

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



ORIGINAL

_____)
In the Matter of)
)
1-800 CONTACTS, INC.,)
a corporation,)
)
Respondent)
_____)

DOCKET NO. 9372

**COMPLAINT COUNSEL’S OPPOSITION TO
RESPONDENT’S MOTION FOR A RULE 3.36 SUBPOENA**

Complaint Counsel submits this Opposition to Respondent 1-800 Contacts, Inc.’s Motion for a Rule 3.36 Subpoena to the Federal Trade Commission (“Motion”). Respondent’s Motion should be denied because Respondent has already received discovery from all of the sources within the Commission that the Rules contemplate: relevant, non-privileged materials collected or reviewed by “the Bureaus or Offices . . . that investigated the matter.” 16 C.F.R. § 3.31(c)(2). Respondent’s Motion seeks discovery from additional sources, invoking a narrow exception that sets aside the clear limitations provided by Rule 3.3.1(c)(2) only if a “special showing of need” provides a “strong justification.” See 74 Fed. Reg. 1804, 1815 (Jan. 13, 2009). But Respondent has shown no need, much less a special need, that might justify discovery of 14-year-old materials that were not reviewed or relied upon in this investigation or lawsuit, from sources “unlikely to possess relevant, discoverable information that is not available from other sources.” *Id.* The Motion should be denied.

ARGUMENT

Rule 3.31(c)(2) explicitly provides that Respondent is entitled to discovery of “materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter.” 16 C.F.R. § 3.31(c)(2). Rule 3.36 provides a narrow exception: if a Respondent makes a “special showing of need,” the Administrative Law Judge may authorize discovery from additional sources, such as the Commission itself, “Bureaus or Offices not involved in the matter,” the General Counsel, the Secretary, or the office of Administrative Law Judges. *See* 74 Fed. Reg. 1804, 1815 (Jan. 13, 2009). In its most recent revision to Rule 3.36, the Commission made clear that when documents are sought through a Rule 3.36 subpoena, “the burden (and delay) of searches for responsive records and the creation of privilege logs should not be imposed without strong justification,” given “the lack of useful additional information likely to be available.” *Id.* This Court performs a gatekeeper role, ensuring that a party seeking a Rule 3.36 subpoena meets the stringent standard explained by the Commission, and that the party demonstrates that the material sought: (i) is reasonable in scope; (ii) is reasonably expected to yield relevant information; (iii) cannot reasonably be obtained by other means; and (iv) is specified “with reasonable particularity.” 16 C.F.R. § 3.36 (incorporating by reference §§ 3.31(c)(1), 3.37(a)).

Here, rather than make a “special showing of need,” Respondent simply argues that there is some chance that the materials it seeks might be useful in this litigation. Respondent’s argument fails, because Rule 3.36 does not require Complaint Counsel to search the Commission’s files for potentially responsive materials that Complaint Counsel has not even

reviewed, and does not intend to rely upon, in the prosecution of this matter. *See* Ex. A (Blank Declaration) ¶ 3.

Complaint Counsel has already produced, or is in the process of producing, all relevant, non-privileged documents collected or reviewed by the Bureau of Competition and the Bureau of Economics in this matter (File No. 141-0200), as required by Rule 3.31(c)(2). In addition, Complaint Counsel will produce relevant materials from a separate Commission investigation (File No. 161-0106), that were reviewed or relied upon in Complaint Counsel's investigation of this matter. To date, Respondent has received over 11,000 pages, including:

- Documents produced by third parties in the pre-complaint investigation;
- Correspondence with market participants; and
- Transcripts of investigational hearings.

See Ex. A (Blank Declaration) ¶¶ 4-5. Further, Complaint Counsel will produce additional materials by October 18, 2016, in response to document requests served by Respondent in September 2016. These materials include documents produced by third parties in a separate Commission investigation of Respondent's proposed acquisition of a competitor (File No. 161-0106). *Id.* at ¶¶ 6-7.

