

# The Nuts and Bolts of Second Request Compliance

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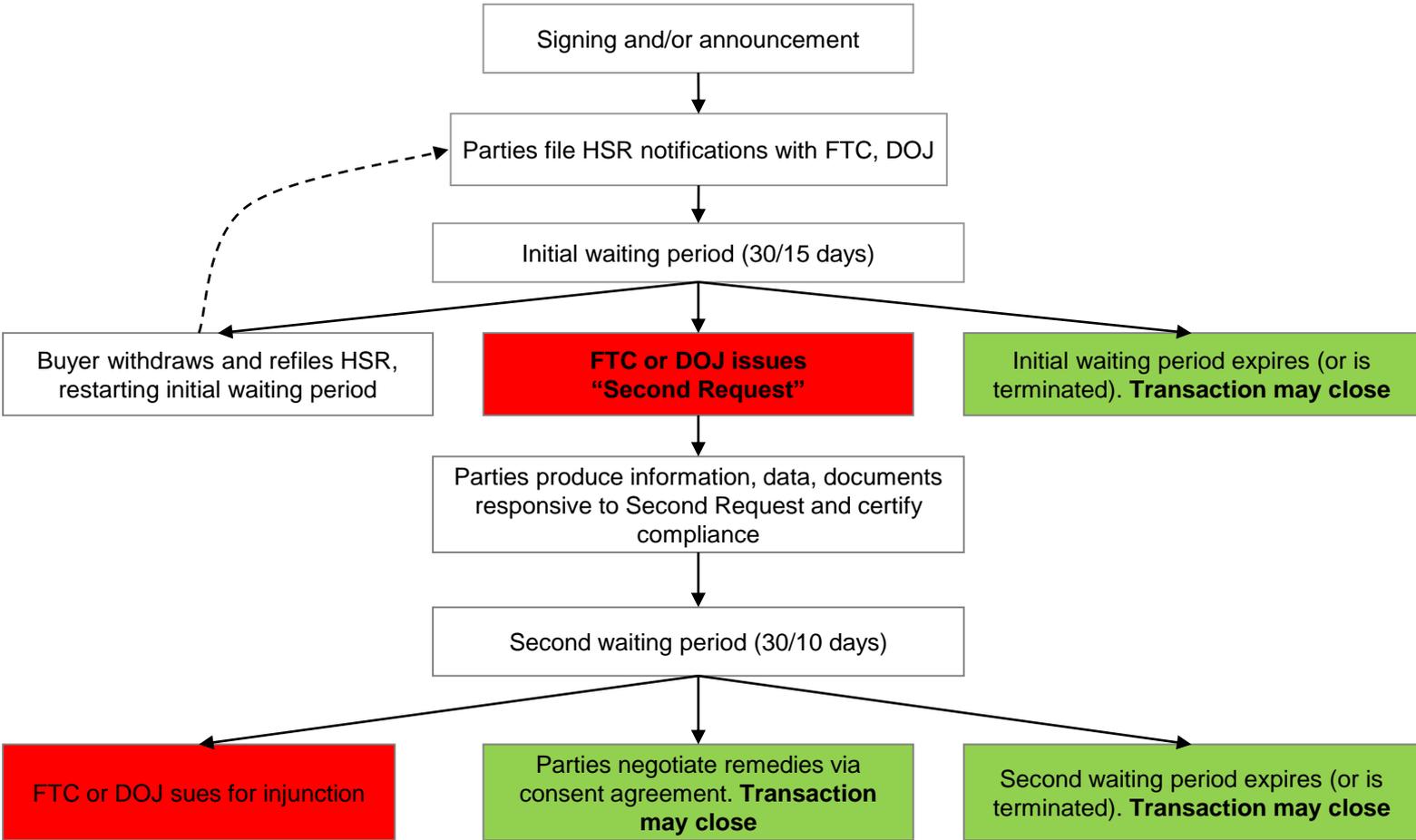
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New York State Bar Association  
Antitrust Section Mergers Committee  
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# Discussion Overview

- Basic Scheme of Second Request
- Second Request Compliance
- Ediscovery Considerations in Second Request Compliance
- “Substantial” Compliance and Second Request Disputes

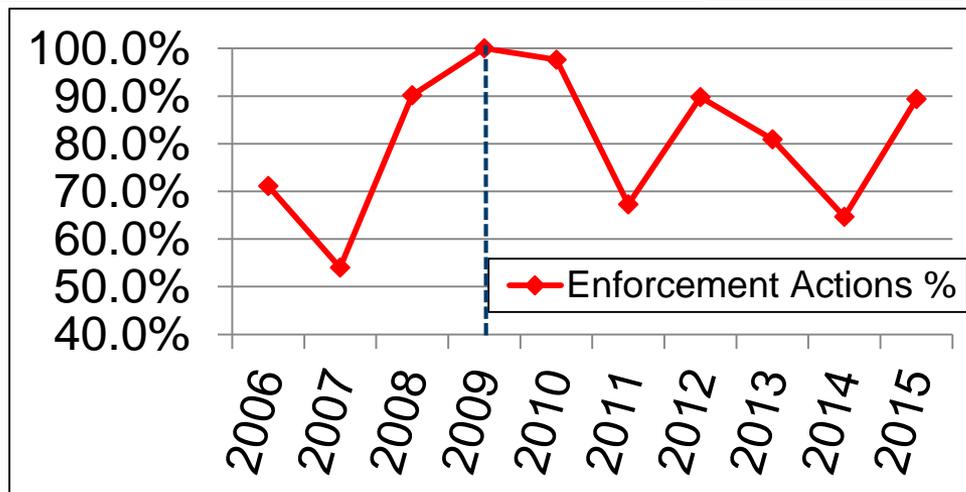
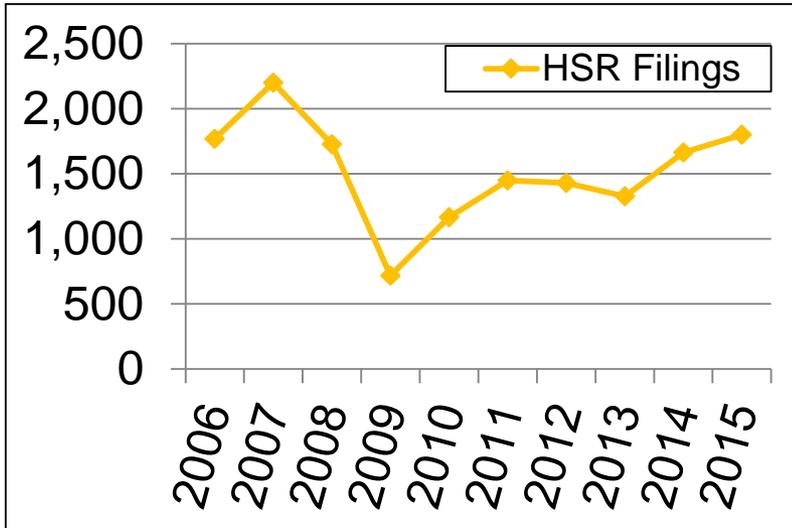
# Overview of HSR Process



