

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



ORIGINAL

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

DOCKET NO. 9372

**Complaint Counsel's Motion for Interlocutory Appeal of the
Court's December 20, 2016, Order**

Complaint Counsel respectfully moves the Court,

- (a) For an order certifying for interlocutory appeal, pursuant to Rule 3.23(b), the order of the Court dated December 20, 2016, pursuant to Rule 3.31(c)(2), that Complaint Counsel shall produce non-privileged, responsive documents in the possession, custody, or control of the Bureau of Competition and the Bureau of Economics, if any, together with any applicable privilege schedule pursuant to Rule 3.38A, by January 20, 2017, or such other date as may be agreed to by the parties; and
- (b) For an order certifying for interlocutory appeal, pursuant to Rule 3.23(b), the order of the Court dated December 20, 2016, pursuant to Rule 3.36 granting in part Respondent's request for the issuance of a subpoena proposed by Respondent, with the modifications ordered by the Court, to the Office Of Policy Planning and the Bureau of Consumer Protection.

Complaint Counsel also moves the Court for a stay of its December 20, 2016, Order until the Federal Trade Commission issues a final decision on Complaint Counsel's request for interlocutory appeal.

The grounds for this motion are more fully set forth in the attached memorandum.

A proposed order is attached.

Dated: December 23, 2016

Respectfully submitted,

/s/ Daniel J. Matheson

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Background

On December 20, 2016, the Court issued an Order granting Respondent's Renewed Motion for Discovery from the Commission Pursuant to Rule 3.36. In ruling on the motion, the Court held that the discovery directed to the Bureau of Competition ("BC") or the Bureau of Economics ("BE") was governed by Rule 3.31(c)(2), which requires Respondent to show "good cause" to justify any discovery beyond the materials that BC or BE "collected or reviewed" in bringing the lawsuit. The Court also held that the discovery directed to the Bureau of Consumer Protection ("BCP") or the Office of Policy Planning ("OPP") was governed by Rule 3.36 because neither BCP nor OPP was involved in the investigation or litigation. December 20 Order at 3-4.

Separately analyzing each of the six document requests, the Court found that the requests "seek relevant information, are reasonable in scope and stated with reasonable particularity, and as to non-public reports, analyses and studies, cannot be obtained by other means." December 20 Order at 6, 7, 8. Based on these findings, the Court held that, to the extent the requests were directed to BCP or OPP, the requests met these standards under Rule 3.36. And, based on these same factors, the Court also found that Respondent showed good cause for additional discovery from BC and BE under Rule 3.31(c)(2). *Id.*

We respectfully ask the Court to certify its December 20 Order for interlocutory appeal both its ruling under Rule 3.31(c)(2) and its ruling under Rule 3.36, to give the Commission the opportunity to interpret the controlling amendments to the Part 3 Rules that it adopted in 2009. The express purpose of the 2009 Amendments was to "limit the scope of discovery for complaint counsel, respondents, and third parties who receive a discovery request." 74 Fed. Reg. 1804, 1812 (January 12, 2009). As discussed below, there is a substantial ground for difference of

opinion as to whether the Court's Order on both rules expands the scope of discovery beyond what the Commission contemplated when it adopted the 2009 Amendments. As a result, the Order has an impact not only on the present litigation but on future litigation brought by the Commission. We therefore ask that this Court provide the Commission with an opportunity to clarify the intended scope of both Rule 3.31(c)(2) and Rule 3.36.

Argument

I. An Interlocutory Appeal is Appropriate When Subsequent Review will be an Inadequate Remedy

Rule 3.23(b) sets forth the standard for interlocutory appeals:

A party may request the Administrative Law Judge to determine that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy.

16 C.F.R. § 3.23(b).¹ Under this standard, the administrative law judges and the Commission have liberally used interlocutory appeals on discovery and evidentiary issues when subsequent review is an inadequate remedy.