As Respondent is receiving all non-privileged documents collected and reviewed in the investigation or prosecution of this matter, its Motion necessarily seeks documents that Complaint Counsel "has, in no way, utilized in the prosecution of this case." *In re Schering-Plough Corp., et. al*, FTC No. 9297, 2001 FTC LEXIS 199, at *15 (Sept. 7, 2001) (Chappell, J.) ("*Schering*"). The Commission's Rules simply do not provide for such discovery. For example, in *Schering*, the respondent asserted that Complaint Counsel was "obligated to broaden its search for responsive documents beyond the files of the staff members of the Bureaus who worked on the investigation and litigation." *Schering*, 2001 FTC Lexis 199 at *11. This Court held that,

even though the documents sought were relevant, Complaint Counsel was obligated to search for and produce only those documents reviewed by Complaint Counsel or a testifying expert. *Id.* at *12-13. This Court should reach the same conclusion here and deny Respondent’s Motion, because Complaint Counsel has already searched for, and is producing, all non-privileged materials it has reviewed or relied upon, and Respondent will receive all documents reviewed by any testifying experts pursuant to Rule 3.31A(c). As explained below, Respondent has not provided any showing that might justify a departure from this rule.

I. Respondent Has Not Made a Special Showing of Need for Any of The Materials it Seeks

Respondent’s Motion seeks two types of documents. First, it seeks all “documents relating to” nonpublic reports regarding (i) competition in the contact lens industry, or (ii) search advertising.¹ Second, it seeks “all documents relating to” all publicly released reports regarding the same two topics.²

Respondent argues that in past matters the Commission has cited publicly released reports and publicly released staff analyses “in adjudicating cases alleging anticompetitive conduct.” Motion at 3. But these matters do not show that Respondent has any special need for the material it seeks, because in each case the Commission cited only *publicly available* reports or analyses, and Respondent is not seeking this material. *See In re Realcomp II Ltd.*, FTC No.

¹ *See* Motion at Ex. A Request 1 (seeking all documents relating to any public or nonpublic reports relating to contact lens competition); *id.* Request 5 (seeking all documents relating to any public or nonpublic reports relating to search advertising).

² *See supra* note 1; Motion at Ex. A Requests 2, 3, 4 (seeking all documents relating to three specific publicly released reports relating to contact lens competition); *id.* Requests 6, 7, 8, 9 (seeking all documents relating to four specific publicly released reports relating to search advertising). Respondent does not contend that the publicly released reports themselves must be produced. Motion at 3 n. 4.

9320, 2007 WL 6936319, at *5 n.1, *24 n.17 (Oct. 30, 2009) (citing public Commission reports on the real estate industry); *In re N. Tex. Specialty Physicians*, 140 F.T.C. 715, 717 & n.2, 728, 736 (Sept. 16, 2003) (citing public reports, health care policy statements, and opinion letter). Neither case involved any citation to the underlying materials that formed the basis for public Commission reports. And neither case involved the Commission citing to a nonpublic report or to the underlying materials that formed the basis for a nonpublic report.

Further, Respondent argues that the subject matter of the materials sought may overlap with the subject matter of this litigation. Motion at 2-6. But this in no way justifies the relief Respondent seeks. Simply because the Commission is in possession of “documents that may be relevant does not entitle respondents to them. . . . Respondent’s rights . . . to present evidence and to conduct cross examination . . . certainly do not extend to an unlimited privilege to examine all the Commission’s files.” *Schering*, 2001 FTC LEXIS 199, at *9 (quotation omitted). Rather, Rule 3.36 clearly requires a “special showing of need.” 74 Fed. Reg. 1804, 1815 (Jan. 13, 2009). As this Court explained in *Schering*, this is the case, in part, because “[t]he Commission . . . has enormous powers to compile highly confidential information from non-parties” that “expect, in providing this information . . . that [their] confidentiality will be maintained wherever possible.” 2001 FTC LEXIS 199, at *8 (internal quotation omitted). Allowing Respondent unrestricted access to the files of other investigations would violate the assurances of confidentiality provided to non-parties, and could potentially hinder the Commission’s ability to conduct future nonpublic investigations.

Thus, the special showing required by Rule 3.36 cannot be satisfied by simply asserting that relevant material exists somewhere within the Commission’s files, nor by speculating that the material sought “*may prove most useful*,” Motion at 4. To the contrary, the Rules make clear

that “[t]he mere hope that some of the material might be useful does not constitute good cause” to order additional discovery under Rule 3.36. *In re The Kroger Co.*, FTC No. 9102 C, 1977 FTC LEXIS 55, at *4-5 (Oct. 27, 1977). Yet Respondent offers nothing beyond “mere hope.” For example, Respondent speculates that the materials it seeks might prove useful “if the Commission and its experts rely upon the conclusions in” a publicly available report. Motion at 4. But this hypothetical concern does not show a compelling need for the materials sought, particularly because Rule 3.31A(c) already mandates the disclosure of all necessary materials considered by a hypothetical expert. Moreover, as noted above, Complaint Counsel has not *reviewed*, let alone relied upon, any of the materials sought by Respondent – not in its pre-complaint investigation, and not in the prosecution of this matter. Nor does Complaint Counsel intend to do so. *See* Ex. A (Declaration of Barbara Blank) ¶ 3.

