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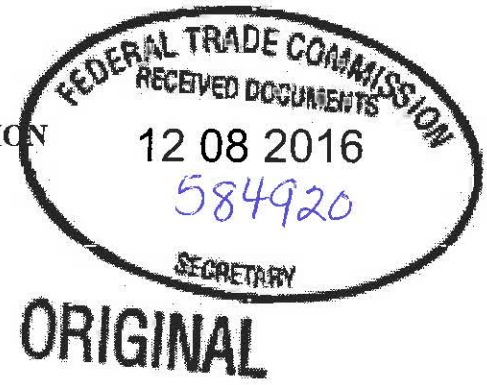

ORIGINAL

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

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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S RENEWED MOTION FOR DISCOVERY FROM THE COMMISSION PURSUANT TO RULE 3.36

Respondent has renewed its effort to serve several document requests on the Federal Trade Commission, trying to correct the defects in the first subpoena that the Court identified in its Order dated October 28, 2016 ("Order"). Respondent neither sets forth the appropriate standard for many of its requests nor meets the standards that do apply under Rule 3.31 and Rule 3.36. Therefore, Respondent's motion should be denied.

BACKGROUND

On October 3, 2016, Respondent first sought leave to serve a subpoena *duces tecum* on the Commission. As distilled by the Court, the nine requests sought two broad categories of documents: (i) documents relating to reports, studies or analyses of competition in the market for contact lenses and the effects of paid search advertising; and (ii) the documents upon which these reports were based. Order at 2. The Court found that the requested "reports, studies, and analyses" were relevant but that Respondent had not shown the relevance of documents on which these reports were based. Order at 5. Further, the Court found that the requests were not reasonable in scope, and were not stated with reasonable particularity, because Respondent had

not limited the requests "only to discrete and identifiable studies, reports, and analyses." Order at 6. On November 28, 2016, Respondent filed a "renewed" motion with a revised set of requests, in an attempt to cure these defects. However, the revised set of requests suffers the same type of defects.

ARGUMENT

I. Respondent Cannot Show Good Cause for Additional Discovery from the Bureau of Competition or the Bureau of Economics. (Requests 1, 4, 5, and 6, and, in part, Requests 2 and 3)

Requests 1, 4, 5, and 6, and, in part, Requests 2 and 3 seek documents from the Bureau of Competition ("BC") and the Bureau of Economics ("BE"). Rule 3.31(c)(2) governs discovery directed toward either BC or BE, the two bureaus responsible for this investigation and litigation. Rule 3.31(c)(2) requires Complaint Counsel to search for responsive materials in the custody of BC and BE that were "collected or reviewed" in the investigation or litigation. Complaint Counsel has done that. Rule 3.31(c)(2) precludes any additional discovery from BC or BE unless Respondent can show "good cause."

Rule 3.31(c)(2) also provides that the Court may authorize other discovery pursuant to Rule 3.36, which Respondent invokes here. But Rule 3.36 applies only to discovery directed to any Bureau or Office "*not* involved in the matter." Thus, Rule 3.36 does not apply to additional discovery from BC or BE. Instead, under Rule 3.31(c)(2), Respondent can justify any additional discovery from BC or BE only on a showing of "good cause."

The "good cause" standard under Rule 3.31(c)(2) is exacting.[1] Thus, "[t]he mere hope that some of the material might be useful does not constitute good cause." *In re Kroger Co.*,

[1] We have not identified any ruling in which the Court has interpreted this "good cause" standard. In *In re LabMD, Inc.*, 2014 FTC LEXIS 35 (Feb. 21, 2014), this Court applied another provision of Rule 3.31(c)(2), which also

1977 FTC LEXIS 55, at *4 (Oct. 27, 1977); *see also In re Sperry & Hutchinson Co.*, 69 F.T.C. 1112, 1113-14 (Apr. 15, 1966). Respondent does nothing to demonstrate that it meets the "good cause" standard. Indeed, Respondent does not even discuss it.

