

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



In the Matter of

1-800 Contacts, Inc.  
a corporation

Docket No. 9372

**RESPONDENT 1-800 CONTACTS' MOTION FOR LEAVE TO FILE A  
REPLY BRIEF IN SUPPORT OF MOTION FOR DISCOVERY FROM THE  
COMMISSION PURSUANT TO RULE 3.36**

Pursuant to Rule 3.22 of the Rules of Practice for Adjudicative Proceedings, Respondent 1-800 Contacts, Inc. respectfully moves for leave to file the attached four-page proposed reply brief in support of its Motion for Discovery From the Commission Pursuant to Rule 3.36. In support of its motion for leave, Respondent states as follows:

1. In its opposition to Respondent's Motion, Complaint Counsel advances a number of arguments "that could not have been raised earlier" in Respondent's "principal brief," 16 C.F.R. § 3.22(d), because Complaint Counsel did not raise these objections to the proposed subpoena during the parties' meet-and-confer on September 20, 2016 pursuant to Paragraph 4 of the Scheduling Order in this matter. Specifically, Complaint Counsel did not call attention to its positions that the proposed subpoena (1) is burdensome, (2) seeks confidential information or (3) requests a large volume of supposedly privileged material. Suppl. Raphael Decl. ¶ 4. In fact, when Respondent's counsel asked whether Respondent could make any changes to its proposed subpoena so that Complaint Counsel would not oppose the Motion, Complaint Counsel declined to suggest any narrowing of the proposed discovery. Suppl. Raphael Decl. ¶ 3.

2. Accordingly, at the time of its Motion, Respondent was not in a position to address many of the arguments that Complaint Counsel has advanced in its opposition to the Motion. Respondent therefore respectfully requests leave to file a reply briefly addressing the arguments and sworn statements that Complaint Counsel raised for the first time in its opposition.

3. Respondent also seeks leave to file a reply to address Complaint Counsel's argument that a party that seeks the issuance of a Rule 3.36 subpoena must demonstrate a "special showing of need." Opp. at 1, 2. Because that standard does not appear in Rule 3.36 and is inconsistent with the language that is in Rule 3.36, 1-800 Contacts had no reason or opportunity to address (or to rebut the existence of) such a standard. The attached proposed reply brief addresses that issue.

For these reasons, as set forth in the proposed reply brief, 1-800 Contacts respectfully requests leave to file its reply brief pursuant to Rule 3.22(d).

DATED: October 18, 2016

Respectfully submitted,

/s/ Justin P. Raphael

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***Counsel for 1-800 Contacts, Inc.***

**CERTIFICATE OF SERVICE**

I hereby certify that on October 18, 2016, I filed the foregoing document using the FTC's E-Filing System, which will send notification of such filing to all counsel of record as well as the following:

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

DATED: October 18, 2016

By: /s/ Justin P. Raphael  
Justin P. Raphael

**CERTIFICATE FOR ELECTRONIC FILING**

I hereby 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.

DATED: October 18, 2016

By: /s/ Justin P. Raphael  
Justin P. Raphael

Notice of Electronic Service

I hereby certify that on October 18, 2016, I filed an electronic copy of the foregoing Respondent's Motion for Leave to File a Reply in Support of Motion for Discovery From the Commission Pursuant to Rule 3.36, Supplemental Declaration of Justin P. Raphael, [Proposed] Order Granting Respondent's Motion for Leave to File a Reply in Support of Motion for Discovery From the Commission Pursuant to Rule 3.36, Respondent's Reply in Support of Motion for Discovery From the Commission Pursuant to Rule 3.36.pdf, with:

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
Suite 110  
Washington, DC, 20580

Donald Clark  
600 Pennsylvania Ave., NW  
Suite 172  
Washington, DC, 20580

I hereby certify that on October 18, 2016, I served via E-Service an electronic copy of the foregoing Respondent's Motion for Leave to File a Reply in Support of Motion for Discovery From the Commission Pursuant to Rule 3.36, Supplemental Declaration of Justin P. Raphael, [Proposed] Order Granting Respondent's Motion for Leave to File a Reply in Support of Motion for Discovery From the Commission Pursuant to Rule 3.36, Respondent's Reply in Support of Motion for Discovery From the Commission Pursuant to Rule 3.36.pdf, upon:

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

**In the Matter of  
  
1-800 CONTACTS, INC.,  
a corporation**

**PUBLIC**

**Docket No. 9372**

**SUPPLEMENTAL DECLARATION OF JUSTIN P. RAPHAEL  
IN SUPPORT OF RESPONDENT'S MOTION FOR LEAVE TO FILE A  
REPLY BRIEF IN SUPPORT OF MOTION FOR DISCOVERY FROM THE  
COMMISSION PURSUANT TO RULE 3.36**

I, Justin P. Raphael, declare as follows:

1. I am an attorney at the law firm of Munger, Tolles & Olson LLP, counsel for Respondent 1-800 Contacts, Inc. in this matter. I am duly licensed to practice law before the courts of the State of California and have appeared in the action pursuant to Rule 4.1 of the Commission's Rules of Practice. I previously submitted a Declaration in Support of Respondent's Motion for Discovery From the Commission Pursuant to Rule 3.36 in this matter on October 3, 2016.