Particularly instructive is *In the Matter of Bristol-Myers Co.*, 1977 FTC LEXIS 25, 90 F.T.C. 455 (1977). In *Bristol-Myers*, the Administrative Law Judge denied a third party's motion for *in camera* treatment of certain documents because the third party failed to show good cause.² Upon certification by the Administrative Law Judge, the Commission accepted the interlocutory appeal of the order "to clarify the standards as to when *in Camera* treatment is

¹ Any decisions under 28 U.S.C. § 1292(b), which provides for interlocutory appeals in federal district court, should be used with caution. Rule 3.23(b) provides for interlocutory appeals when "subsequent review will be an inadequate remedy." That clause is not included in the statute governing interlocutory appeals in federal court.

² Under the version of Rule 3.45(b) then in effect, *in camera* treatment was appropriate only "when good cause is found on the record." 16 C.F.R. § 3.45(b) (1976).

warranted” and to set forth “guidance as to what constitutes ‘good cause’ in terms of § 3.45(b).” 1977 FTC LEXIS 25 at *1, 3.

Other cases similarly have endorsed the use of interlocutory appeals on procedural and evidentiary orders. In *In the Matter of Hoechst Celanese Corp.*, 1990 FTC LEXIS 121 (1990), the Commission accepted an interlocutory appeal to review the Administrative Law Judge’s interpretation of a rule regarding parties’ financial responsibility for discovery costs. Although the Commission found the Administrative Law Judge’s interpretation to be “not unreasonable,” it found interlocutory review to be warranted because the issue “appears to be relatively uncharted territory.” 1990 FTC LEXIS 121, at *2, 3. *See also In the Matter of Exxon Corp.*, 1981 FTC LEXIS 27, at *1, 5-6, 98 F.T.C. 107 (1981) (accepting interlocutory appeal of pre-trial discovery order “[b]ecause of the importance of this issue not only for this matter, but for discovery requests in future cases”); *In the Matter of Bristol-Myers Co.*, 1978 FTC LEXIS 424, at *3 (1978) (Administrative Law Judge certified for interlocutory review decision to hold record open pending other actions at FTC and FDA).

II. The Court Should Certify its Decision Approving the Respondent’s Subpoena Seeking Discovery from the Bureau of Competition and the Bureau of Economics under Rule 3.31(c)(2)

Complaint Counsel respectfully requests that the Court certify for Commission review its order that Complaint Counsel produce non-privileged responsive documents in the possession, custody or control of the Bureaus of Competition and Economics under Rule 3.31(c)(2). The Court concluded in its December 20 ruling that these document requests, as directed toward BC and BE, were appropriate only upon a showing of “good cause” under Rule 3.31(c)(2). Nonetheless, Respondent made no express showing that its requests to BC and BE satisfied the good cause standard of Rule 3.31(c)(2). The Court analyzed these requests under the same

factors it considered under Rule 3.36 in evaluating the requests directed to BCP and OPP. Based on this analysis, the Court concluded that Respondent had also “shown good cause for this additional discovery, to the extent the requests call for information in the possession of BE or BC.” December 20 Opinion at 6; *see id.* at 7, 8.

There is substantial ground for difference of opinion as to whether a showing of good cause under Rule 3.31(c)(2) requires the satisfaction of different or additional factors not specified in Rule 3.36. An interlocutory appeal would provide the Commission with the opportunity to delineate any such factors that should be considered in assessing “good cause,” just as the Commission did in *Bristol-Myers*. In that case, the Commission recognized that, under past precedent, good cause for *in camera* treatment was a demanding standard that was satisfied only if “public disclosure of the documents will result in ‘clearly defined, serious injury.’” 1977 FTC LEXIS, at *1, *citing H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1888 (1961). And, the Commission used the interlocutory appeal to delineate six factors, drawn from the Restatement of Torts, that should be considered – and the special weight that should be given to certain factors – in determining whether the heightened standard of “good cause” exists. 1977 FTC LEXIS 25, at *5.