Instead, Respondent's discovery is a fishing expedition. Respondent attempts to justify one request to BE, for example, as an attempt to determine "whether the Commission's own staff economists have analyzed the issues in this case and arrived at conclusions that support Respondent's defense." Respondent's Brief at 4-5. And, Respondent attempts to justify its other requests to BE and BC on the ground that the additional information might be relevant to this case. But, "[s]imply because the Commission has collected documents that may be relevant does not entitle respondents to them." *In re Schering-Plough*, 2001 FTC LEXIS 199, at *8 (Sept. 7, 2001) (citing *Sperry & Hutchinson Co.*, 69 F.T.C. at 1114); *see also Schering-Plough*, 2001 FTC LEXIS 199, at *12-13 (limiting discovery to materials that (1) complaint counsel had reviewed in prosecuting its case or intended to use at trial, and (2) any testifying expert had reviewed); *In re AndroGel Antitrust Litig. (No. II)*, 2015 WL 2193777, at *4 (N.D. Ga. May 11, 2015) (denying motion to compel information underlying studies that provided only "general background information" and did not speak to "the specific facts of this case"); *FTC v. Cephalon*, No. 08-2141 (E.D. Pa. Feb. 28, 2011) (Exhibit A) (denying motion to compel production of FTC documents that Commission had no intention to introduce into evidence).

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requires "good cause" to compel production of communications between complaint counsel and its consulting expert.

The *LabMD* Court did order the production of certain documents by the Commission. Paragraph 16 of the *LabMD* complaint had specific allegations about the Commission's pronouncements regarding the challenged conduct, and complaint counsel had already produced 9,600 responsive documents of the Commission. The Court merely ordered complaint counsel to complete that production. In this case, the complaint does not refer to any actions or documents of the Commission, the Office of Policy Planning, or the Bureau of Consumer Protection.

In the absence of a showing of good cause, Respondent has not provided a basis for approval of Requests 1, 4, 5, and 6 (and portions of requests 2 and 3) seeking additional discovery from either BC or BE.

II. Respondent Has Not Shown a Need for Discovery from BCP or OPP (Requests 2-6).

A. Respondent Is Entitled to Discovery from BCP or OPP Only Upon Meeting the Requirements of Rule 3.36.

Neither the Bureau of Consumer Protection ("BCP") nor the Office of Policy Planning ("OPP") were involved in the investigation or this litigation. For such bureaus or offices, Rule 3.31(c)(2) cross-references Rule 3.36, which governs subpoenas directed to "any Bureau or Office *not* involved in the matter." Rule 3.36 establishes exacting standards for such discovery.

As the Court explained in its Order, a respondent must meet the four criteria listed in Rule 3.36(b) to justify a subpoena *duces tecum*: The requested material must be "relevant" and "reasonable in scope"; Respondent must show that "the materials cannot reasonably be obtained by other means"; and the subpoena must meet the requirements of Rule 3.37 (including the requirement that the request for materials be specified "with reasonable particularity"). 16 C.F.R. § 3.36(b); *see* Order at 3-4. Respondent's requests to BCP and OPP do not meet these criteria.

B. Request 2 Does Not Meet the Requirements of Rule 3.36.[2]

In Request 2, Respondent would seek production of:

> All reports, studies, or analyses of Paid Search Advertising's effect on consumers, including the potential for consumer confusion, deception, or false advertising in such advertising.

As the Court explained in its Order, requests are not reasonable if the requests "are not . . . limited only to discrete and identifiable studies, reports and analyses." Order at 6. A request for "all reports, studies, or analyses" is far from a discrete and identifiable set of documents. To the extent Respondent is seeking final, published reports, studies, or analyses, they are available on the FTC website, and Respondent clearly has access to those. To the extent Respondent seeks non-public documents, however – in particular, any internal studies or analyses – the requests are neither reasonable in scope nor stated with reasonable particularity. For example, complying with such a request would require a review of individual FTC employees' emails to determine whether they contain responsive materials. Rule 3.36 does not provide for such discovery.

This conclusion is supported by *In re Intel Corp.*, 2010 FTC LEXIS 56 (June 9, 2010), which the Court cited in its Order. The *Intel* respondent intended to introduce into evidence the producer price index for microprocessors, as calculated by the Bureau of Labor Statistics. *Id.* at *4. Intel was permitted to subpoena a BLS employee for a two-hour deposition for questioning on six discrete issues regarding the calculation of the index. The discrete and particularized discovery sought in *Intel* differs dramatically from Respondent's open-ended request for "all reports, studies, and analyses" about broadly defined topics. Therefore, Respondent's motion to

[2] These arguments are also applicable to Request 1, if the Court evaluates discovery directed to BC under Rule 3.36 rather than the "good cause" standard of Rule 3.31(c)(2).

serve Request 2 on the Commission should be denied because, just like Respondent's first subpoena, "[t]he limited scope, duration, and burden imposed on a single individual in *Intel* bears no resemblance to the discovery sought here." Order at 7.[3]

C. Request 3 Seeks Old Documents That Are Not "Reasonably Relevant."

Request 3 seeks all data relating to decade-old documents, a 2005 Commission Report and a 2006 BE Working Paper.[4] In its Order, the Court questioned whether ten-year old documents are "reasonably relevant," as Rule 3.36(b)(2) requires. This concern is more serious than the dates of these documents suggest: the February 2005 report uses data from 2002, and the 2006 report uses data from 2004.[5] Thus, the request for these materials is inconsistent with Respondent's representation that "the revised subpoena calls only for documents created on or after January 1, 2006." Respondent's Brief at 2.