# Basics of Second Request

- At the end of the initial waiting period, if the reviewing agency believes that a transaction warrants further investigation, it will issue a request for additional information and documentary material (“Second Request”)
- Second Request extends the waiting period until 30 days (or 10 days for all-cash tender offers or bankruptcy transactions) after substantial compliance by all parties (or by the acquiring person in case of tender offers or bankruptcy transactions)
- Absent some other timing agreement with the parties, at the end of the second waiting period the agency must take action or allow the deal to close
- Second Request can delay closing of a transaction by several months
  - No publicly available statistics, but experience indicates that compliance with a Second Request takes about 3 months on average
- Second Request process is a critical determinant of substantive merger review outcome
  - Agencies use Second Request both as an investigative tool and as a timing lever
- Parties are not required to comply with a Second Request, but without compliance, they have no leverage with the agencies and no control of timing
- Merger agreement must reflect possibility of Second Request, both with respect to the parties’ efforts covenants and timing of the deal (e.g., drop-dead date)

# Second Request Statistics



- Only a small percentage of HSR filings trigger a Second Request, but...
- ... the vast majority of Second Requests result in an enforcement action

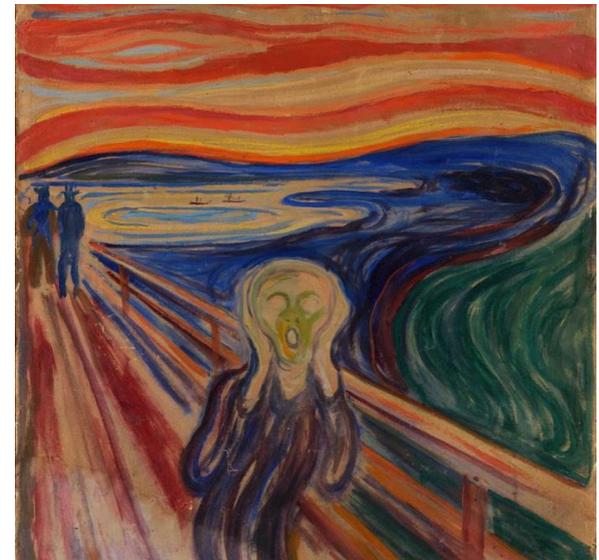
# What's a Second Request?

## ■ Legislative intent ...

- “. . . plainly, Government requests for additional information must be reasonable. The House conferees contemplate that, in most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and prepared by them. If the merging parties are prepared to rely on it, all of its should be available to the Government. But lengthy delays and extended searches should consequently be rare. . . In sum, a government request for material of dubious or marginal relevance, or a request for data that could not be compiled or reduced to writing in a relatively short period of time, might well be unreasonable.” Rep. Rodino, 122 Cong. Rec. 30,877 (1976)(emphasis added)

## ■ ... and today's reality

- Second Requests are *extremely burdensome* requests for documents, data, databases, and interrogatory responses
- Often written in a way that makes it extremely difficult for the parties to comply without the agencies' agreement to certain modifications or limitations
- Compliance usually takes months, costs several million dollars and involves substantial management time and effort



# 2006 Second Request Reforms

- **In 2006, FTC and DOJ announced separate initiatives to reform the Second Request process, with stated goal of reducing burden for merger parties**
  - Quid pro quo – agencies will mitigate burden of compliance if parties grant agencies additional time
  - Reforms only provide general guidance – no mandatory procedures for agencies or entitlements for parties
  - Despite stated goal of reducing burden associated with Second Request, cost and delay remain considerable
  - Key aspects of DOJ and FTC reforms:

Issue	DOJ	FTC
<b>Number of Custodians</b>	30 + up to 5 later if necessary (extra custodians do not delay certification if documents produced within 15 business days of request)	In most cases 35, set at the outset
<b>Timing of Production</b>	As agreed between parties and DOJ	At least 30 days prior to certification (or “rolling” production or other timing agreement)
<b>Pre-Trial Discovery Period</b>	Parties must agree to 4 to 6 months of pre-trial discovery if litigate	Parties must agree to at least 60 days of pre-trial discovery if litigate
<b>Relevant Time Period for Documents</b>	Start: Two years prior to issuance of Second Request	
	End: Generally 30 days prior to certification; parties may limit “refresh” search to certain documents if comply within 90 days of Second Request	End: Generally 45 days prior to certification, unless otherwise agreed regarding a rolling production
<b>Privilege Log</b>	Negotiation of categorical exclusions encouraged; may omit documents solely between counsel	Parties can produce partial log listing numbers of privileged documents for each custodian and a full log for a subset of custodians selected by staff