2. I submit this Supplemental Declaration in Support of Respondent's Motion for Leave to File a Reply in Support of 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. On September 20, 2016, I participated in a telephone conference with Complaint Counsel Daniel Matheson and Kathleen Clair. During this telephone conference, I asked Complaint Counsel whether 1-800 Contacts could make any changes to its proposed subpoena so that Complaint Counsel would not oppose the Motion. Complaint Counsel declined to offer any suggestions to narrow the proposed discovery.

4. During the September 20, 2106 telephone conference, Complaint Counsel did not raise objections that the proposed subpoena was burdensome, sought confidential information or requested a large volume of supposedly privileged material.

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

Executed on October 18, 2016, in San Francisco, California.

/s/Justin P. Raphael  
Justin P. Raphael

**CERTIFICATE OF SERVICE**

I hereby certify that on October 18, 2016, I filed the foregoing document using the FTC's E-Filing System, which will send notification of such filing to all counsel of record as well as the following:

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The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-110  
Washington, DC 20580

DATED: October 18, 2016

By: /s/ Justin P. Raphael  
Justin P. Raphael

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DATED: October 18, 2016

By: /s/ Justin P. Raphael  
Justin P. Raphael

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In the Matter of

1-800 CONTACTS, INC.,  
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PUBLIC

Docket No. 9372

[PROPOSED] ORDER GRANTING  
RESPONDENT'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF  
MOTION FOR DISCOVERY FROM THE COMMISSION PURSUANT TO  
RULE 3.36

Upon consideration of Respondent's Motion for Leave to File a Reply in  
Support of Motion for Discovery from the Commission Pursuant to Rule 3.36:

IT IS HEREBY ORDERED that Respondent's Motion is GRANTED.

IT IS FURTHER ORDERED that Respondent 1-800 Contacts, Inc. is  
authorized to file its Reply in Support of Motion for Discovery from the Commission  
Pursuant to Rule 3.36 and accompanying papers.

ORDERED:

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D. Michael Chappell  
Chief Administrative Law Judge

DATED:

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DATED: October 18, 2016

By: /s/ Justin P. Raphael  
Justin P. Raphael

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DATED: October 18, 2016

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Justin P. Raphael

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**In the Matter of**

**1-800 CONTACTS, INC.,  
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**Docket No. 9372**

**RESPONDENT'S REPLY IN SUPPORT OF MOTION FOR DISCOVERY FROM THE  
COMMISSION PURSUANT TO RULE 3.36**

Complaint Counsel do not dispute the relevance of studies and reports related to competition in the contact lens industry or the effects of paid search advertising's effects on consumers. Nor do Complaint Counsel deny that the Commission has created studies or reports on those issues in addition to those it has released to the public. Complaint Counsel nevertheless oppose discovery on these core issues, claiming that Respondent has not shown some "special need" and that responding to the subpoena would be too burdensome. But Complaint Counsel's purported "special need" requirement misstates the law. And Complaint Counsel have failed to substantiate their claims that the requested materials are voluminous, confidential or privileged, which they raised for the first time in their opposition. Suppl. Raphael Decl. ¶ 4. Complaint Counsel have no basis to characterize the requested materials because they have sworn that they have not reviewed them.

**I. RULE 3.36 DOES NOT REQUIRE A SHOWING OF A SPECIAL NEED**

Complaint Counsel are incorrect that Rule 3.36 required Respondent to demonstrate a "special need" for the proposed discovery. Opp. at 1-2, 4-6. Rule 3.36 says nothing about a "special showing of need" or "special need." Complaint Counsel cite no case law authority requiring such a heightened showing to obtain a Rule 3.36 subpoena and Respondent is not aware of any. The phrase "special showing of need" does appear in the Notice of Proposed Rulemaking amending Rule 3.36. *See* 74 Fed. Reg. 1804, 1815 (Jan. 13, 2009). But nothing in that Notice or any other authority shows that a "special showing of need" is the governing standard. The Notice's reference to a "special showing of need" merely connotes that Rule 3.36 imposes a more stringent standard for discovery from the Commission than Rule 3.31's general discovery standard. The operative heightened requirements are contained in the text of the Rule: the discovery must be (1) "reasonable in scope," (2) "reasonably expected to yield relevant information; (3) "cannot reasonably be obtained by other means; and (4) specified

“with reasonable particularity.” 16 C.F.R. § 3.36(b). As explained in Respondent’s Motion and below, the proposed subpoena meets these standards.

