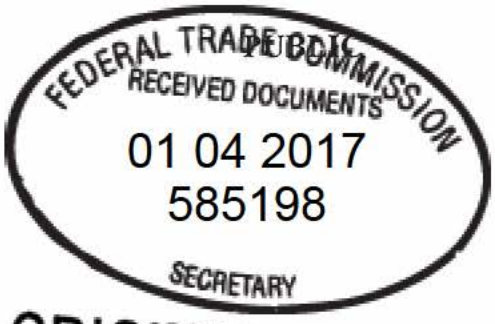
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



ORIGINAL

In the Matter of	)	
1-800 Contacts, Inc., a corporation,	)	DOCKET NO. 9372
Respondent.	)	

ORDER DENYING REQUEST FOR INTERLOCUTORY APPEAL

I.

On December 23, 2016, Federal Trade Commission ("FTC") Complaint Counsel filed a Request for Interlocutory Appeal of the Court's December 20, 2016 Order ("Request"). Respondent 1-800 Contacts, Inc. ("Respondent") failed to file a timely answer.[1] As set forth below, the Request is DENIED.

II.

On December 20, 2016, an order was issued granting in part Respondent's Renewed Motion for Discovery from the Commission Pursuant to Rule 3.36 ("December 20 Order").[2] The December 20 Order allowed discovery of non-privileged (1) non-public reports and studies of the FTC[3] regarding competition in the contact lens industry and the effects of paid search advertising on consumers; and (2) factual data underlying certain, specifically identified public statements of FTC officials regarding contact lens pricing and the effects of paid search advertising on consumers.

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[1] Pursuant to FTC Rule 3.23(b), which sets forth that an answer to a request for interlocutory appeal may be filed within 3 days after the request for determination is filed, Respondent's answer was due by December 29, 2016. Respondent served its answer on December 30, 2016. Accordingly, Respondent's answer has not been considered.

[2] Respondent's previous Motion for Discovery from the Commission pursuant to Rule 3.36 was denied without prejudice by Order issued October 28, 2016 ("October 28 Order"). That ruling determined, among other things, that Respondent's proposed subpoena was overbroad in a number of respects and allowed Respondent to file a renewed motion for issuance of a narrower subpoena. A review of the October 28 Order is not part of Complaint Counsel's Request.

[3] Respondent's Proposed Subpoena limited the required search for responsive documents to files maintained by four offices: 1) the Office of Policy Planning ("OPP"); 2) the Division of Advertising Practices and Division of Marketing Practices of the Bureau of Consumer Protection ("BCP"); 3) the Office of Policy & Coordination, Health Care Division and Anticompetitive Practices Division of the Bureau of Competition ("BC"); and 4) the Office of Applied Research, Antitrust Division I, Antitrust Division II, and Consumer Protection Division of the Bureau of Economics ("BE"). December 20 Order at 2. The Proposed Subpoena specifically excluded the Commission's investigative files or the litigation files of any FTC staff attorney and further excluded from its scope "draft reports, studies or analyses or e-mail correspondence between Commission employees involved in the preparation of reports, studies or analyses." December 20 Order at 2. The abbreviations "BCP," "BC," and "BE," as used in this Order shall refer to these specified offices within each of these Bureaus.

The December 20 Order determined that the allowed discovery was relevant within the meaning of Rule 3.31(c)(1); reasonable in scope; requested with reasonable particularity; and not reasonably obtainable by other means. These findings were further held to constitute "good cause" for "additional discovery" beyond that required of Complaint Counsel pursuant to Rule 3.31(c)(2), of non-privileged, responsive documents in the possession, custody, or control of the Bureau of Competition ("BC") and/or the Bureau of Economics ("BE"). *See* 16 C.F.R. 3.31(c)(2) ("Complaint counsel need only search for 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, including the Bureau of Economics. The Administrative Law Judge may authorize for good cause additional discovery of materials in the possession, custody, or control of those Bureaus or Offices . . .").

The determinations in the December 20 Order that the allowed discovery was relevant within the meaning of Rule 3.31(c)(1), reasonable in scope, requested with reasonable particularity, and not reasonably obtainable by other means, were also held to satisfy the requirements for authorizing a subpoena pursuant to Rule 3.36 for non-privileged, responsive documents in the custody or control of the Bureau of Consumer Protection ("BCP") and the Office of Policy Planning ("OPP"), which were not involved in the matter. 16 C.F.R. § 3.36(b)(1)-(3),(5); § 3.31(c)(2) (notwithstanding limitations on discovery in Rule 3.31(c)(2), ALJ may "authorize other discovery pursuant to §3.36").