# Model Second Requests

- **Both agencies have issued Model Second Requests to enable parties to anticipate what information will be required**
  - FTC model was last revised in August 2015
  - DOJ issued revised and “streamlined” model on November 28, 2016 to conform model “to current division practice”
    - Despite stated goal, new model appears to increase burden on parties (e.g., 38 specs v. 23 in prior model, new burdensome bid data spec, second sweep obligation expanded)
    - New model appears to signal *increased* acceptance of use of predictive coding/TAR
- **The agencies’ models are similar...**
  - Default two-year time frame for document requests
  - Default three-year time frame for data and information requests (technically, new DOJ model has a two-year default, but most data specs call for three years)
  - Default ten years for entry spec
  - Similar interrogatories, document and data requests
    - In particular, DOJ’s revised model tracks FTC’s burdensome specs on entry, efficiencies, and bid data
  - ... but there are some notable differences
  - FTC model privilege log instruction allows partial privilege log; DOJ model does not
  - DOJ model (which previously allowed parties to essentially avoid a second sweep for document searches if they complied within 90 days), now requires second sweep for multiple specs even if parties comply within 90 days, with cutoff date for second sweep of 30 days prior to compliance; FTC model establishes a presumptive cutoff date of 45 days prior to compliance

# DOJ Model Second Request Update November 2016

## March 2012 Version (updated June 25, 2015): <https://www.justice.gov/atr/request-additional-information-and-documentary-material-issued-weebvewe-corporation-0>

- **If the company or its agent uses or intends to use** software or technology to identify or eliminate potentially responsive documents and information produced in response to this Request, including but not limited to search terms, predictive coding, near-deduplication, deduplication, and email threading, the company must provide a **detailed** description of the method(s) used to conduct all or any part of the search.
- If search terms will be used, in whole or in part, to identify documents and information that are responsive to this Request, provide the following: (1) a list of the proposed search terms; (2) a word dictionary or tally list of all the terms that appear in the collection and the frequency with which the terms appear in the collection (both the total number of appearances and the number of documents in which each word appears); (3) a glossary of industry and company terminology (including any code words related to the Transaction); (4) **a description of the search methodology (including the planned use of stem searches and combination (or Boolean) searches); and (5) a description of the applications that will be used to execute the search.**
- **The Department strongly recommends that the company provide these items prior to conducting its collection of potentially responsive information and consult with the Department to avoid omissions that would cause the company's response to be deemed deficient.**

## November 2016 Version: <https://www.justice.gov/atr/request-additional-information-and-documentary-material-issued-weebvewe-corporation>

- **Before using software or technology** (including search terms, predictive coding, de-duplication, or similar technologies) to identify or eliminate documents, data, or information potentially responsive to this Request, the Company must submit a **written** description of the method(s) used to conduct any part of its search.
- In addition, for any process that relies on search terms to identify or eliminate documents, the Company must submit: (a) a list of proposed terms; (b) a tally of all the terms that appear in the collection and the frequency of each term; (c) **a list of stop words and operators for the platform being used;** and (d) a glossary of industry and company terminology.
- For any process that instead relies on predictive coding to identify or eliminate documents, you must include (a) **confirmation that subject-matter experts will be reviewing the seed set and training rounds;** (b) recall, precision, and confidence-level statistics (or an equivalent); and (c) **a validation process that allows for Department review of statistically-significant samples of documents categorized as non-responsive documents by the algorithm.**

# Second Request Modifications

- **Parties “are encouraged to discuss ... possible modifications” with the staff ...**
  - Both FTC and DOJ policies require staff to respond to modification requests promptly
- **... but agencies can grant modifications at their discretion**
  - Modification process often takes long time and results in limited reduction of compliance burden
  - Staff will sometimes agree to “deferrals” instead of modifications (e.g., staff will not exclude a product from the Second Request, but will defer compliance with respect to that product)
- **Review Second Requests carefully, identify potentially problematic or overly burdensome requests, and consider possible ways to narrow them**
  - General principle is that modifications should reduce burden on the parties while still providing agencies with information and documents necessary to conduct their review
  - Involve relevant team at the client who have visibility on what is easily available and what is not
  - Focus on modifications that may have tangible impact on compliance burden
  - All modifications must be in writing (unless modified in writing, original Second Request governs)
- **When information or documents do not exist, no need to seek a modification**
  - But always include statement to explain why the company is unable to supply responsive information
  - More generally, whenever a response does not completely address a request, include statement of non-compliance to explain

# Timing Agreements

- **Second waiting period rarely provides sufficient time for staff to review the information and documents received in response to a Second Request**
  - Agencies attempt to obviate the issue with so-called “timing agreements”
- **Timing agreements typically include commitment by the parties not to close the transaction for some period of time after Second Request compliance (e.g., 60 days)**
  - DOJ Model Process & Timing Agreement is very detailed and includes procedural agreements regarding closing of transaction, document productions, Second Request compliance, substantive communications between DOJ and parties, including white papers, interviews/depositions, section recommendation to Front Office, Front Office meetings
- **FTC has not provided model timing agreement**
  - FTC timing agreements tend to be less detailed and often bare-bones
- **While Second Request modifications are generally not part of timing agreements, the two are strictly related**
  - Agencies unlikely to grant key modifications unless parties enter into timing agreement
  - Parties should not sign timing agreement until they reach agreement with staff on key modifications
  - Agencies less likely to “bounce” a Second Request when there is a signed timing agreement

# Document Requests

- **Document requests are usually the most onerous part of a Second Request, although e-discovery has significantly cut costs and time in recent years**
- **Requests tend to be very broad**
  - e.g., all documents relating to competition, all documents relating to the company's pricing strategies, all documents relating to the proposed transaction
- **Technically, Second Request “requires a complete search of ‘the company’” (including any affiliate in which the company owns 25% or more)**
  - In practice, search is limited to certain individuals' files and central document repositories
    - Identify key custodians and central repositories likely to have responsive documents early in the process
    - Commence search group negotiation with staff as soon as it becomes clear agency will issue Second Request
- **Default timeframe for document requests is two-year from issuance of Second Request**
  - Identify any deviations that may impact entire search
- **Continuing nature of Second Request means parties often have to re-search many custodians shortly before final compliance date (so-called “second sweeps”)**
  - Modification of second sweep obligation can save significant time and costs
- **Model Second Requests require translation of foreign language documents**