**II. COMPLAINT COUNSEL’S BURDEN ARGUMENTS LACK ANY BASIS**

Unable to dispute the relevance of the discovery called for by the proposed subpoena, Complaint Counsel argue that responding to the subpoena would be burdensome. Complaint Counsel, however, fail to substantiate this speculative argument, which they raised for the first time in their Opposition.

*First*, resorting to the familiar refrain of a “fishing expedition,” Complaint Counsel argue that the proposed discovery would be “burdensome” because it “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 an “unspecified and potentially vast body” of documents. Opp. at 7. This argument does not address at all Respondent’s request for documents relied upon in creating discrete reports and studies that Respondent has specifically identified. Moreover, Complaint Counsel are no position to complain about the burden of reviewing documents that they claim never to have tried to review. Blank Decl. ¶ 3. As such, the only salience of a “vast array” of reports and studies on issues central to this case would be that Complaint Counsel failed to consult an abundance of relevant material under their own roof before seeking authority to file this case.

Further, during the parties’ meet-and-confer on September 20, Respondent’s counsel asked Complaint Counsel whether Respondent could make any changes to its proposed subpoena so that Complaint Counsel would not oppose the Motion. Suppl. Raphael Decl. ¶ 3. Complaint Counsel expressly declined to offer any suggestions to narrow the proposed discovery. *Id.* Having declined to engage in “narrowing or negotiations” that “could lead to a less onerous result,” Opp. at 8, Complaint Counsel should not now complain about the proposed

subpoena's supposed burden. At any rate, according to Complaint Counsel's own authority, the remedy for an overbroad request (which this is not) would be to deny the motion without prejudice and with leave to renew the motion as to a narrower subpoena. *See In Re Associated Merch. Corp.*, 72 F.T.C. 1030, 1967 WL 94071, at \*2 (1967).<sup>1</sup>

*Second*, Complaint Counsel suggest that the subpoena would require the Commission to produce confidential information provided by third parties. Opp. at 5. Complaint Counsel, however, do not identify any document, type of document or category of documents responsive to the subpoena containing confidential information. Of course, that is hardly surprising given Complaint Counsel's testimony that "Complaint Counsel has not reviewed or relied upon ... the materials sought by Respondent." Blank Decl. ¶ 3. Complaint Counsel cannot assert that documents it has never read contain confidential material, and tellingly, Ms. Blank does not aver as much. If it turns out that some documents called for by the subpoena contain confidential material, the solution is to redact that material or withhold a subset of documents. But the Commission cannot avoid discovery of any documents because some of them contain confidential material. As to Complaint Counsel's concern—raised for the first time in its opposition—about "[a]llowing Respondent unrestricted access to the files of other investigations," Opp. at 5, Respondent agrees to forgo any discovery from investigative files.

*Third*, Complaint Counsel argue that "Respondent's request is particularly onerous because it will require the review of an enormous quantity of privileged documents." Opp. at 8. Again, however, Complaint Counsel cannot claim privilege over documents it claims never to have read and fails to substantiate its privilege claim. Complaint Counsel do not explain

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<sup>1</sup> The subpoena here is addressed to reports or studies on particular subjects of the kind that the Commission already has disclosed to the public and is very different from the request for "all books, records and documents obtained from the suppl[i]ers," sought in that case, *id.* at \*2.



why or how a large proportion of documents regarding economic or consumer studies would involve attorney-client communications.

Nor do Complaint Counsel explain how such studies would “reveal the mental processes of decisionmakers,” *Moye, O’Brien, O’Rourke, Hogan, & Pickert v. Nat’l R.R. Passenger Corp.*, 376 F.3d 1270, 1278 (11th Cir. 2004), as required to qualify for the deliberative process privilege. These studies have been released by the Commission as objective evaluations of market data. “Purely factual material that does not reflect deliberative processes is not protected.” *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). In any event, Complaint Counsel could redact any non-factual material covered by the privilege. *In re Polypropylene Carpet Antitrust Litig.*, 181 F.R.D. 680, 695 (N.D. Ga. 1998) (rejecting claim that deliberative process privilege shielded documents where “minor redactions to many of the documents could eliminate” any material related to policymaking opinions); *see also Stolt-Nielsen Transp. Grp. Ltd. v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008); *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970) (same).

And, Respondent agrees to forgo discovery from investigative files, mooted any supposed need for “reviewing an enormous number of documents from prior case files to determine whether privileges apply.” Opp. at 8.

### **III. CONCLUSION**

Respondent’s Motion for Discovery From the Commission Pursuant to Rule 3.36 should be granted.

DATED: October 18, 2016

Respectfully submitted,

/s/ Justin P. Raphael

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*Counsel for 1-800 Contacts, Inc.*

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