Given the substantial ground for difference of opinion on the meaning of good cause, the Commission’s guidance as to what constitutes good cause under Rule 3.31(c)(2) is important. Indeed, just as in *Hoechst*, this is “uncharted territory,” 1990 FTC LEXIS 121, at *6, and the Commission’s guidance is warranted. It is the first time that a dispute of this nature has arisen under Rule 3.31(c)(2) since it was amended in 2009. An interlocutory appeal would present the Commission with a concrete opportunity to clarify what “good cause” means under Rule 3.31(c)(2).

This issue is also important because the Court's ruling could generate significant discovery disputes between the complaint counsel and future respondents. *See Exxon*, 1981 FTC LEXIS 27, at *5-6 (interlocutory appeal of pre-trial discovery order warranted "[b]ecause of the importance of this issue not only for this matter, but for discovery requests in future cases. . . .") In particular, future respondents could use the Court's endorsement of Respondent's Request No. 1 (seeking all reports, studies, or analyses of competition in the market for contact lenses) to regularly seek large, tangentially-related productions of documents relating to any relevant industry, even though complaint counsel neither collected nor reviewed the materials in that case. That could place an undue burden on the Commission by opening the door to significant additional discovery, not less – exactly the opposite of the Commission's stated intention in revising the Part 3 rules. An interlocutory appeal to the Commission to clarify the "good cause" standard could thus protect both this Court and the Commission against burdensome, marginal discovery requests unrelated to complaint counsel's prosecution of a specific case.

Finally, an interlocutory appeal would permit the Commission to clarify the proper use of the different standards under Rule 3.31(c)(2) and Rule 3.36 generally. Rule 3.36 – for discovery directed to bureaus and certain other third parties *not* involved in the matter – delineates the requirements necessary to justify the only discovery that will be served on those third parties. On the other hand, Rule 3.31(c)(2) – for discovery directed to bureaus involved in the litigation – governs discovery directed to a party that already has satisfied its initial disclosure requirements and responded to any routine document requests contemplated by Rule 3.31. Under the Court's December 20 decision, these two standards, which govern these very different discovery needs, could be viewed as perilously indistinguishable.

As a result, Complaint Counsel respectfully requests that the Court certify to the Commission the interlocutory review of its December 20 order authorizing the Respondent's discovery to BC and BE pursuant to Rule 3.31(c)(2).

III. The Court Should Certify its Decision Approving the Respondent's Subpoena Seeking Discovery from the Bureau of Consumer Protection and the Office of Policy Planning under Rule 3.36

Complaint Counsel respectfully requests that the Court also certify to the Commission the interlocutory review of its December 20 Order authorizing the Respondent's subpoena to BCP and OPP under Rule 3.36. Rule 3.36 has not been interpreted by the Commission since it was amended in 2009. The 2009 Amendments included changes to Rule 3.36 that required a respondent to seek the approval of the Administrative Law Judge for subpoenas to be issued to "any Bureau or Office not involved in the matter." In promulgating the amendment, the Commission explained that subpoenas under Rule 3.36 would require a "special showing of need," and that the obligation to respond to such discovery requests "should not be imposed without strong justification." 74 Fed. Reg. 1804, 1815 (January 13, 2009).

In ruling on Respondent's proposed subpoena in this case, however, the Court found that "[b]ecause the language of Rule 3.36 is not ambiguous, there is no need to refer to the legislative history" in interpreting the rule. October 28 Order at 4; *see* December 20 Order at 3 n.3. As a result, the Court applied the Rule 3.36 standards in its December 20 Order without requiring Respondent to present any special showing of need or strong justification. The Court then determined that, subject to certain modifications, these subpoena requests seek relevant information, are reasonable in scope and stated with reasonable particularity, and as to non-public reports, analyses and studies, cannot be obtained by other means. December 20 Order at 6, 7, 8.