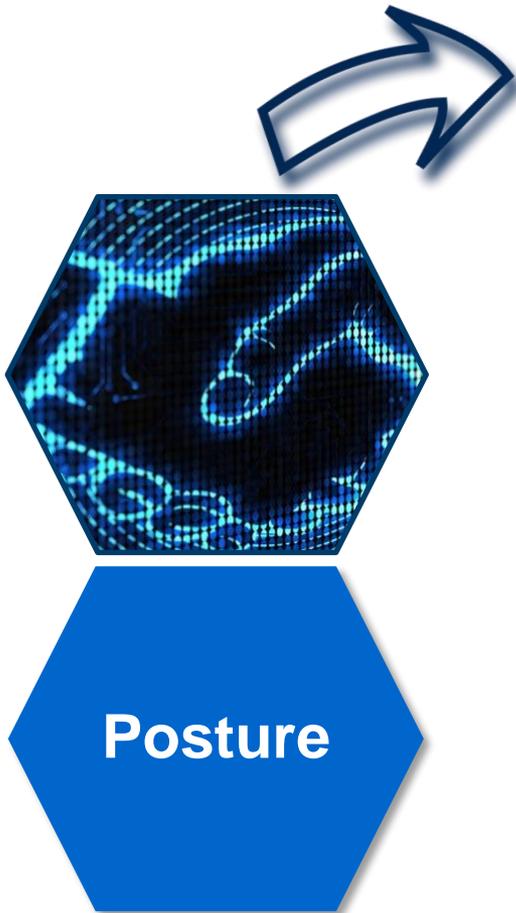
# Privilege Log

- **Privilege review and log can add significant cost and delay**
  - Technology can help as initial screening, but attorney review is necessary
  - Similarly, technology can help in privilege log creation, but human labor still dominant
- **FTC Model Second Request allows for “partial privilege log”**
  - Parties can produce partial log listing numbers of privileged documents for each custodian
  - In 5 business days staff may select up to 5 custodians (or 10% of total custodians) for whom full log is required *prior to compliance*
- **DOJ does not allow parties to submit a partial log**
  - Categorical modifications are possible (e.g., all privileged documents relating to certain litigations can be excluded)
  - Counsel-to-counsel communications can be excluded from privilege log
- Important to consider and negotiate possible modifications to privilege log instructions early on
- Consistent with Fed. R. Evid. 502(a) – (b), inadvertent production of privileged material will not constitute waiver if parties undertake precautions
  - “... the Bureau of Competition will not treat inadvertent production of privileged materials as a waiver of the attorney-client privilege or work product protection ... This situation differs from production that occurs because of negligence so significant that ... it may still constitute a waiver.”

# Ediscovery in Second Requests



# Ediscovery in Second Requests | Posture



- The negotiating stance in a Second Request may differ from a traditional civil litigation due to short timelines
- Merging parties want to be helpful to the agencies so that the merger is approved as quickly as possible

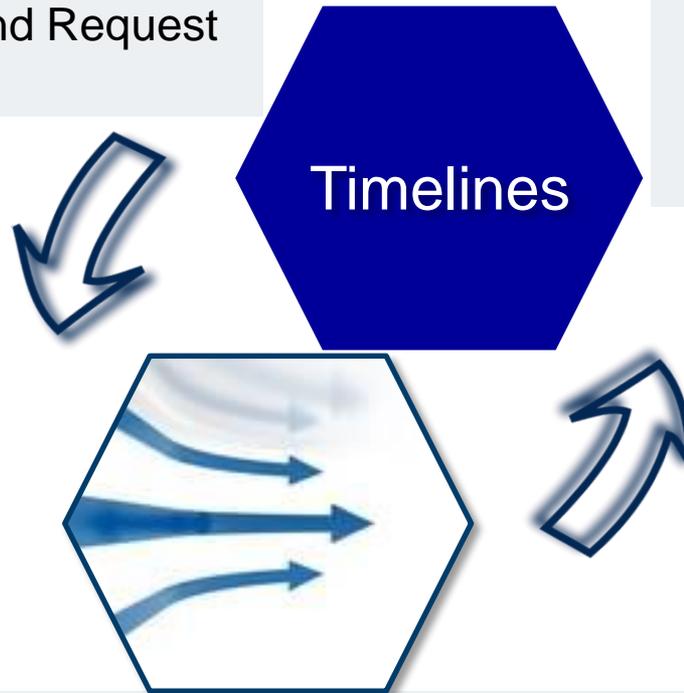
## What does this mean for ediscovery?

- Prioritize what you review first
- Utilizing electronic search platforms to produce relevant documents
- Might produce more documents
- Third party considerations

# Ediscovery in Second Requests | Timelines

- Parties should consider **collecting documents before** the Second Request is issued

- Prioritize and front-load the **most important documents first** for quick production



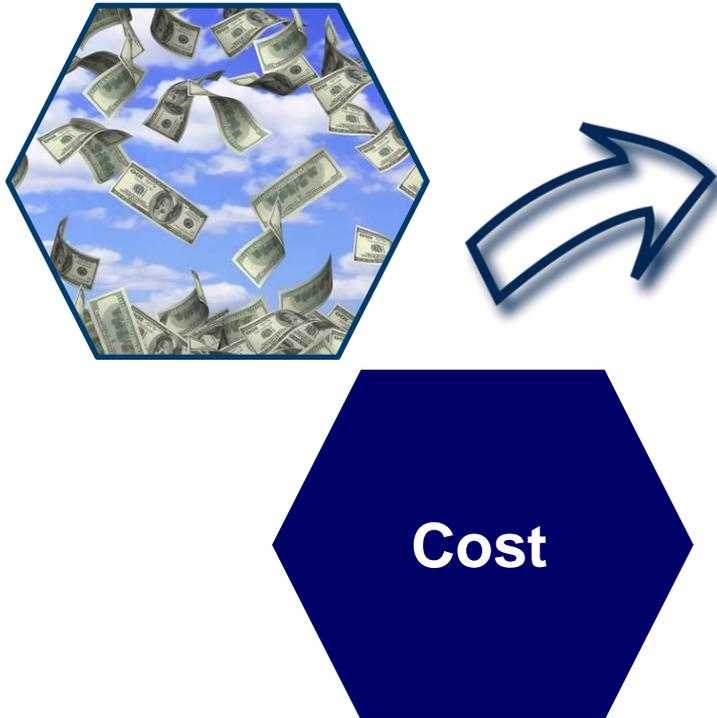
- Think about whether to provide a **rolling production or a single document dump**

