

**ORIGINAL**

**PUBLIC**

**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**

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

**I. INTRODUCTION**

Pursuant to Rules 3.22 and 3.36 of the Federal Trade Commission's Rules of Practice, 16 C.F.R §§ 3.22, 3.36, Respondent 1-800 Contacts, Inc. hereby moves for an order authorizing the issuance of a subpoena *duces tecum* to the Commission for documents relating to reports, studies and analyses of (1) competitive conditions in the market for contact lenses or (2) the effects of paid search advertising on consumers.<sup>1</sup> The Commission has issued several public statements, reports and studies of each issue, including a 2005 report, *Strength of Competition in the Sale of RX Contact Lenses*,<sup>2</sup> and a 2015 Enforcement Policy Statement on Deceptively Formatted Advertisements ("Enforcement Policy Statement")<sup>3</sup> that opines on what "consumers ordinarily would expect" and what "likely would influence consumers' decisions" in using search engines. Respondent seeks two categories of documents: (a) any reports, studies or analyses of these two issues that the Commission has not yet disclosed, and (b) all documents on which any such analyses, public or non-public, were based.

The requested discovery meets all three requirements of the Rules of Practice: it is relevant, reasonable in scope, and cannot reasonably be obtained through other means. 16 C.F.R. § 3.36(b)(1), (2), (3); *id.* § 3.31(c)(1).

*First*, the Commission's analyses of prices and competition in the market for contact lenses are squarely relevant to the Commission's allegations that Respondent harmed competition in an alleged market for "the retail sale of contact lenses." Cmplt., ¶¶ 29, 31. The Commission's analyses of the effects of paid search advertising on consumers also are relevant,

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<sup>1</sup> The form of the requested subpoena is attached as Exhibit A to the accompanying Declaration of Justin P. Raphael.

<sup>2</sup> [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/strength-competition-sale-rx-contact-lenses-ftc-study/050214contactlensrpt.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/strength-competition-sale-rx-contact-lenses-ftc-study/050214contactlensrpt.pdf).

<sup>3</sup> [https://www.ftc.gov/system/files/documents/public\\_statements/896923/151222deceptiveenforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf).

bearing directly on the Commission's allegations that Respondent's settlement agreements harmed consumers. Cmplt., ¶¶ 31(h), (i).

*Second*, the requested discovery is reasonable in scope. Respondent does not seek documents from the Commissioners. The requested subpoena is narrowly tailored to analyses of contact lens competition and the effects of paid search advertising prepared by the Bureaus and staff.

*Finally*, Respondent has no other means to obtain these reports, analyses and studies, or the documents on which they were based.

**II. THE COMMISSION SHOULD PRODUCE DOCUMENTS RELATED TO STUDIES OF THE MARKETS AND CONSUMER EFFECTS AT ISSUE**

As outlined above and discussed in greater detail below, the materials sought by Respondent satisfy the three requirements for issuance of a subpoena to the Commission for discovery of materials other than those collected or reviewed by Complaint Counsel. 16 C.F.R. §§ 3.36(a), (b).

**A. The Requested Discovery is Relevant**

**1. Studies of Competition in the Contact Lens Market**

Reports, studies and analyses of competition in the market for contact lenses are squarely relevant. 16 C.F.R. § 3.36(b)(2); *id.* § 3.31(c)(1).

The Commission alleges that Respondent's settlements of litigation regarding the use of its trademark as a keyword in paid search advertising harmed competition in an alleged market for "the retail sale of contact lenses." Cmplt., ¶¶ 29, 31; *see also* Tr. of Pretrial Conf., Sept. 7, 2016, at 18:8-14 (arguing that the agreements "harmed consumers" in a market "for the retail sale of contact lenses in the United States"). For example, the Commission alleges that Respondent's conduct caused "at least some consumers to pay higher prices for contact lenses"

in the alleged retail market. Cmplt., ¶ 31(i). Studies of prices and competition in the contact lens industry directly bear on these allegations. See *In re Intel Corp.*, Docket No. 9341, 2010 WL 2544424, at \*3 (June 9, 2010) (granting motion for subpoena to Bureau of Labor Statistics for deposition regarding pricing data to support defense that allegedly harmed antitrust market was, in fact, characterized by “ever-increasing output and simultaneously decreasing prices”). In the past, in fact, the Commission has relied upon similar reports and staff analyses in adjudicating cases alleging anticompetitive conduct. See *In re Realcomp II Ltd.*, Docket No. 9320, 2007 WL 6936319, at \*5 n.1, \*24 & n.17 (Oct. 30, 2009) (relying on Commission reports on competition in real estate industry); *In re N. Texas Specialty Physicians*, 140 F.T.C. 715, 717 & n.2, 728, 736 (2005) (relying on Commission “report on competition policy and health care,” staff advisory letters, and Commission “guidelines”). Thus, any reports, studies or analyses of competition in the contact lens industry are relevant and should be produced.