Finally, Respondent points out that Complaint Counsel has sought from Respondent discovery of relevant documents and analyses, and has refused to provide reciprocal production of all such analyses and related documents. Motion at 4, 6. This complaint misses the mark, as it ignores the explicit limitation on Complaint Counsel’s obligation to search provided by Rule 3.31(c)(2). *See In re Abbott Labs*, FTC No. 9253, 1992 FTC LEXIS 296, at **7-8 (Dec. 15, 1992) (striking provisions of respondent’s subpoena “to the extent it purports to require a search of the entire Commission for responsive documents; only files in the custody or control of complaint counsel need be searched”); *Kroger Co.*, 1977 FTC LEXIS 55, at *4 (striking specifications from a Rule 3.36 subpoena seeking documents from “[t]he Commission’s prior proceedings, including formal proceedings, investigations, compliance proceedings and proposed rulemaking proceedings” as “clearly irrelevant” and “beyond the scope of legitimate discovery”).

II. Respondent Has Not Made the Showings Required by Rule 3.36

In addition, Respondent's Motion should be denied because its enormously burdensome proposed subpoena fails the "reasonable particularity" and "reasonable scope" requirements of Rules 3.36(b)(1) and (b)(5), and represents precisely the type of fishing expedition that the rules forbid. *Intel*, which Respondent cites, provides an instructive contrast. There, the court granted an unopposed Rule 3.36 motion to depose a Bureau of Labor Statistics official for "two hours or less," on "six narrow topics" regarding prices of a single series of microprocessors. *In re Intel Corp.*, FTC No. 9341, 2010 WL 2544424, at *3 (June 9, 2010). The limited scope, duration, and burden imposed on a single individual in *Intel* bears no resemblance to the burdensome discovery sought here. For example, Request 1 seeks "[a]ll Documents" from 2002 to present "[r]elating to reports, papers, working papers, studies or analyses Relating to competition in the contact lens industry." Compliance would require searching, among others, the Bureaus of Consumer Protection, the Offices of the Administrative Law Judges, General Counsel, Policy Planning, and Public Affairs for any publication "relating to" the sale of contact lenses since 2002, as well as all underlying materials. And while Respondent might counter that post-subpoena narrowing or negotiations could lead to a less onerous result, the burden rests on the party seeking a Rule 3.36 subpoena to affirmatively make a showing that the discovery sought is reasonable. Respondent has made no such showing.

Moreover, the enormous scope of the Requests are compounded by Respondent's vague request for "All Documents Relating to" an unspecified and potentially vast body of "reports," "papers," "studies," and "analyses" – none of which are defined by Respondent. *See* Motion at Ex. A, Definitions. This imprecise request fails to provide reasonable particularity regarding what specific materials Respondent seeks, and whether, or how, such materials relate to

Respondent's defenses, as required by Rule 3.36(5). *See generally Assoc. Merchandising Corp.*, FTC No. 8651, 72 F.T.C. 1030, 1967 WL 94071, at *2 (Dec. 11, 1967) (denying the respondents' broad discovery request, which "can only be evaluated with difficulty, if at all, against the standards of the rule" as some Commission files "would have no relevance to the issues involved in litigation"). Broadly formulated and imprecise requests are generally disfavored. *See, e.g., In re OSF Healthcare Sys.*, FTC No. 9349, 2012 FTC LEXIS 31, at *4-5 (Feb. 14, 2012) ("[S]ubpoena requests that seek documents 'concerning' or 'relating to' have been found to lack the 'reasonable particularity' required."); *see also In re North Texas Specialty Physicians*, FTC No. 9312, Dkt. No. 2004 FTC LEXIS 19, at *12 (Feb. 4, 2004). And such discovery requests are particularly inappropriate in the context of a Rule 3.36 motion, where Respondent must demonstrate a "strong justification" and a "special showing of need" for the particular discovery it seeks.