- The **sooner the parties produce, the sooner the pressure shifts** to the agencies

- **Strike a balance** between time constraints and looking at every document

# Ediscovery in Second Requests | Cost

## Money Matters

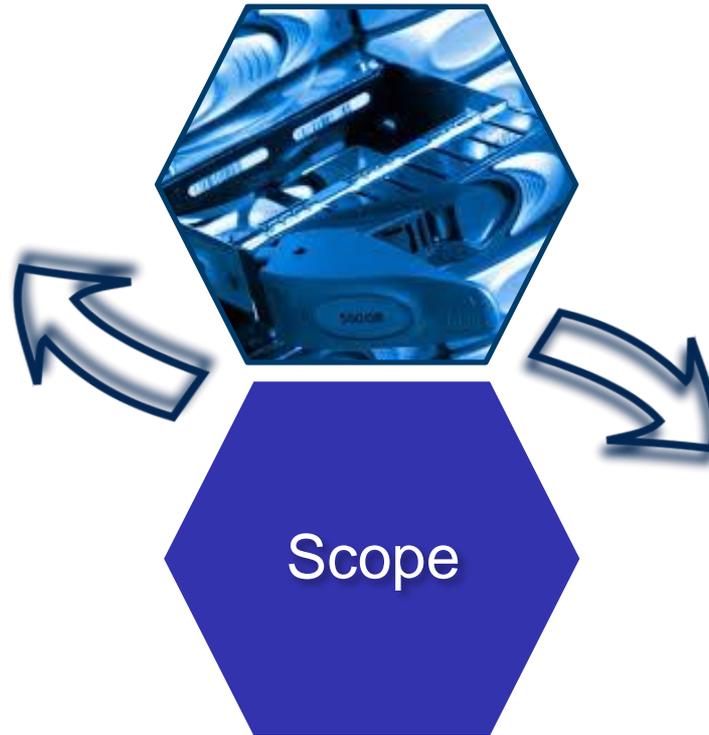


- Merging parties want to **keep costs down**, but also want to do it right
- Must be forthright about costs, so that the **client is prepared** from the beginning how much a Second Request could cost
- Think about the best way to **staff the document review team** to control costs
- **Predictive coding** is a good way to mitigate costs during review
- **Third party** considerations

# Ediscovery in Second Requests | Scope

- Don't forget about **foreign language documents**

- Ensure **early preservation & collection** efforts



- Negotiate & **identify custodians** and focus on their materials first

- Think about **protection of trade secrets & privileged documents**

# Ediscovery in Second Requests | Technology



- Consider the role technology will play in the review:
- Manual v. automated
- Prioritization & predictive coding
- Keyword searches for culling
- Customized category tree
- Email threading & near de-duplication
- Case mapping technology
- Choice of vendor or technology platform

**“ Predictive coding is preferred because the judgments about responsiveness during manual review are less accurate and almost certainly are not consistent among reviewers.”**

*Source: “Technology Assisted Review and other Discovery Initiatives at the Antitrust Division”, U.S. Department of Justice*

<https://www.justice.gov/sites/default/files/atr/legacy/2014/03/27/304722.pdf>

# What is Predictive Coding?

**Predict**



**Goal**

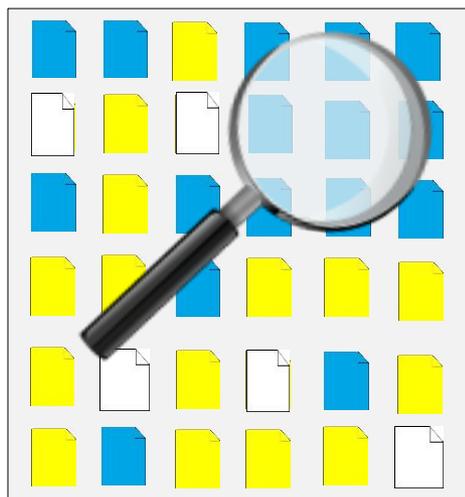
**Leverage technology to work faster and more accurately, reducing costs**

**Train**

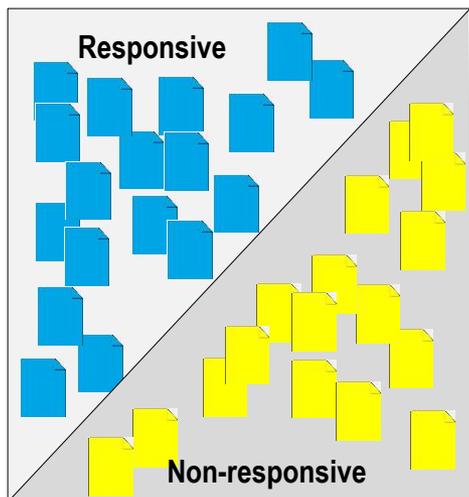


# Why Predictive Coding?

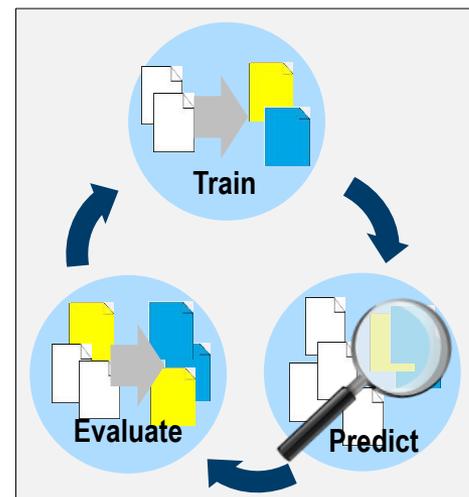
As ediscovery budgets shrink and data volumes continue to increase, predictive coding can help **save time and reduce costs** by solving these key problems:



