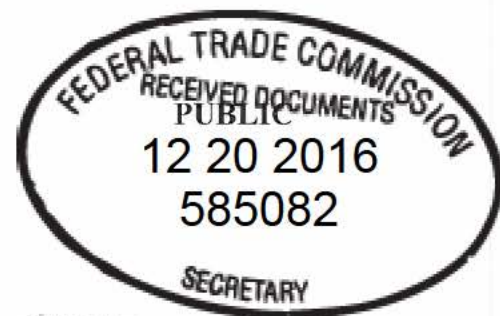


UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



ORIGINAL

\_\_\_\_\_  
In the Matter of )  
 )  
1-800 Contacts, Inc., )  
a corporation, )  
 )  
Respondent. )  
\_\_\_\_\_

DOCKET NO. 9372

**ORDER ON RESPONDENT'S RENEWED MOTION FOR DISCOVERY  
FROM THE COMMISSION PURSUANT TO RULE 3.36**

**I.**

On November 28, 2016, Respondent 1-800 Contacts, Inc. ("Respondent") filed a Renewed Motion for Discovery from the Commission Pursuant to Rule 3.36 ("Motion").<sup>1</sup> On December 8, 2016, Federal Trade Commission ("FTC") Complaint Counsel filed an opposition to the Motion ("Opposition"). Respondent's Motion is GRANTED IN PART, as explained below.

**II.**

Respondent's Motion seeks issuance of a subpoena to the FTC requiring the production of the following:

1. All reports, studies or analyses of competition in the market for contact lenses.
2. 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.
3. The contact lens pricing and availability data relied upon in *Prices and Price Dispersion in Online and Offline Markets for Contact Lenses*, WORKING PAPER NO. 283 (Original Version: April 2006 Revised: November 2006) and the Commission's 2005 report on *Strength of Competition in the Sale of Rx Contact Lenses*.

<sup>1</sup> Respondent's October 3, 2016 Motion for Issuance of a Subpoena Under Rule 3.36 ("October 3 Motion") was denied without prejudice by Order dated October 28, 2016 ("October 28 Order").

4. All data, studies, and information relied upon to support the statement in footnote 35 of the *FTC Staff Comment Before the North Carolina State Board of Opticians Concerning Proposed Regulations for Optical Goods and Optical Goods Businesses* (Jan. 13, 2011; V110002) that “[t]here [wa]s no indication that” the Commission’s 2005 findings about pricing and availability of contact lenses “ha[d] changed in the intervening years.”
5. All data, surveys, studies, and information relied upon to support the statements in the Commission’s 2015 Enforcement Policy Statement on Deceptively Formatted Advertisements that “consumers ordinarily would expect a search engine to return results based on relevance to a search query, as determined by impartial criteria, not based on payment from a third party” and that “[k]nowing when search results are included or ranked higher based on payment and not on impartial criteria likely would influence consumers’ decisions with regard to a search engine and the results it delivers.”
6. All documents, data, information, or studies relied upon to support the statements in the June 24, 2013 letters from Associate Director Mary K. Engle to Search Engines that Commission Staff had “observed a decline in compliance with the [2002 Search Engine Letter’s] guidance” and that “the features traditional search engines use to differentiate advertising from natural search results have become less noticeable to consumers.”

Motion Exhibit A (“Proposed Subpoena”).

The Proposed Subpoena limits 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”).<sup>2</sup> *Id.*, Instruction 2. The Proposed Subpoena specifically excludes the Commission’s investigative files or the litigation files of any FTC staff attorney and further excludes from its scope “draft reports, studies or analyses or e-mail correspondence between Commission employees involved in the preparation of reports, studies or analyses.” *Id.*, Instruction 3-4.

### III.

Respondent files its Motion under the authority of FTC Rule 3.36. As discussed in detail below, obtaining a subpoena pursuant to Rule 3.36 requires a showing that the material sought is relevant; reasonable in scope; requested with particularity; and cannot reasonably be obtained by other means. 16 C.F.R. § 3.36(a), (b).

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<sup>2</sup> The abbreviations “BCP,” “BC,” and “BE,” as used in this Order shall refer to these specified offices within each of these Bureaus.