Respondent also seeks the documents upon which the Commission based its reports and analyses of contact lens prices or competition, including the documents upon which publicly available reports were based.<sup>4</sup> The Commission’s 2005 report on *Strength of Competition in the Sale of Rx Contact Lenses* is instructive. According to the 2005 report, Commission staff collected price data on 10 different contact lenses from 20 online and 14 offline retailers. Staff located the online retailers by conducting a search for “contact lenses” using an Internet search engine. *Id.* at 36-37. Comparing prices of all retailers of contact lenses,

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<sup>4</sup> Of course, those reports previously made public by the Commission need not be produced. (*Strength of Competition in the Sale of Rx Contact Lenses; Possible Anticompetitive Barriers to E-Commerce: Contact Lenses* (2004), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/possible-anticompetitive-barriers-e-commerce-contact-lenses-report-staff-ftc/040329clreportfinal.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/possible-anticompetitive-barriers-e-commerce-contact-lenses-report-staff-ftc/040329clreportfinal.pdf); and “Prices and Price Dispersion in Online and Offline Markets for Contact Lenses,” Working Paper No. 283 (2006), [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).)

staff concluded that “contact lenses are on average \$15.48 less expensive online than offline.” *Id.* at 42. Staff also found that Respondent was the only online retailer that carried all 10 lenses studied. *Id.* at 38.

These findings and analysis are obviously relevant to the issues here. Some support Respondent’s positions. For instance, staff’s analysis of sales and prices across channels demonstrates that the relevant market is the broad retail market for contact lenses and that online retailers account for only a small fraction of sales, *id.* at 12. Those facts can be offered to refute Complaint Counsel’s contention that the settling parties have market power. Tr. of Pretrial Conf., Sept. 7, 2016, at 20:9-17. Further, the Commission’s use of the generic search “contact lenses” rather than “1-800 Contacts” to gather online contact lens prices confirms that the most intuitive and useful searches for price-comparing consumers do not involve Respondent’s trademark and are unaffected by the challenged agreements. For its part, Complaint Counsel may offer other aspects of this or other reports to support its positions.

None of the reports, however, discloses the complete data, calculations, methodology, or other materials on which staff relied in reaching their conclusions. Yet it is that underlying evidence and supporting material that may prove most useful for evaluating the effects on competition of the challenged settlement agreements. Nonetheless, during meet-and-confer, Complaint Counsel took the position that a report’s underlying materials need not be produced, even if the Commission and its experts rely upon the conclusions in the report. That position is inconsistent with the position Complaint Counsel have taken in discovery sought from Respondent. Complaint Counsel expect Respondent to produce “[a]ll analyses comparing 1-800 Contacts’ prices to the prices of a Competitor,” Raphael Decl. Ex. C (RFP No. 10), and “all documents that discuss or analyze competition in the sale of contact lenses,” Raphael Decl. Ex. B

(Specification No. 4). The Commission's own analyses of prices and competition are as relevant to the issues here as Respondent's, and should be produced.

**2. Studies of the Effects of Paid Search Advertising on Consumers**

Reports, studies and analyses of paid search advertising's effect on consumers, including the potential of such advertising to cause confusion, deception and dilution, also are relevant. 16 C.F.R. § 3.36(b)(2); *id.* § 3.31(c)(1). The Commission alleges that Respondent's settlement agreements "[i]mpair[ed] the quality of the service provided to consumers by search engine companies," "[p]revent[ed]" retailers from providing "non-confusing information" about their products and prices, and "[i]ncreas[ed] consumers' search costs relating to the online purchase of contact lenses." Cmplt., ¶¶ 31(d), (g), (h). Any analysis of whether advertisements using another company's trademark confuse consumers searching for the trademark owner's site or increase their search costs could directly refute the Commission's allegations. Accordingly, the Commission should produce any analyses, studies or reports regarding paid search advertising's effects on consumers in addition to the following documents it has made public: (1) the Enforcement Policy Statement; (2) *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* (2013)<sup>5</sup>; (3) a June 24, 2013 Letter from Associate Director Mary K. Engle to numerous search engines, including Google and Bing<sup>6</sup>; and (4) a June 27, 2002 Letter from Acting Associate Director Heather Hipsley.<sup>7</sup>