Finding the **right documents as fast as possible**

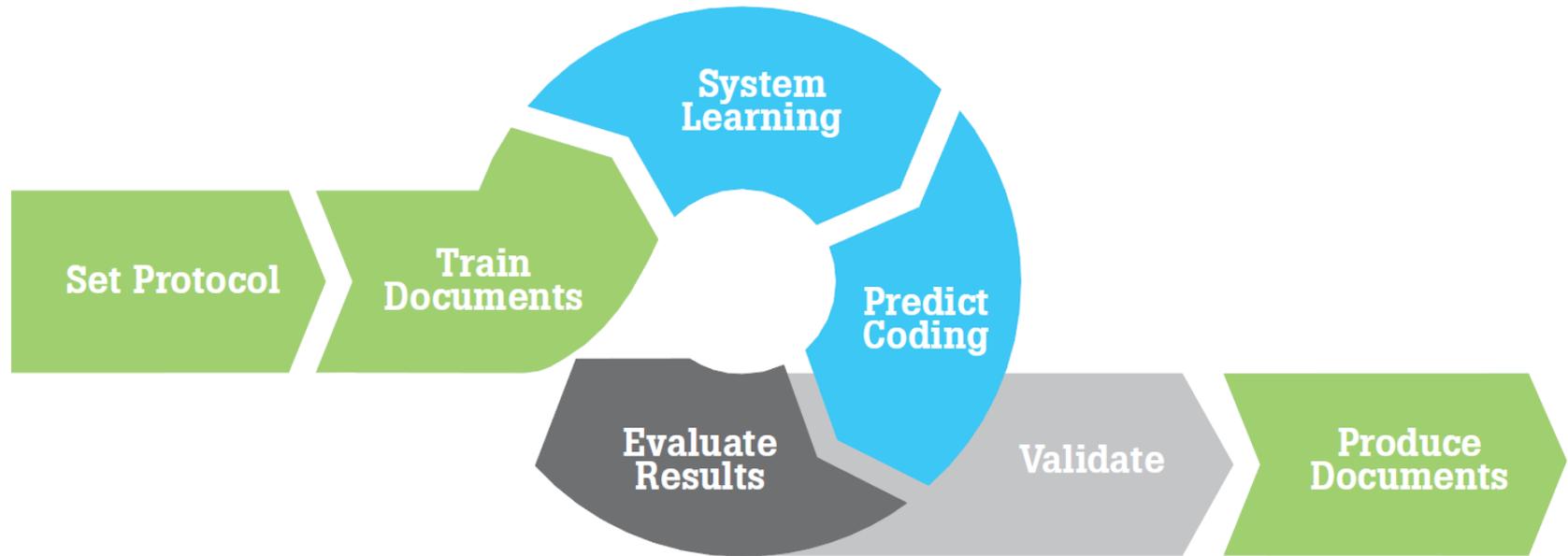


**Sorting and grouping** documents more efficiently



**Validating the reviewer's work** before production

# The Predictive Coding Lifecycle



Planning | Training & Analysis | Metrics & Reporting

# Predictive Coding Case Law (US & UK)

2012

2016

- Da Silva Moore v. Publicis Groupe
- Kleen Products v. Packaging Corporation of America
- Global Aerospace Inc. v. Landow Aviation, L.P.
- In re Actos (Pioglitazone) Products Liability Litigation
  - Gabriel Tech. Corp. v. Qualcomm Inc.,
  - In Re: Biomet M2A Magnum Hip Implant Products Liability Litigation
  - Gordon v. Kaleida Health
  - FDIC v. Bowden
  - Fed. Hous. Fin. Agency v. HSBC
  - The New Mexico State Inv. Council v. Bland
  - Progressive Casualty Insurance Company v. Delaney
  - Bridgestone v. IBM
  - AMEC Env't & Infrastructure, Inc. v. Geosyntec Consultants, Inc.
- Dynamo Holdings v. Comm'r of Internal Revenue
- Rio Tinto PLC v. Vale S.A.,
- Pyrrho Investments Ltd. V. MWB property Ltd. (UK)
- David Brown v. BCA Trading (UK)
- Hyles v. New York City
- Pyle v. Selective Ins. Co. Of Am.
- In re Viagra (Sildenafil Citrate) Prods. Liab. Litig.