Finally, Respondent's request is particularly onerous because it will require the review of an enormous quantity of privileged documents, a burden anticipated by the Commission's instruction that Rule 3.36 subpoenas should not be approved "without strong justification" in part due to "the burden (and delay) of searches for responsive records and the creation of privilege logs." 74 Fed. Reg. 1804, 1815 (emphasis added). Here, Respondent's requests squarely target materials that are protected from disclosure by several privileges, including the work product doctrine, attorney-client privilege, the government deliberative process privilege, and the law enforcement (or investigatory files) privilege.³ The process of reviewing an enormous number of

³ If the Court grants Respondent's Rule 3.36 Motion, Complaint Counsel reserves the right to have the appropriate Commission personnel formally claim any applicable executive privileges after a motion to compel has been filed. *See In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (executive privileges need not be claimed until motion to compel filed).

documents from prior case files to determine whether privileges apply would impose precisely the substantial burden and delay the Commission sought to eliminate by specifying the stringent requirements of Rule 3.36.

CONCLUSION

For the foregoing reasons, the Court should deny Respondent's Motion for a Rule 3.36 Subpoena.

Dated: October 14, 2016

Respectfully submitted,

/s/ Dan Matheson
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Barbara Blank
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Counsel Supporting the Complaint

EXHIBIT A

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

_____)	
In the Matter of)	
)	
1-800 CONTACTS, INC.,)	
a corporation,)	DOCKET NO. 9372
)	
Respondent)	
_____)	

**DECLARATION OF BARBARA BLANK IN SUPPORT OF
COMPLAINT COUNSEL’S OPPOSITION TO
RESPONDENT’S MOTION FOR A RULE 3.36 SUBPOENA**

I, Barbara Blank, declare as follows:

1. I am an attorney at the Federal Trade Commission, Complaint Counsel in this matter. I am duly licensed to practice law before the courts of the District of Columbia and have appeared in the action pursuant to Rule 4.1 of the Commission’s Rules of Practice.
2. I submit this Declaration in Support of Complaint Counsel’s Opposition to Respondent’s Motion for Discovery from the Commission Pursuant to Rule 3.36. I have personal knowledge of the facts stated in this declaration and, if called as a witness, could competently testify to them.
3. Complaint Counsel has not reviewed or relied upon, and does not intend to review or rely upon, the materials sought by Respondent in the pre-complaint investigation of this matter or in the prosecution of this case.

4. As of October 14, 2016, Complaint Counsel has produced to Respondent 11,264 pages of documents bearing the Bates numbers FTC-PROD-0000001 through FTC-PROD-0011264.
5. As of October 14, 2016, Complaint Counsel has produced to Respondent the following categories of documents, electronically stored information, and tangible things (“documents”) in the possession, custody, or control of the Commission:
 - a. Documents produced by third parties to the Commission in response to the subpoenas *duces tecum* and Civil Investigative Demands issued by the Commission in the course of the investigation bearing the FTC File No. 141-0200;
 - b. Documents produced by third parties to the Commission voluntarily in lieu of process during the Commission’s investigation in FTC File No. 141-0200;
 - c. Retained correspondence with market participants that took place in the course of the Commission’s investigation in FTC File No. 141-0200;
 - d. Transcripts of investigational hearings of employees of Respondent and other persons taken by the Commission in FTC File No. 141-0200;
 - e. One declaration received by the Commission in FTC File No. 141-0200.
6. In addition, Complaint Counsel is in the process of responding to two sets of document requests Respondent served on September 16, 2016 and September 20, 2016.
7. On or before October 18, 2016, Complaint Counsel intends to produce all non-privileged documents responsive to Respondent’s Request for Production dated

September 16, 2016, for documents produced by Walgreens Boots Alliance, Inc. or Johnson & Johnson, Inc. in connection with the investigation of the proposed purchase of Vision Direct by Respondent (FTC File No. 161-0106), specifically: business plans and analysis relevant to Walgreens, and pricing data and analysis relevant to Vistakon and ABB, to the extent such documents were collected or reviewed by the Bureau of Competition or the Bureau of Economics as part of the Commission's investigation in File No. 141-0200.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on October 14, 2016 in Washington, D.C.

/s/ Barbara Blank

Barbara Blank

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2016, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

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Dated: October 14, 2016

By: /s/ Dan Matheson
Attorney

CERTIFICATE FOR ELECTRONIC FILING

I 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 the adjudicator.

October 14, 2016

By: s/ Dan Matheson
Attorney