that and learned that electronic production was the way to go, particularly with regard to spreadsheets.

The real benefit of going to a format like PDF vs. Native is a couple of things. First of all, you mentioned the issue of Bates numbering and having trouble with Native files, you can't apply a Bates number. You can solve that problem, obviously, when you convert to something like PDF. The other thing that can be done in the conversion process, or the display process, when the original file type is converted to a PDF file, all of the metadata or data behind the spreadsheets can be saved and conserved and displayed in some format, side by side with that PDF file.

So the most common things that people are interested in in spreadsheets are formulas that are associated with the numbers that you see displayed with words that just print, any comments in the fields, that sort of thing. All of that information can be exposed, preserved, displayed in the PDF process if that is required in a particular case.

If you don't think you're going to have a serious issue with that kind of information, you can process them quickly without all of that amount of data. But if you know it's going to be a problem, you can request that up front. And as Adam said -- (inaudible) -- if the electronic production is putting up with specifications of the production in advance so you know how to move forward very quickly and efficiently.

And then you can process that data in half the time and half the cost of making a paper production. It's just simply I think in most cases a matter of knowing what you need to ask for.

MR. RICHMAN: Is the conversion of Native format files to PDF, whether or not you I guess are including the metadata, cheaper than just copying it and handing it over?

MS. LLEWELLYN: Absolutely. We have had a number of conversations with Rich Corbett of our New York Office and I think we have provided actually substantial documentation about some of the differences in producing in paper vs. producing electronic format in terms of the cost and the timing --

MR. RICHMAN: Yeah, I'm not doubting that it saves money to produce an electronic format for TIF files. I mean, especially if there are multiple states involved and those states want their own copies. I mean, you know, copy over some CD's or, as you did over the Internet. I mean, it saves even more money. I'm asking for the Native Format Excel spreadsheet, or I'm giving more kudos to Microsoft, spreadsheet files or database files, rather than just copying those onto a CD and sending us the CD of data.

I mean, it seems you're adding a step to the process that goes even beyond my nightmare which is somebody just hitting print on a spreadsheet and me just getting whatever was designated on the format of the originally kept file. So my question is converting an Excel spreadsheet to a PDF file, saving the metadata, and then giving us that -- what's the cost difference compared to just copying the original file?

MS. LLEWELLYN: Well, I think the real crux of that issue lies in the fact that that conversion is an automated process and it's a process that the technology has been leveraged to do that very quickly. So while we think about it as an extra step because you started with an original file, and then you're doing something between, the real cost savings is in the turnaround time, being able to process that information electronically versus dealing with a printer and a copy vendor and whoever else may be involved, and a Bates number and somebody sort of tracking the mechanism.

I mean, the time that is saved in not just transmitting the information to the Commission, but also the time that is saved on the reviewer's side is information that can be searched and accessed electronically instead of requiring a manual review.

MR. BENDELL: Two more points, one in which I would have expected to hear before now, and that is the requirement to sort by specification number. That which your colleagues at the Department of Justice did not have, that is a major impediment to efficiency and I can't imagine that what you get is very helpful to you because the judgment calls that are made in putting documents in very broad specifications vary so much from lawyer to lawyer that even with the best intentions, it is hard to do it well.

It also requires that every single document go through a page by page review, particularly in the electronic world. That is not really necessary. It's the requirement to do this, to organize documents and specification that's driving that. And that is the key part of the expense of responding to large Second Requests. So I would urge you to consider the value you get from it given the burden it imposes on a company.

And then the second thing is just to chime in on the whole Archive Tape issue. Archived Tapes are made -- data tapes are made for disaster recovery purpose, not to aid in civil discovery. Firms are taking snapshots of their mail servers on a regular basis in order to restore them if there is an earthquake or other problem, and the idea that we can go in easily and find all the e-mail of Mr. Smith on a certain date is just not so.

I won't take the time to walk through what's involved in actually responding literally to a definition of documents that's in the standard -- in the model request. But it's extremely burdensome. That's not to say that in particular circumstances we can't go after targeted -- that's if you have

government anything in the end.