Complaint Counsel contends that Rule 3.36 does not govern requests in Respondent's Proposed Subpoena that call for production by the Bureau of Competition and the Bureau of Economics, which are the two bureaus responsible for the investigation and litigation of this matter. Complaint Counsel argues that Rule 3.36 governs "[a]n application for issuance of a subpoena for the production of documents . . . in the possession, custody, or control of . . . any Bureau or Office *not involved in the matter* . . . ." 16 C.F.R. § 3.36(a) (emphasis added). Because the Bureau of Competition and the Bureau of Economics are or have been involved in this matter, Complaint Counsel argues that issuance of the Proposed Subpoena, insofar as it effects these Bureaus, requires Respondent to demonstrate "good cause." Complaint Counsel cites Rule 3.31(c)(2), which provides in pertinent part:

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, or authorize other discovery pursuant to §3.36.*

16 C.F.R. § 3.31(c)(2) (emphasis added).

Respondent's previous motion, titled "Motion for Discovery from the Commission Pursuant to Rule 3.36," sought documents from "the Commission" generally. The October 28 Order held, among other things, that by seeking documents from the "Commission," as it was broadly defined by Respondent, Respondent's document requests were not reasonable in scope. In the instant Motion, Respondent seeks documents from four specific Bureaus or Offices.

Two of the offices, within the Office of Policy Planning and the Bureau of Consumer Protection, according to Complaint Counsel, were not "involved in the investigation or litigation" of this matter. Opposition at 4. Accordingly, Rule 3.36 governs Respondent's application for issuance of a subpoena for the production of documents from these offices. 16 C.F.R. § 3.36(a). Under Rule 3.36, Respondent must make a showing that: (1) the material sought is reasonable in scope; (2) the material falls within the limits of discovery under § 3.31(c)(1) ("reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent"); (3) the material sought cannot reasonably be obtained by other means; and (4) the subpoena meets the requirements of § 3.37 (including, among other requirements, that the document requests specify the requested material "with reasonable particularity"). 16 C.F.R. § 3.36(b).<sup>3</sup>

The other two offices, within the Bureau of Competition and the Bureau of Economics, were, according to Complaint Counsel, "responsible for this investigation and litigation."

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<sup>3</sup> In opposition to Respondent's October 3 Motion, Complaint Counsel cited to 74 Fed. Reg. 1804, 1815 (Jan. 13, 2009) to argue that Rule 3.36 required a "special showing of need." The October 28 Order held that "by requiring a motion that must show not only relevance, but also reasonable scope, reasonable particularity, and that the material cannot reasonably be obtained by other means, the language of Rule 3.36 is consistent with the notion of a 'special showing of need.'" 16 C.F.R. § 3.36(b)." October 28 Order at 4.

Opposition at 2. Accordingly, Rule 3.31(c)(2) governs Respondent's request for documents from these offices. 16 C.F.R. § 3.31(c)(2). Under Rule 3.31(c)(2), the Administrative Law Judge may authorize additional discovery of materials in the possession, custody, or control of those Bureaus or Offices that investigated the matter upon a showing of "good cause." 16 C.F.R. § 3.31(c)(2).<sup>4</sup>

Complaint Counsel contends that Respondent has failed to establish good cause because, according to Complaint Counsel, the Proposed Subpoena represents a "fishing expedition" and it is not enough to demonstrate that requested documents "may be relevant." Opposition at 3, citing *In re Schering-Plough*, 2001 FTC LEXIS 199, at \*8 (Sept. 7, 2001). However, as more fully discussed below, Respondent has demonstrated more than potential relevance; it has demonstrated actual relevance of the materials sought by the Proposed Subpoena. In addition, with the modifications directed by this Order, explained below, Respondent's requested discovery is reasonable in scope and stated with reasonable particularity. Furthermore, as to non-public documents, Respondent has established the requested materials are not obtainable through other means. Based on the record presented, this demonstration also supports a finding of good cause for additional discovery from the Bureau of Competition and the Bureau of Economics.

#### IV.

##### **A. Reports, Studies and Analyses of Competition and the Effects of Paid Search Advertising on Consumers (Requests 1 and 2)**

In the October 28 Order, it was held that "reports, studies, and analyses of competition in the market for contact lenses are relevant" and that "reports, studies, and analyses of paid search advertising's effect on consumers, including the potential of such advertising to cause confusion, deception, and dilution, are relevant." October 28 Order at 5. Specifically, such reports, studies or analyses are relevant to the allegations of the Complaint that (1) Respondent's alleged Bidding Agreements regarding paid search advertising harmed competition in an alleged market for the retail sale of contact lenses, (Complaint ¶¶ 29, 31); and (2) Respondent's alleged Bidding Agreements impaired the quality of the service provided to consumers by search engine companies, prevented retailers from providing non-confusing information about their products and prices, and increased consumers' search costs relating to the online purchase of contact lenses (Complaint ¶¶ 31(d), (g), (h)). See October 28 Order at 5.