# Predictive Coding: A Second Request Case Study

## PREDICTIVE CODING IN A SECOND REQUEST

### SITUATION

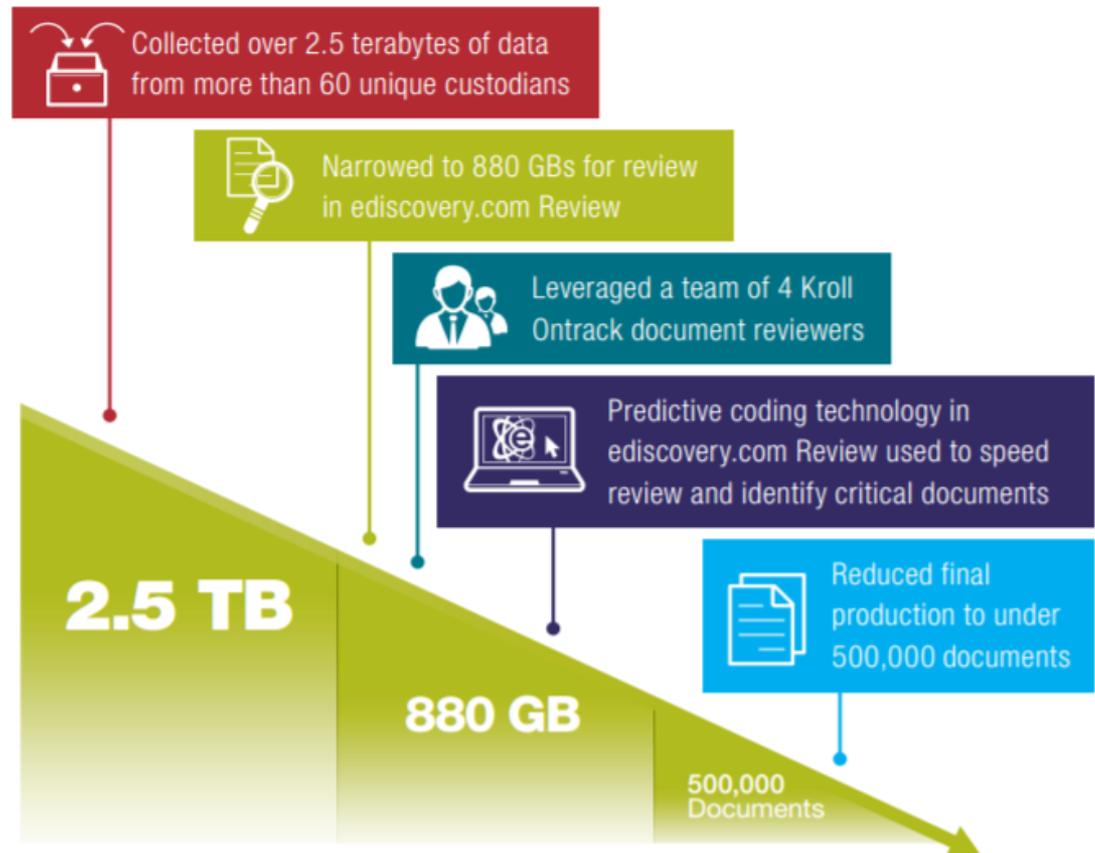
A second request issued by the FTC

### SOLUTION

Fast-track review using Kroll Ontrack's platform and predictive coding technology

### RESULT

Predictive coding algorithm returned a 90% document classification accuracy rate, which aided the merging companies in completing the FTC production in less than two months



# Data and Database Requests

- **Data production can encompass provision of company's ordinary course data and databases and drafting of responses to targeted data requests**
  - Data requests generally cover sales, costs, margins, capacity, capacity utilization rate, production, minimum viable scale, prices, customer location, expected efficiencies/cost savings, bid data, etc.
  - Default timeframe is three years from issuance of Second Request
  - Data requests are primarily driven by economists at the agencies, who use data for econometric analyses
    - Increased use of econometric models in merger review has resulted in dramatic increase in data requests
- **Database requests were introduced in the last decade and are extremely broad, even by Second Request standard**
  - Compliance with data and database requests involves interactive process driven by agency economists
  - Provide data maps or lists of company's databases with description of content, identify potentially responsive databases, ask staff to select databases of interest and modify Second Request to exclude all others, produce selected datasets in accepted format
  - Consider hiring economists to assist with data and database requests

# Interrogatory Responses

- **Interrogatories call for narrative responses**
- **Typically cover, among other things:**
  - Descriptions of relevant products/services
  - Descriptions of relevant assets of facilities
  - Entry, potential entrants, and expansion plans
  - Timetable and rationale for the transaction
  - Anticipated efficiencies, cost savings and changes to the parties' operations
- **Unlike responses to document and data requests, interrogatory responses often offer opportunity for substantive advocacy**
  - e.g., responses to entry specifications can easily morph into substantive white paper on entry

# “Substantial” Compliance

- **HSR Act refers to “substantial” compliance, but “substantial” compliance is not defined in the Act or implementing rules**
- **Legislative intent**
  - “If the omitted data is withheld by the parties for frivolous, unjustifiable, or improper reasons, the [agency] may seek a court order . . . A broad and liberal interpretation of the doctrine of ‘substantial compliance’ should protect the rights of the Government as well as the parties . . . a government request for material of dubious or marginal relevance, or a request for data that could not be compiled or reduced to writing in a relatively short period of time, might well be unreasonable. In these cases, a failure to comply with such unreasonable portions of a request would not constitute a failure to ‘substantially comply’ with the bill’s requirements.” Rep. Rodino, 122 Cong. Rec. 30,876-77 (1976)
- **The agencies’ position in the original Statement of Basis and Purpose**
  - “A complete response, within the meaning of the act and rules, is one that supplies all requested information. Anything less than a complete response potentially is not substantial compliance. The rule . . . does not define substantial compliance, and the agencies contemplate resolving whether a person has substantially complied on a case-by-case basis.” 43 Fed. Reg. 33,508-33,509 (1978)

# Second Request Disputes

- **If agency believes that a party has not substantially complied with a Second Request, it will notify the party of any deficiencies and the waiting period will not run until deficiencies have been remedied**
- **2000 HSR Act reform amended statute to require internal appeals of both Second Requests and compliance**
  - FTC: Appeals to the FTC's General Counsel
  - DOJ: Appeals to "neutral" DAAG not involved in the review of the transaction
  - Same processes generally used for Second Request, modification and compliance appeals
- **Internal appeals are uncommon**
  - May take longer than repairing "deficient" compliance, with less certain outcome
  - Officials hearing the appeal are not directly involved in deal review, but are they objective?
- **Judicial review of agency claims of failure to substantially comply with a Second Request**
  - Upon DOJ or FTC application, U.S. district court may order compliance, extend the waiting period, and grant other equitable relief deemed necessary or appropriate
  - Typically, agency will bring action upon an acquiring person's threat to close, but in theory parties may pursue a declaratory action
  - Parties best position themselves by exhausting internal appeals at the agency before getting to court