Respondent argues that these old materials are relevant because, although they are more than a decade old, they address issues substantively similar to the issues in this 2016 litigation. Respondent's Brief at 5 n.3. However, Respondent does not answer the Court's concern that ten-year old reports are not reasonably relevant to this litigation because of their age, even if the data relate to the same market or activity at issue in this case. *See In re AndroGel Antitrust Litig. (No.*

[3] This analysis also applies to Request 1, if the Court decides it should be evaluated under Rule 3.36.

[4] Because the materials relating to the 2006 document are in the possession of BE, Respondent's request for these materials should be evaluated under the good cause standard of Rule 3.31(c)(2).

[5] FED. TRADE COMM'N, THE STRENGTH OF COMPETITION IN THE SALE OF RX CONTACT LENSES (2005) at 12 n.36, 22 n.68, *reproduced at* https://www.ftc.gov/sites/default/files/documents/reports/strength-competition-sale-rx-contact-lenses-ftc-study/050214contactlensrpt.pdf; FED. TRADE COMM'N, PRICES AND PRICE DISPERSIONS IN ONLINE AND OFFLINE MARKETS FOR CONTACT LENSES, WORKING PAPER NO. 283 (2006) at 8, *reproduced at* https://www.ftc.gov/sites/default/files/documents/reports/prices-and-price-dispersion-online-and-offline-markets-contact-lenses/wp283revised_0.pdf.

II), 2015 WL 2193777, at *4 (denying motion to compel production of "general background information" about the industry).

An examination of the reports simply compounds concerns about the material's relevance. The 2005 Report is based primarily on advocacy pieces submitted by the industry. This includes comments of Respondent itself that have never been tested by cross-examination. And, the 2006 BE working paper "do[es] not purport to represent the views of the Federal Trade Commission . . . ."[6] Therefore, even apart from their age, these particular documents have such limited evidentiary value that they are not reasonably relevant.

D. Requests 4-6 Seek the Production of Documents that Are Not Subject to Rule 3.36, Are Irrelevant, or Are Privileged.

Requests 4-6 seek blanket discovery about three policy pronouncements of the Commission, including a January 13, 2011 FTC Staff Comment to the North Carolina State Board of Opticians (Request 4); a 2015 Enforcement Policy Statement on Deceptively Formatted Advertisements (Request 5); and a June 24, 2013 policy letter from an Associate Director of BCP (Request 6). None of these materials were collected or reviewed in the course of the investigation. Respondent has ready access to the public version of these documents. To the extent Respondent seeks production of the internal working papers of the bureaus underlying the policy statements, the Court should not approve these requests. *Cf. Schering-Plough*, 2001 FTC LEXIS 199, at *12 (Sept. 7, 2001) (materials from other investigations not subject to discovery unless complaint counsel or testifying expert reviewed the materials in prosecuting its case or forming an opinion).

[6] *Id.* We also are concerned that if articles independently published by FTC personnel are automatically subject to discovery, it will deter the Commission's public education and institutional research efforts.

First, the January 13, 2011 letter was prepared by BE and BC, as well as OPP, and therefore the request should be evaluated under the good cause standard of Rule 3.31(c)(2). Respondent does not explain why there is good cause for the production of these underlying documents.

Second, Respondent's suggestion of the relevance of materials is based on conjecture:

- The January 13, 2011 FTC letter "*could*" be used to refute the Commission's contentions . . .
- With respect to the 2015 Policy Statement, "[o]ne *assumes* that the Commission conducted surveys, focus groups or other consumer research . . . ."
- "Any" consumer research underlying the June 24, 2013 letter – if any exists – is "clearly relevant."

Respondent's Brief at 6, 7. None of these requests meets the exacting Rule 3.36 standards the Court set forth in *Intel.*

Third, the requests themselves do not meet the "reasonable particularity" requirement of Rule 3.36. Unlike the subpoena that the Court approved in *Intel*, Requests 4 and 5 seek "*all* data, studies, and information," regarding certain topics, rather than seeking discrete discovery. And Request 6 seeks "*[a]ll documents*, data, information, or studies . . ." a type of request the Court expressly rejected in its Order.