Accordingly, based on an application of the provisions of Rule 3.31 and Rule 3.36 to the record presented, the December 20 Order: (1) directed Complaint Counsel to produce non-privileged, responsive documents in the possession, custody or control of BC and BE, 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 (2) authorized Respondent to request the Secretary to issue a subpoena for documents from OPP and BCP, as modified by the December 20 Order. *See* 16 C.F.R. § 3.36(c).

III.

Complaint Counsel's request for interlocutory appeal is based upon Rule 3.23(b), which provides in pertinent part:

> (b) Other 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). *See* 74 Fed. Reg. 1804, 1810 (Interim final rules with request for comment) (Jan. 13, 2009) (noting that "applications for interlocutory review [under Rule 3.23(b)] are allowed *only on a determination* 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'" (emphasis added)). When a request under Rule 3.23(b) is denied by the ALJ, interlocutory appeal is not permitted. *See In re N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 185, at **4 (Feb. 9, 2011) (denying motion for interlocutory appeal where ALJ denied request under Rule 3.23(b), noting that Commission Rule 3.23(b) permits "interlocutory appeals to the Commission from ALJ rulings on such motions but only when (1) the ALJ *fails to rule* on an application to take an interlocutory appeal or (2) the ALJ *grants* the application to take an interlocutory appeal") (emphasis in original).

Interlocutory appeals are disfavored, as intrusions on the orderly and expeditious conduct of the adjudicative process. *In re Bristol-Myers Co.*, 1977 FTC LEXIS 83, at *1 (Oct. 7, 1977); *In re N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 33, at *2 (March 1, 2011). Interlocutory appeals of discovery rulings are particularly disfavored. *In re Gillette Co.*, 1981 FTC LEXIS 2, at *1 (Dec. 1, 1981). "The Commission believes that routine review of such rulings would substantially delay adjudicative proceedings." *Gillette,* 1981 FTC LEXIS 2, at *1.

Accordingly, pursuant to Rule 3.23(b), the movant must satisfy a very stringent three prong test by demonstrating that: (1) the ruling involves a controlling question of law or policy; (2) there is substantial ground for difference of opinion as to that controlling issue; *and* (3) immediate appeal from the ruling may materially advance the ultimate termination of the litigation + subsequent review will be an inadequate remedy. 16 C.F.R. § 3.23(b); *In re N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 33, at *2.

Whether or not Complaint Counsel has met each of the foregoing requirements of Rule 3.23(b) is addressed below.

IV.

Complaint Counsel asserts that the question presented by the December 20 Order is "whether the Court's Order on both rules [3.31(c)(2) and 3.36] expands the scope of discovery beyond what the Commission contemplated when it adopted" amendments to these rules in 2009. Request at 3. In 2009, when the Commission amended its Rules of Practice for Adjudicative Proceedings, it added the discovery limitations of Rule 3.31(c)(2), set forth above, and revised Rule 3.36 to allow for applications for subpoenas for records of the Commission. 74 Fed. Reg. 1804 (Interim final rules with request for comment) (Jan. 13, 2009) (herein, "the 2009 Amendments").

Complaint Counsel asserts that the express purpose of these amendments was to limit discovery. With the 2009 Amendments, Rule 3.31(c)(2) limited Complaint Counsel's discovery obligations, but also authorized the ALJ to order further discovery from the Commission, beyond the limited obligations of Complaint Counsel. First, "[t]he Administrative Law Judge may authorize for good cause additional discovery of materials in the possession, custody, or control of" "Bureaus or Offices of the Commission" that investigated the matter. 16 C.F.R. § 3.31(c)(2). Second, the ALJ may "authorize other discovery pursuant to §3.36," 16 C.F.R. § 3.31(c)(2), which the Commission also amended in 2009 to allow discovery of documents in the custody or control of the Commissioners or any Bureau or Office "not involved in the matter." 16 C.F.R. § 3.36. *See also* 74 Fed. Reg. at 1812. The December 20 Order is consistent with this framework.