Requests 1 and 2 are patterned specifically after the language of the October 28 Order. Complaint Counsel does not deny that Requests 1 and 2 seek relevant information. Accordingly, Respondent has demonstrated that the materials sought by Requests 1 and 2 are relevant.

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<sup>4</sup> The legislative history confirms that the 3.31(c)(2) good cause standard applies to the Bureaus or Offices of the Commission that investigated the matter, whereas the 3.36 standard applies to Bureaus and Offices not involved in the matter. 73 Fed. Reg. 58832, 58834, 58837-39 (Proposed Rules) (October 7, 2008). See also 74 Fed. Reg. 1804, 1812 (Interim final rules with request for comment) (Jan. 13, 2009) ("In the rare event that material excluded by the proposed rule [3.31(c)(2)] 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.").



With regard to the scope of Requests 1 and 2 and whether they are stated with reasonable particularity, Respondent argues that Complaint Counsel cannot reasonably claim to lack guidance on what would constitute responsive documents. Respondent asserts that the Commission's public documents confirm that the Commission has studied competitive conditions in the market for contact lenses and the effects of paid search advertising on consumers. Furthermore, Respondent points to the provisions of the Proposed Subpoena, summarized above, that limit the required search to offices and divisions which, Respondent argues, are likely to have produced the requested reports, studies and analyses.

Complaint Counsel's Opposition does not address the above arguments of Respondent. Complaint Counsel contends that the October 28 Order dictates that, to be deemed reasonable, Respondent's requests must set forth discrete and identifiable studies, reports, and analyses. Complaint Counsel's interpretation of the October 28 Order is incorrect. The Order rejected Respondent's argument that its requests for "[a]ll Documents" "[r]elating to reports, papers, working papers, studies or analyses relating to" the contact lens industry or paid search advertising sought "discrete and identifiable" studies. The breadth of those requests contributed, along with other factors, to the determination that Respondent had failed to meet its burden of demonstrating that its document requests were reasonable in scope and stated with sufficient particularity. In contrast to Respondent's prior 3.36 subpoena request, however, Requests 1 and 2 do not seek "[a]ll Documents" "[r]elating to" reports, studies or analyses "relating to" the contact lens industry or paid search advertising. In addition, Requests 1 and 2 omit the references to "papers" and "working papers."

Complaint Counsel also argues that Requests 1 and 2,<sup>5</sup> to the extent they seek non-public documents, such as internal studies or analyses, are unreasonable because complying with the requests would require, "[f]or example, . . . a review of individual FTC employees' emails for responsive materials." Opposition at 5. This assertion, to the extent it may be correct, is not sufficient to warrant the conclusion that Requests 1 and 2 should be rejected as unreasonable in scope or for failure to be stated with reasonable particularity.

In addition, Complaint Counsel's reliance on *In re Intel Corp.*, 2010 FTC LEXIS 56 (June 9, 2010) is misplaced. The decision in *Intel* held that the respondent met its burden of proving reasonable scope for purposes of a Rule 3.36 deposition subpoena, noting that the requested deposition was limited to two hours or less, and the inquiry was limited to six narrow topics. *Intel*, 2010 FTC LEXIS 56, at \*8. The decision in *Intel* was based on an evaluation of the particular discovery sought, and does not purport to set an outer limit, as a matter of law, as to what constitutes reasonable scope or reasonable particularity. Whether a proposed subpoena meets the requirements of reasonable scope or reasonable particularity is a fact-based inquiry, to be resolved on a case-by-case basis.

Regarding whether the materials sought by Requests 1 and 2 can be obtained through other means, the October 28 Order held that Respondent had demonstrated that "non-public reports, analyses, and studies" could not be obtained by other means. In this Motion, Respondent has failed to demonstrate that it cannot obtain public reports, analyses, and studies from through other means, such as the FTC website.

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<sup>5</sup> See Opposition at 6 n.5.

In conclusion, Respondent has demonstrated that Requests 1 and 2 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. In addition, Respondent has shown good cause for this additional discovery, to the extent the requests call for information in the possession of BE or BC. Accordingly, Respondent's Motion is GRANTED as to these Requests, as modified to exclude publicly available materials.

## **B. Data and Information Relied Upon to Support Certain Public Statements (Requests 3-6)**

In summary, Requests 3-6 of the Proposed Subpoena seek data and other information relied upon for certain public statements of the FTC regarding the market for contact lenses and the effect of paid search advertising on consumers. The specific requests are addressed below.