Finally, these requests target privileged materials that are not subject to discovery. All these materials were prepared in connection with opinions, recommendations, or advice about agency decisions. *See, e.g., Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975); *see also Cofield v. City of LaGrange*, 913 F. Supp. 608, 616 (D.D.C. 1996) (pendency of litigation is not a prerequisite for the deliberative process privilege). And, to the

extent that either BC or BCP attorneys prepared materials to give legal advice in conjunction with the Commission's actions – or BE provided materials to BC or BCP to assist the attorneys in giving the legal advice – a subpoena for these materials likely will generate a claim of privilege for virtually all the materials.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court deny Respondent's renewed motion for issuance of a Rule 3.36 Subpoena.[7]

Dated: December 8, 2016

Respectfully submitted,

/s/ Daniel J. Matheson
Daniel J. Matheson

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2075
Facsimile: (202) 326-3496
Electronic Mail: dmatheson@ftc.gov

Counsel Supporting the Complaint

[7] The Commission reserves the right to raise specific objections to these requests, including any claims of privilege, should the Court grant any part of Respondent's motion.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL TRADE COMMISSION	:	CIVIL ACTION
	:	
v.	:	
	:	
CEPHALON	:	No. 08-2141

ORDER

AND NOW, this 28th day of February, 2011, having considered Defendant Cephalon's Motion to Compel Documents From Plaintiff Federal Trade Commission ("FTC") (Doc. 84), Plaintiff FTC's Response (Doc. 96), and Generic Defendants' Response (Doc. 90); the Notice of Direct Purchaser Plaintiffs' Position (Doc. 122); Third Party Pharmaceutical Companies' Motion to Intervene (Doc. 87) and Defendant Cephalon's Response (Doc. 123); and Third Party Pharmaceutical Companies' Motion for Protective Order (Doc. 88), Defendant Cephalon's Response (Doc. 124), the Companies' Reply (Doc. 139), and the FTC's Reply (Doc. 140), is it hereby ORDERED that:

1. Defendant's Motion to Compel (Doc. 84) is DENIED.[1] It is further ORDERED that Plaintiff FTC is not precluded from citing the publicly-available studies at issue: *Generic Drug Entry Prior to Patent Expiration: An FTC Study* or *Pay for Delay: How Drug Company Pay-Offs Cost Consumers Billions.*

[1] The Court finds the parties' written submissions sufficient to render a decision regarding Defendant Cephalon's Motion to Compel. Therefore, the Court declines to hold oral argument, which was tentatively scheduled for March 4, 2011.

The FTC has stipulated that it "[h]as no intention to offer the two studies into evidence," (Doc. 96 at 2), and that it has not provided its experts with any of the supporting documentation underlying the studies, with the exception of the Provigil agreements at issue in the present case (Doc. 96 at 12). The FTC has also agreed to disclose all materials considered by the FTC's testifying experts in accordance with the discovery schedule. (Doc. 96 at 12.)

The results of the studies listed above are accessible to the public; both parties have the ability to access and reference these publications for use in Court briefings at their discretion. And the Court finds no reason to doubt that the FTC will fully comply with Federal Rule of Civil Procedure 26(a)(2)(B)(ii), requiring disclosure of the facts or data considered by any expert witness in forming his or her opinions. Therefore, the Court will not order the disclosure of documents underlying the above studies at this time.

2. Third Party Pharmaceutical Companies' Motion to Intervene (Doc. 87) is GRANTED. Defendant Cephalon has expressed in its response that it does not oppose intervention by the movant Third Party Companies for the purpose of seeking a protective order for confidential information. (Doc. 123 at 1.) Accordingly, the Court will grant the Motion to Intervene for said purpose.

3. Third Party Pharmaceutical Companies' Motion for Protective Order (Doc. 88) is DENIED as moot, in light of the denial of Defendant's Motion to Compel.

BY THE COURT:

/s/ L. Felipe Restrepo
L. Felipe Restrepo
United States Magistrate Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2016, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
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
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

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

Gregory P. Stone
Steven M. Perry
Garth T. Vincent
Stuart N. Senator
Gregory M. Sergi
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
gregory.stone@mto.com
steven.perry@mto.com
garth.vincent@mto.com
stuart.senator@mto.com
gregory.sergi@mto.com

Justin P. Raphael
Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
justin.raphael@mto.com

Sean Gates
Charis Lex P.C.
16 N. Marengo Ave.
Suite 300
Pasadena, CA 91101
sgates@charislex.com

Counsel for Respondent 1-800 Contacts, Inc.

Dated: December 8, 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 8, 2016

By: /s/ Daniel J. Matheson
Attorney