In response to criticism of the limitations contained in proposed Rule 3.31(c)(2), the Commission explained that the materials that would be excluded by the proposed rule "are frequently duplicative and almost always protected by the deliberative process or attorney-client privileges or as work product. In the rare event that material excluded by the proposed rule is not duplicative, privileged or work product, *it should not be difficult for respondent to satisfy a good cause standard or the requirements of Rule 3.36.*" 74 Fed. Reg. at 1812 (emphasis added). The December 20 Order expressly excluded privileged material, and held that Respondent had both demonstrated good cause and met the requirements of Rule 3.36 for the discovery allowed by the Order.

A.

The first prong of the three prong test set forth in Rule 3.23(b) requires a movant to show that the ruling for which review is sought involves a controlling question of law or policy. Interpreting 26 U.S.C. § 1292(b), upon which Rule 3.23(b) is modeled, it has been held that the phrase:

> "question of law" . . . [refers] to a "pure" question of law rather than merely to an issue that might be free from a factual contest. The idea was that if a case turned on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so without having to wait till the end of the case.

In re N.C. Bd. of Dental Examiners, 2011 FTC LEXIS 32, at *7 (Feb. 7, 2011) (quoting *Ahrenholz v. University of Illinois*, 219 F.3d 674, 677 (7th Cir. 2000)). A question of law "is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases." *In re N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 32, at *10 (citations omitted).

Procedural disputes and discovery disputes do not amount to controlling questions of law. *In re N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 32, at *7; *In re Suburban Propane Gas Corp.*, 1968 FTC LEXIS 277, at *9 (Sept. 20, 1968) (denying request for interlocutory review concerning prehearing discovery because appeals concerning "issues relating to procedural details . . . concern prehearing discovery or procedure and thus are subject to the wide discretion of the [Administrative Law Judge]"). "[R]esolution of discovery issues, as a general matter, should be left to the discretion of the ALJ." *Gillette,* 1981 FTC LEXIS 2, at *1-2; *see also In re Bristol-Myers Co.*, 1977 FTC LEXIS 83, at *1 ("Interlocutory appeals from discovery rulings merit a particularly skeptical reception, because [they are] particularly suited for resolution by the Administrative Law Judge on the scene and particularly conducive to repetitive delay."); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, at *17-18 (Oct. 17, 2000).

In *Hoechst Marion Roussel*, 2000 FTC LEXIS 155, at *19, it was held that a denial of a motion to quash did not present a controlling question of law, noting that the subpoena allowed narrowly limited discovery of non-privileged information relevant to the respondent's defenses. In addition, in *North Carolina Board of Dental Examiners*, 2011 FTC LEXIS 33, at *6, it was held that the denial of a motion to require Complaint Counsel to disclose certain information was a procedural ruling regarding respondent's entitlement to the requested information under the Rules, and as such, was "clearly not determinative of the case" and did not "present a controlling question of law or policy." In the instant case, the December 20 Order was a discovery ruling, which determined, based on the language of the Rules as applied to the facts presented, that Respondent was entitled to the narrowly limited requested discovery. This does not present a controlling question of law or policy.

Accordingly, Complaint Counsel has failed to meet its burden of proving the first prong of the three prong test under Rule 3.23(b).

B.

In order to establish that there is substantial ground for difference of opinion as to a controlling question of law, it must be demonstrated that the controlling legal question "involves novel or unsettled authority." *In re N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 33, at *8-9. "[O]ne method for demonstrating a substantial ground for difference of opinion is 'by adducing conflicting and contradictory opinions of courts which have ruled on the issue.'" *Fed'l Election Comm'n v. Club for Growth, Inc.*, 2006

U.S. Dist. LEXIS 73933 (D.D.C. Oct. 10, 2006) (citations omitted). It has also been held that establishing a substantial ground for difference of opinion requires a showing of a probability of success on the merits of the appeal. *In re Daniel Chapter One*, 2009 FTC LEXIS 111, at *6 (May 5, 2009); *In re BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, at *3 (Nov. 20, 1979).

(1)

Regarding the ruling in the December 20 Order that good cause existed under Rule 3.31(c)(2) to allow certain limited discovery of materials that may be in the custody or control of BC and BE, Complaint Counsel contends that "[t]he Court analyzed [the request for discovery] under the same factors it considered under Rule 3.36" and that there is substantial ground for difference of opinion as to meaning of "good cause," including "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." Request at 4-5.