MR. RICHMAN: Anything else on electronic data?

MR. THOMPSON: Just one question really. On the initial filing of the HSR, have you folks made a decision whether it's routinely acceptable to send those documents that are filed with regulatory agencies by link rather than -- I did that a few months ago and they told me it was a pilot project and they would decide whether that would be routinely acceptable. I never heard whether that --

MR. RICHMAN: You mean for the SEC files?

MR. THOMPSON: Yeah. I mean there was one highly regulated market where we had just a lot of volume. And we said, how about sending it by link? He said okay.

MR. HOFFMAN: I think we're going to make that routinely acceptable. If there's a project on that going on right now, I don't know what the exact status of that is, but I believe that that's where it is going to end up -- and it may be pretty soon.

MR. RICHMAN: Anything else?

MR. BENDELL: One other thought. The de-duping of electronic files is much more scientific than the removal of duplicate in paper. If there are better indicia, they can be done in a more automated way. Have you found any resistance in negotiating that? It seems like it would be of mutual benefit in many circumstances. It does require that you have a known set of custodians from whom you are collecting the e-mail. To unwind it is very problematic.

MR. HOFFMAN: Let me say one word about that. The model Second Request does not require the production of duplicate documents. So technically, you don't need any modification to de-dupe the file.

MR. BENDELL: You're interpreting that as sort of if two people have an e-mail, the fact that it was in one person's file, it doesn't need to be produced twice?

MR. HOFFMAN: Correct. Non-identical copies need to be produced, but not identical copies.

MR. BENDELL: And the fact that I'm the recipient on one line and you're the recipient on another, you don't interpret as a different copy?

MR. HOFFMAN: No.

MR. BENDELL: That's not uniformly --

MR. HOFFMAN: I know, but every time that's been called to the Bureau's attention, our position on that has been -- and this has been an issue of some recent relevance -- but every time that issue has been brought to the Bureau's attention, our uniform position is that the mere fact that a document has gotten to a different person's file does not make it a non-identical copy.

MR. RICHMAN: But going along with that is a presumption that everybody on the recipient and cc list received that document, opened it, and read it. So, I mean, the argument comes down the road when we drag the vice president of sales in for an investigational hearing and don't show her an e-mail because it was in her files and it's not

MR. RICHMAN: Norris?

MR. WASHINGTON: Well, I guess I need to address the topic or bring up the topic of access to transcripts and Third Party Discovery. I noticed over the years that in dealing with outside counsel, one of the big irritants that seems to occur is when they ask us to turn over their investigational hearing transcripts and we say, "Well, we really can't. We have it as a matter of policy that we don't turn them over."

And I noted over the years that the policy has changed and I realize that this has been an issue that has been brought up many times. And Scott Sher is going to be at least one person who is going to address this type of issue.

MR. SHER: Well, I consider the first issue, access to transcripts, as almost a throw-away and an easy area that the agencies could reform the process. So we've actually seen -- and Norris, the last one that we did with you -- we get access now to that deposition transcript and we've gotten access to investigation hearing transcripts and it's really the only result that seems to make any sense. You know, in a process that should really be transparent and investigatory, rather than litigation oriented, it only makes sense to give parties access to comments that they had made.

If your goal is ultimately to be able to allow the parties to expand on or clear up any points that were made during the hearing, that had come up. And they don't have access to the transcripts of those depositions or hearings. It just doesn't really make any sense. And I think that's one -- Marty was talking about the low hanging fruit that had been picked with recent reform, and I think we can completely fix that problem very easily by making deposition transcripts, as a matter of course, available to the parties.

And, again, I think it's more of a procedure that you have to change rather than substance because I have seen in the last several investigations that we've done that we've actually gotten access to our transcripts. It really does facilitate the process. We can clear up any points that were made during the hearing. You're also ultimately going to invite more papers and briefs explaining why we said something that we had said or clarified things.