The Commission also should produce the materials upon which any of its reports or statements were based. The Commission's public statements about consumers' intent and

<sup>5</sup> <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

<sup>6</sup> <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industryon-need-distinguish/130625searchenginegeneralletter.pdf>.

<sup>7</sup> [https://www.ftc.gov/sites/default/files/documents/closing\\_letters/commercial-alert-response-letter/commercialalertletter.pdf](https://www.ftc.gov/sites/default/files/documents/closing_letters/commercial-alert-response-letter/commercialalertletter.pdf).

behavior provide indications that the Commission conducted surveys or other studies of consumers' search activity that support and underlie its statements. For example, in the Enforcement Policy Statement, the Commission writes 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." *Id.* at 6. Any data from consumer surveys or research on which staff relied in reaching that conclusion would be highly relevant to the parties' contentions about consumers' intentions and propensity for confusion when looking at *paid* advertisements, which are the only ads at issue here. Complaint Counsel seeks these same types of documents from Respondent, demanding that it produce "any study, analysis, or evaluation of search advertising," Raphael Decl. Ex. B (Specification No. 6), "all documents relating to, or evidencing, consumer confusion in connection with any Competitor's use of 1-800's trademarks as keywords in a search advertising," *id.* (Specification No. 13) and "[a]ll documents Relating to surveys conducted of customers and potential customers, and comments provided by customers or potential customers." Raphael Decl. Ex. C (RFP No. 19). The Commission should produce any similar documents in its possession as well.

**B. The Requested Discovery is Reasonable in Scope**

The requested discovery is reasonable in scope. 16 C.F.R. § 3.36(b)(1).

Respondent does not seek documents from the Commissioners. Nor does Respondent seek any and all documents or communications among staff regarding contact lenses or paid search advertising. Rather, the requested discovery is limited to discrete and identifiable studies, reports and analyses of the kind that the public record shows that the Commission or its staff have undertaken over the past decade. As discussed above, several of the Commission's public

documents refer to supporting analyses or strongly indicate that they exist. Further, the Commission's attention to issues related to this case suggests that the Commission, as it often does, may have collected information or conducted analyses that did not result in public statements.

**C. The Requested Discovery is Not Reasonably Available Through Other Means**

Finally, Respondent cannot reasonably obtain the requested discovery through other means. 16 C.F.R. § 3.36(b)(3). Respondent cannot obtain from other sources the Commission's non-public analyses or materials on which they were based. Even if the Commission disclosed some of these materials to third parties, it is plainly much easier for Respondent to obtain all of the documents generated by the Commission directly from the Commission, rather than to try to obtain them via subpoenas to multiple non-parties. Those non-parties may be governmental units, may not be readily identifiable, and are likely not to have all of the Commission's documents in any event.

**III. CONCLUSION**

An order should issue authorizing a subpoena in the form attached as Exhibit A to the accompanying Declaration of Justin P. Raphael for documents relating to reports, studies and analyses of competition in the market for contact lenses or the effects of paid search advertising on consumers.

DATED: October 3, 2016

Respectfully submitted,

/s/ Justin P. Raphael

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*Counsel for 1-800 Contacts, Inc.*

CERTIFICATE OF CONFERENCE

Pursuant to Paragraph 4 of the Scheduling Order entered in this matter on September 7, 2006, I hereby certify that counsel for Respondent 1-800 Contacts, Inc., the moving party, conferred by telephone with Complaint Counsel on September 20, 2016 in an effort to resolve the issues raised by Respondent's Motion for Discovery from the Commission. Counsel for Respondent and Complaint Counsel were unable to reach an agreement to resolve the motion.

DATED: October 3, 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 3, 2016, I filed **RESPONDENT'S MOTION FOR DISCOVERY FROM THE COMMISSION PURSUANT TO RULE 3.36** 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 3, 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 3, 2016

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