The December 20 Order based the finding of good cause on proof that the requested discovery was relevant, was not available through other means, and as modified, was reasonable in scope and stated with reasonable particularity. Complaint Counsel does not cite to any case interpreting the good cause standard in Rule 3.31(c)(2), much less cite to any case or other authority holding that proof of the foregoing factors is insufficient to establish good cause under Rule 3.31(c)(2). Rather, Complaint Counsel contends that there is no authority interpreting the good cause standard under Rule 3.31(c)(2), and that the Commission's guidance and clarification is therefore necessary. Moreover, Complaint Counsel does not articulate what additional or different factors should have been considered, does not contend that the ultimate determination of good cause was erroneous, and does not assert that an interlocutory appeal is likely to succeed in obtaining a reversal of the determination of good cause.

For all the foregoing reasons, Complaint Counsel has failed to demonstrate that the ruling in the December 20 Order that there was good cause under Rule 3.31(c)(2) for production of limited documents in the possession from BC and BE presents a controlling question as to which there is substantial ground for difference of opinion.

(2)

Complaint Counsel argues that the ruling in the December 20 Order authorizing a subpoena to BCP and OPP pursuant to Rule 3.36 presents substantial ground for difference of opinion because the Commission intended such subpoenas to issue only upon a "special showing of need" and a "strong justification."

As noted above, Rule 3.36 was expanded by the 2009 Amendments to authorize subpoenas to the offices of the Commissioners, and Bureaus and Offices "not involved in the matter." 74 Fed. Reg. at 1812. The Commission described the revised Rule 3.36 as imposing on movants "a special showing of need" and stated that the burden of responding to a subpoena should not be imposed without "a strong justification." 74 Fed Reg. at 1815. However, in amending Rule 3.36 to allow discovery from the Commission, the Commission left unchanged the requirements that the movant show not only relevance, but also reasonable scope, reasonable particularity, and that the material cannot reasonably be obtained by other means. 16 C.F.R. § 3.36(b)(1)-(3), (5). Such legislative history does not support Complaint Counsel's implication that the Commission intended to require proof of something more than that which is set forth in the language of the Rule. Moreover, as held in the October 28 Order, the requirement that the movant prove relevance, reasonable scope, reasonable particularity, and that the material cannot reasonably be obtained by other

means, as required for issuance of a subpoena under Rule 3.36, is consistent with a "special showing of need." October 28 Order at 4.

Furthermore, Complaint Counsel does not cite to any case interpreting the requirements of Rule 3.36 differently than the December 20 Order, or otherwise adopting Complaint Counsel's position as to the requirements of Rule 3.36. Complaint Counsel's argument is that the Commission has not addressed the issue, and therefore Commission's guidance is appropriate. This argument fails to demonstrate a substantial ground for difference of opinion as to whether or not the December 20 Order correctly applied the provisions of Rule 3.36.

For all the foregoing reasons, Complaint Counsel has failed to demonstrate that the ruling authorizing a subpoena pursuant to Rule 3.36 for limited documents in the possession of BCP and OPP presents a controlling question as to which there is substantial ground for difference of opinion.

C.

Complaint Counsel does not contend that an interlocutory appeal of the December 20 Order will materially advance the ultimate termination of the parties' litigation. Indeed, such a construction of Rule 3.23(b) with respect to a discovery ruling could render immediately appealable every ruling "as to the relevance and propriety of any areas of discovery allowed by an administrative law judge. 'This would negate the general policy that rulings on discovery, absent an abuse of discretion, are not appealable to the Commission.'" *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 155, at *20. *Accord In re N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 33, at *12.

Complaint Counsel argues that interlocutory appeals are appropriate where subsequent review will be inadequate. However, Complaint Counsel fails to show how subsequent review of the December 20 Order will be inadequate. To successfully demonstrate that subsequent review will be an inadequate remedy, the movant cannot rely on conclusory assertions but must provide supporting facts or legal authority. Bare assertions in this regard are "insufficient to override the policy disfavoring interlocutory appeals." *In re Daniel Chapter One*, 2009 FTC LEXIS 111, at *11-12.