### **1. Support for FTC statements regarding contact lens sales and pricing (Requests 3 and 4)**

Request 3 pertains to a 2005 public<sup>6</sup> report entitled *The Strength of Competition in the Sale of Rx Contact Lenses* (the "2005 Report"), and a related Working Paper from 2006 ("Working Paper").<sup>7</sup> Respondent states that according to the 2005 Report, FTC staff collected price data on 10 different contact lenses from 20 online and 14 offline retailers and concluded that "contact lenses are on average \$15.48 less expensive online than offline." Request 3 seeks the contact lens pricing and availability data relied upon for those reports.

Request 4 pertains to a January 2011 statement in an FTC staff comment to the North Carolina State Board of Opticians that "[t]here is no indication" that the conclusion in the 2005 report regarding the cost of lenses online "has changed in the intervening years." (the "Staff Comment").<sup>8</sup>

Respondent argues that the data underlying the foregoing conclusions regarding contact lens pricing could be used to refute the Complaint's allegations that Respondent harmed competition in the alleged market for contact lenses, including through increased contact lens prices. *See* Complaint ¶¶ 29, 31(i). Respondent further argues that the staff's analysis of sales and prices across retail channels demonstrates that the relevant market is the broad retail market for contact lenses and that online retailers account for only a small fraction, which is relevant to allegations that the parties to the Bidding Agreements have market power. In addition, Respondent argues that the FTC's use for the 2005 Report of the generic search phrase "contact lenses" supports Respondent's position that most consumers would use such phrase to search for

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<sup>6</sup> Available at : <https://www.ftc.gov/sites/default/files/documents/reports/strength-competition-sale-rx-contact-lenses-ftc-study/050214contactlensrpt.pdf>

<sup>7</sup> Available at: [https://www.ftc.gov/sites/default/files/documents/reports/prices-and-price-dispersion-online-and-offline-markets-contact-lenses/wp283revised\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/reports/prices-and-price-dispersion-online-and-offline-markets-contact-lenses/wp283revised_0.pdf)

<sup>8</sup> *See* [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-comment-north-carolina-state-board-opticians-concerning-proposed-regulations-optical-goods/1101ncopticiansletter.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-north-carolina-state-board-opticians-concerning-proposed-regulations-optical-goods/1101ncopticiansletter.pdf) at 5 n.35.

contact lenses, rather than the trademarked name, “1-800 Contacts,” and therefore the challenged Bidding Agreements have little effect in the market.

Arguing against relevance, Complaint Counsel asserts that the 2005 Report uses data from 2002, and the Working Paper uses data from 2004, noting that the October 28 Order questioned whether ten-year-old documents are reasonably relevant. However, the FTC stated in the Staff Comment that “[t]here is no indication” that the conclusion in the 2005 report “ha[d] changed in the intervening years,” which indicates that the data has maintained validity, at least through the date of the Staff Comment. Complaint Counsel further argues that the 2005 Report and the Working Paper are “based primarily on advocacy pieces submitted by the industry,” including by Respondent, that have not been tested by cross-examination, and therefore have “such limited evidentiary value” that they should not be deemed reasonably relevant. The standard for discoverability is not the ultimate weight that the evidence may receive, but whether the requested discovery is reasonably calculated to lead to evidence that is admissible. 16 C.F.R. § 3.31(c)(1). Regarding the relevance of Request 4 for information underlying the Staff Comment, Complaint Counsel states that the letter was prepared in part by BE and BC, as well as OPP, and argues that “Respondent doesn’t explain why there is good cause” to provide the data. In addition, Complaint Counsel charges that Respondent’s assertions of relevance are conjectural or conclusory, which is insufficient under Rule 3.36.

Based on the foregoing, Requests 3 and 4 seek information that is reasonably expected to yield information relevant to the allegations of the Complaint and/or Respondent’s defenses thereto, and are therefore relevant for purposes of discovery.

It also appears from the nature of the data sought through Requests 3 and 4 that the materials sought are not available through other means, and there is no contention to the contrary. With respect to reasonable scope and particularity, Request 3 seeks only the “data” supporting the identified reports of the FTC. This is reasonable in scope and requested with reasonable particularity. Request 4, in contrast, seeks all “data, studies, and information” relied upon for the statement in the identified Staff Comment. In requesting all information, as well as data and studies, Request 4 is not reasonably tailored to encompass only factual information, but could encompass opinions or deliberative materials that may not be discoverable. Rule 3.31(c)(4). Accordingly, Request 4 shall be modified to request only data and studies.

In conclusion, Respondent has demonstrated that Requests 3 and 4 are relevant, reasonable in scope, stated with reasonable particularity, and seek information that is not available through other means, except that Request 4 will be narrowed as set forth above. In addition, Respondent has shown good cause for this discovery, as modified, to the extent the Requests call for information in the possession of BC or BE. Accordingly, Respondent’s Motion is GRANTED as to these Requests, as modified herein.