# Second Request Litigation

- **Scant legal precedent on “substantial compliance”**
- ***FTC v. McCormick & Co.* (1988-1 Trade Cas. (CCH) ¶ 67,976 (D.D.C. 1988))**
  - FTC issued Second Request and McCormick sued for declaration that it was “unduly broad, burdensome, and oppressive,” seeking either invalidation or declaration of compliance
  - FTC brought separate action alleging that McCormick had not complied with Second Request
  - “The statutory . . . waiting period has not begun, and will not begin, unless and until McCormick substantially complies with the [Second Request] by providing complete responses . . . A complete response is one that either (a) sets forth all the information and documentary material required to be submitted pursuant to the request, or (b) in the event a person is unable to provide a complete response, a detailed statement of the reasons for non-compliance”
  - Court granted injunction to prevent closing prior to compliance and expiration of waiting period
- ***FTC v. Blockbuster, Inc.* (Complaint, 2005 WL 919219 (D.D.C. 2005))**
  - FTC issued Second Request in connection with Blockbuster’s offer for Hollywood Entertainment
  - Blockbuster complied in 23 days, but FTC issued two deficiency letters claiming data deficiencies
  - Blockbuster remedied the data issues but would not re-certify, claiming its original submission was substantial compliance
  - Blockbuster exhausted internal appeals and threatened to close, so FTC sued to enjoin closing
  - Blockbuster argued the errors were (1) inadvertent, (2) immediately corrected, and (3) insufficiently consequential for Second Request response to fail the test for “substantial compliance”
  - Parties settled without court reaching issue of substantial compliance (agreed to two-week extension of original waiting period)

# Non-Consensual Transactions

- **Tender offer targets (and bankrupt companies) cannot prevent substantial compliance, but they are often less cooperative in an investigation than targets in consensual deals**
  - Failure to provide information can impede resolution of substantive issues
  - Targets in other types of § 801.30 transactions (open-market purchases, negotiated sales) can prevent the waiting period from restarting by failing to comply
- **HSR rules require that “[a]ll additional information or documentary material requested . . . shall be supplied within a reasonable time”**
  - “What constitutes a reasonable time must be judged on a case-by-case basis, considering all the facts and circumstances” (43 Fed. Reg. 33,516, July 31, 1978)
  - In theory, agency could seek civil penalties or an order of compliance from a federal district court
- **Agencies typically issue subpoenas and civil investigative demands to tender offer targets and bankrupt firms to compel response to Second Requests by a date certain**
  - Return dates often unreasonable
  - Target in FTC investigation must make any petition to quash within 20 days of receipt or prior to the return date, whichever is earlier, after conferring with FTC counsel
- ***FTC v. Take-Two Interactive Software (D.D.C. 2008)***
  - After weeks of negotiation, FTC sought order to compel target to respond to Second Request and compulsory process
  - FTC claimed Take-Two was estopped from raising burden arguments because it failed to make a petition to quash compulsory process in time
  - FTC and Take-Two ultimately resolved the matter out of court, so no decision issued

# Global Data Transfer

## EU-U.S. Privacy Shield (New in 2016)

- The new Privacy Shield replaces the former Safe Harbor agreement as a compliance mechanism for personal data transfers from Europe to the US
- The Privacy Shield principles are largely the same as under the Safe Harbor
- Merging parties needing to produce global documents may seek data transfer protection through Privacy Shield certification
- However, continue to monitor the international data protection landscape as many open questions remain:
  - What will be the full impact of Brexit on data transfers between the UK and US?
  - What new requirements will need to be implemented to comply with the forthcoming General Data Protection Regulation, which was also adopted in 2016 but does not apply until 2018?



# Updated FTC/DOJ Guidelines for International Antitrust Enforcement



- FTC and DOJ are seeking public comment on proposed Antitrust Guidelines for International Enforcement and Cooperation
  - Last updated in 1995
  - Provide guidance on the agencies' international enforcement policy, investigative tools and cooperation with foreign authorities
  - Reflect the growing importance of antitrust enforcement in a globalized economy
  - Comment period ends December 1, 2016
- In particular, the revisions:
  - Add a section on international cooperation, which addresses the agencies' investigative tools, confidentiality safeguards, types of information exchanged, waivers of confidentiality, and remedies;
  - Update the discussion of the application of U.S. antitrust law to conduct involving foreign commerce, agencies' consideration of foreign jurisdictions and international comity;
  - Clarify that the agencies do not view the existence of blocking statutes in foreign countries (i.e., statutes that prevent individuals or entities from disclosing documents for use in U.S. proceedings) as creating a conflict of law for purposes of comity analysis and does not excuse noncompliance with a Second Request

**Questions?**



# Cathleen Peterson

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- Cathleen Peterson is a Senior Executive leading Kroll Ontrack's strategic consulting team, forensics and collections practice – delivering client-tailored solutions to meet all discovery and data management needs, from preservation and collection, through technology selection, data analytics, search, technology-assisted review and data lifecycle optimization.
- Prior to joining Kroll Ontrack, Peterson was of counsel and the legal director of discovery analytics and review services for Orrick, Herrington & Sutcliffe LLP, where she consulted with clients and case teams on technology and ediscovery, led the development of the firm's search analytics team and expanded discovery service offerings leveraging advanced technologies.
- Before joining Orrick, Peterson served as Counsel at WilmerHale, with an emphasis on large-scale SEC inquiries, complex litigation and internal investigations.
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# Franco Castelli

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- Franco Castelli joined Wachtell, Lipton, Rosen & Katz's Antitrust Department in 2005. He focuses on analysis of competition issues in U.S. and cross-border mergers, acquisitions, and joint ventures. Mr. Castelli has represented clients before the Federal Trade Commission, the U.S. Department of Justice, the European Commission, as well as other antitrust regulatory agencies. He has worked on transactions involving a wide variety of industries, most recently representing companies in the high-tech, stock exchange, pharmaceutical, oil and gas and chemical industries. Mr. Castelli has served as a guest lecturer on antitrust law at the Law School of the University of Milan, Italy.