Complaint Counsel does not describe any harm or prejudice that may result from the December 20 Order. Although Complaint Counsel warns generally of the potential for discovery disputes with litigants in future cases and argues it is important for the Commission to clarify its standards for allowing discovery under Rule 3.31(c)(2) and 3.36, Complaint Counsel does not explain why these matters cannot properly be addressed in the context of subsequent review. Complaint Counsel implies that subsequent review of the December 20 Order is an inadequate remedy because of the alleged burden in searching for and/or providing the discovery authorized by the December 20 Order. However, Complaint Counsel has failed to demonstrate what burden, if any, is imposed by the December 20 Order, or that such burden outweighs the usefulness of the discovery that the December 20 Order authorized. *See In re N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 33, at *13 (unsupported assertions of hardship held insufficient under third prong of Rule 3.23(b)). Moreover, the discovery authorized by the December 20 Order is appropriately limited in its scope, thereby minimizing burden.[4]

Complaint Counsel points to Commission decisions on interlocutory appeals regarding discovery or other procedural matters as support for the proposition that subsequent review of such matters is

[4] Any assertion of undue burden arising in connection with responding to the authorized subpoena would be more appropriately raised in a motion to quash pursuant to Rule 3.34.

inadequate. These cases are not persuasive, however, because they are not analogous to the instant case legally or factually. They are not analogous legally because the opinions do not address whether or not subsequent review of the order at issue in those cases was an inadequate remedy pursuant to Rule 3.23(b), which is the issue here. *See In re Bristol-Myers Co.*, 1977 FTC LEXIS 25 (Nov. 11, 1977); *In re Hoechst Celanese Corp.*, 1990 FTC LEXIS 121, at *1 (May 14, 1990); *In re Exxon Corp.*, 1981 FTC LEXIS 27, at *1 (Aug. 6, 1981). The foregoing decisions, which address the merits of the underlying orders, do not address the 3.23(b) factors. In addition, the orders at issue in these cases are readily distinguishable from the limited, non-privileged, document discovery authorized in the instant case. *See In re Bristol-Myers Co.*, 1977 FTC LEXIS 25, at *8 (granting application for review of ALJ order requiring disclosure of documents which respondent claimed contained sensitive competitive information, disclosure of which would cause serious injury); *In re Hoechst Celanese Corp.*, 1990 FTC LEXIS 121, at *1 (granting application for review of ALJ order requiring respondents to provide English language translations of foreign language documents produced under subpoena); *In re Exxon Corp.*, 1981 FTC LEXIS 27, at *5 (granting application for review of ALJ order which raised "issues that go beyond the proper exercise of an ALJ's discretion in ruling upon discovery requests" and "present[ed] the questions of whether Section 6(b) should be available as a discovery device in adjudicatory proceedings and, if so, how the exercise of Section 6(b) authority should be used").[5]

Complaint Counsel also cites *In re Bristol-Myers Co.*, 1978 FTC LEXIS 424 (1978), in which the ALJ denied the respondent's motion to hold the evidentiary record open pending resolution of certain adjudicative and regulatory actions affecting the substance of the case. The ALJ further held that an interlocutory appeal of the ruling should be allowed pursuant to Rule 3.23(b), reasoning only that the motion raised "important policy questions for the Commission." *Id.* at *3. This rationale fails to apply any of the factors in the three prong test set forth in 3.23(b), and does not support the conclusion that subsequent review of the December 20 Order would be an inadequate remedy in the instant case.

For all the foregoing reasons, Complaint Counsel has failed to demonstrate that subsequent review would be an inadequate remedy. However, even if subsequent review were deemed an inadequate remedy, Complaint Counsel's Request must be denied because of failure to satisfy the first two prongs of the test required by Rule 3.23(b). *See In re N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 32, at *19.

V.

Complaint Counsel has failed to meet the requirements of Rule 3.23(b). Based upon full consideration of Complaint Counsel's Request, and all arguments and contentions therein, Complaint Counsel's Request for Interlocutory Appeal is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: January 4, 2017

[5] "Section 6(b) [of the FTC Act] orders to file special reports are not expressly included among the discovery devices described in the Commission's rules governing adjudicatory matters." *In re Exxon Corp.*, 1981 FTC LEXIS 27, at *8. By contrast, the discovery devices of Rule 3.31(c)(2) and Rule 3.36 are expressly within the ALJ's discretion.

Notice of Electronic Service

I hereby certify that on January 04, 2017, I filed an electronic copy of the foregoing Order Denying Request for Interlocutory Appeal , with:

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I hereby certify that on January 04, 2017, I served via E-Service an electronic copy of the foregoing Order Denying Request for Interlocutory Appeal , upon:

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