The Court's Order regarding Rule 3.36 presents substantial ground for difference of opinion. Although the Court found the subpoena requests reasonable, Complaint Counsel believes that "reasonableness" under Rule 3.36 must be interpreted in the context of the purpose of the rule, as set out in its regulatory history. That regulatory history shows that Rule 3.36 was designed to restrict subpoenas to the Commission absent strong justification and a special showing of need. Such an interpretation of Rule 3.36 is also consistent with recent amendments to the Federal Rules of Civil Procedure, which allow courts to restrict relevant discovery based on whether it is "proportional to the needs of the case, considering the importance of the issues at stake in the action, . . . the importance of the discovery in resolving the issues," and other factors. *See* Fed. R. Civ. P. 26(b)(1). Providing an opportunity for the Commission to provide guidance on the interpretation of Rule 3.36 is therefore appropriate and important.

Given the substantial ground for differences of opinion on the interpretation of Rule 3.36, and the importance of that interpretation to the scope and availability of such discovery in future cases, interlocutory appeal on the December 20 Order's ruling on discovery from OPP and BCP under Rule 3.36 is warranted.

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court certify its December 20 Order for interlocutory appeal to the Commission pursuant to Rule 3.23.

Dated: December 23, 2016

Respectfully submitted,

/s/ Daniel J. Matheson

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Certificate to Resolve Issues

Complaint Counsel certifies that, in a telephone conversation on December 23, 2016, Complaint Counsel conferred with Respondent's Counsel in a good faith effort to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement.

/s/ Daniel J. Matheson
Daniel J. Matheson

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

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1-800 CONTACTS, INC.,)	
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Respondent.)	
_____)	

**[Proposed] Order Certifying December 20 2016, Order of the Court
for Interlocutory Appeal Pursuant to Rule 3.23(b)**

Upon motion of Complaint Counsel dated December 23, 2016, and in consideration of the memoranda in support and in opposition thereto, it is hereby

ORDERED, that pursuant to Rule 3.23(b),

- (a) The Court has examined its Order dated December 20, 2016, that Complaint Counsel, pursuant to Rule 3.31(c)(2), shall produce non-privileged, responsive documents in the possession, custody, or control of the Bureau of Competition and the Bureau of Economics, if any, together with any applicable privilege schedule pursuant to Rule 3.38A, by January 20, 2017, or such other date as may be agreed to by the parties, and based on that examination,
- (b) The Court has determined that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy, and

- (c) The Court has determined that this portion of the Court's Order dated December 20, 2016, should be subject to interlocutory appeal pursuant to the Federal Trade Commission;

And it is further,

ORDERED, that pursuant to Rule 3.23(b),

- (a) The Court has examined its Order dated December 20, 2016, pursuant to Rule 3.36 granting in part Respondent's request for the issuance of a subpoena proposed by Respondent, with the modifications ordered by the Court, to the Office Of Policy Planning and the Bureau of Consumer Protection, Competition, Bureau of Competition, and based on that examination,
- (b) The Court has determined that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy, and
- (c) The Court has determined that this portion of the Court's Order dated December 20, 2016, should be subject to interlocutory appeal pursuant to the Federal Trade Commission.

And it is further,

ORDERED, that the Court's Order dated December 20, 2016, is stayed until 30 days after the Federal Trade Commission issues a final decision in this interlocutory appeal.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated: _____

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2016, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
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I also certify that I delivered via electronic mail a copy of the foregoing documents to:

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Dated: December 23, 2016

By: /s/ Daniel J. 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.

December 23, 2016

By: /s/ Daniel J. Matheson
Attorney

Notice of Electronic Service

I hereby certify that on December 23, 2016, I filed an electronic copy of the foregoing Complaint Counsel's Motion for Interlocutory Appeal of the Court's December 20, 2016, Order, with:

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I hereby certify that on December 23, 2016, I served via E-Service an electronic copy of the foregoing Complaint Counsel's Motion for Interlocutory Appeal of the Court's December 20, 2016, Order, upon:

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