But really, in the end, it's going to enable us to clear up any ambiguities that were raised during those hearings or depositions. Did you want me to move on to Access to Third Party?

MR. HOFFMAN: Yes.

MR. SHER: We see several issues with Access to Third Party information. One is parties getting access to the nature of complaints from third parties. We see the third party corporate citizens who are given a CID or a call from the government, and then the people who affirmatively go to the agencies and complain. I think each one is a different area.

As far as parties' access to Third Party Information, I think it would be very helpful if the agencies were upfront and communicated from the get go, not necessarily obviously who has raised complaints, but the nature of any complaints that you might have received. Because you know that a lot of complaints that you receive are from a particular standpoint where people have particular agendas when they are bringing up complaints.

So what we would encourage and what we find as being most helpful is, without revealing the source, obviously, it's crucial to keep the process open for third parties to come and complain. But to tell us what type of information you have received from these third parties that we might be able to present the fuller picture, or at least we know where you're coming from in your investigation.

It would be extraordinarily helpful if we had that information up front and right away, that we might be able to completely discount information as it had been brought by a third party or explain why that particular viewpoint has been presented. And we can also rebut any information we've been presented.

The bulk of the problem, though, is the Third Parties who are being affirmatively requested for information from the government. And I don't know if you're necessarily aware, but even in a simple inquiry, a Third Party, a good corporate citizen who receives an inquiry from the government, and it costs $50-100,000 in legal fees for that person to respond. It's very expensive. They have to be prepped.

To the extent that they're turning over documents, those documents have to be reviewed by their attorneys. It's just the nature and course. So we would just encourage the agencies to rely more on live interviews. When I've represented Third Parties and there have been live interviews, you know, we find that you can get most if not all of the information that you need without actually having to rely on a document request, or a CID, or a deposition.

You get what you need and what you want to help further your case and, at the same time, parties are not being over-burdened with what we've seen is basically just a re-written second request in an extreme circumstance as a CID. And for a Third Party, that's extraordinarily burdensome when they're not materially -- you know, they do not choose to be involved in the merger and they might not feel that they are materially affected by the merger.

MR. HOFFMAN: Let me ask you a question about that. One of the things that we have done a lot recently is when we have been working on transactions, and these are particularly transactions that seemed problematic, likely to go to litigation. We have been trying to shorten the Third Party discovery process by going straight to deposition and document requests, but very, very targeted.

We're talking like three request lines in the item asking for very specific things and very quick depositions. Part of the two is a Justice problem. But I wonder if that in any way -- does that exacerbate the problem that you're pointing at? Or is it a partial solution, although not as good as the live interviews? I mean, I have to tell you that our analytical bias is we give a little more credit internally to deposition transcripts than interview notes.

MR. SHER: Well, I guess you would have to ask whether or not this is a case that you are seriously going to challenge. If it's less than a handful of cases a year that you plan on challenging, well, of course, you're going to at least need some sort of documentary evidence or a deposition from some third parties.

Maybe if you have an industry where there are hundreds of customers and several competitors, you clearly don't need to request that level of information from each of the Third Parties. In those cases where you are seriously considering litigation, I would agree that a targeted documentary evidence request or a deposition probably is helpful.

But they are very few and far between cases where you actually are getting to the point where you are going to be litigating the case. And I would rely first on -- because we

that have things you want us to know, please get them to us. The hopeful outcome of this is that we will make some changes in the way we do some things.

Obviously, we're getting a lot of input and feedback on a lot of points and we have to sit down and assimilate it all. But it's been extremely helpful and we've heard a lot of consistent themes and some things that varied from place to place. So we want to take it all into account and try to make this process work as well as it can for everybody. Thanks very much.

(Whereupon, the discussion was adjourned.)

C E R T I F I C A T I O N   O F   R E P O R T E R

DOCKET/FILE NUMBER: P019503

CASE TITLE: MERGER BEST PRACTICES WORKSHOP

HEARING DATE: JUNE 25, 2002

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED:

C E R T I F I C A T I O N   O F   P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

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SARA J. VANCE