## **2. Support for FTC statements regarding consumer search behavior and confusion (Requests 5 and 6)**

Request 5 seeks information supporting FTC statements in the 2015 Enforcement Policy Statement on Deceptively Formatted Advertisements that: “consumers ordinarily would expect a search engine to return results based on relevance to a search query, as determined by impartial

criteria, not based on payment from a third party”; and “[k]nowing when search results are included or ranked higher based on payment and not on impartial criteria likely would influence consumers’ decisions with regard to a search engine and the results it delivers.” Request 6 seeks information supporting statements in a June 24, 2013 letter authored by Associate Director Mary K. Engle stating that FTC staff had “observed a decline in compliance with a [2002 letter’s] guidance” and that “the features traditional search engines use to differentiate advertising from natural search results have become less noticeable to consumers.”

The above statements refer to consumer expectations and the effects of paid search advertising on consumers, including with regard to consumer confusion. Respondent contends these issues are relevant, pointing to the Commission’s allegations in Paragraph 31 of the Complaint that the challenged Bidding Agreements impaired the quality of the service provided to consumers by search engine companies; prevented retailers from providing non-confusing information about products and prices; and increased consumers’ search costs relating to the online purchase of contact lenses. Complaint ¶¶ 31(d),(g),(h). The requests for consumer surveys, focus groups or similar consumer research underlying the FTC’s statements, to the extent these documents exist, are reasonably expected to yield evidence to refute these allegations. Respondent also notes that Complaint Counsel has asked Respondent to produce studies and other documents evaluating search advertising and consumer confusion. Complaint Counsel contends that Respondent’s assertions of relevance are only conjecture.

Based on the foregoing, Requests 5 and 6 seek information that is reasonably expected to yield information relevant to the allegations of the Complaint and/or Respondent’s defenses thereto, and are therefore relevant for purposes of discovery. The requested data also does not appear to be available to Respondent through other means.

However, Requests 5 and 6 go beyond requesting factual data such as the results of surveys, but request all information or documents. As with Request 4, such language is not reasonably tailored to encompass only factual information, but could encompass opinions or deliberative materials that may not be discoverable. Rule 3.31(c)(4). Accordingly, Requests 5 and 6 shall be modified to request only “data, surveys, or studies.”

In conclusion, Respondent has demonstrated that Requests 5 and 6 are relevant, reasonable in scope, stated with reasonable particularity, and seek information that is not available through other means, except that the requests will be narrowed as set forth above. In addition, Respondent has shown good cause for this discovery, as modified, to the extent the Requests call for information in the possession of BC or BE. Accordingly, Respondent’s Motion is GRANTED as to these Requests, as modified herein.

### **3. Privileges**

Complaint Counsel contends that Requests 3-6 “target” privileged materials that were prepared “in connection with” opinion, recommendations, and advice about Agency decisions. Respondent states that the supporting data, studies and other information Respondent seeks is only factual information, and is not privileged.




A conclusory, blanket assertion of privilege is not a sufficient basis for denying a request for discovery, particularly where, as modified herein, the requested information is limited to factual data. Moreover, notwithstanding the granting of Respondent's Motion herein, neither this Order, nor the discovery rules, requires the production of privileged materials. *See* Rule 3.31(c)(4). Applicable privileges may be raised in connection with the response to the discovery authorized herein, as provided under the Rules. *See, e.g.*, 16 C.F.R. 3.34(c); 3.38A(a).

V.

For the reasons set forth above, Respondent's request for issuance of a subpoena under Rule 3.36 is GRANTED IN PART, to allow issuance of the Proposed Subpoena with the modifications ordered herein. Respondent shall modify its subpoena in accordance with this Order. Pursuant to Rule 3.36(c), Respondent may forward to the Secretary a request for the authorized subpoena for documents from OPP and BCP, with a copy of this authorizing order attached. 16 C.F.R. § 3.36(c). Pursuant to Rule 3.31(c)(2), Complaint Counsel shall 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.

ORDERED:

  
\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date: December 20, 2016

Notice of Electronic Service

**I hereby certify that on December 20, 2016, I filed an electronic copy of the foregoing Order on Respondent's Renewed Motion for Discovery from the Commission Pursuant to Rule 3.36, with:**

D. Michael Chappell  
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**I hereby certify that on December 20, 2016, I served via E-Service an electronic copy of the foregoing Order on Respondent's Renewed Motion for Discovery from the Commission Pursuant to Rule 3.36, upon:**

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