

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

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

DOCKET NO. 9372

ORDER ON RESPONDENT’S MOTION FOR ISSUANCE  
OF A SUBPOENA UNDER RULE 3.36

I.

On October 3, 2016, Respondent 1-800 Contacts, Inc. (“Respondent”) filed a Motion for Discovery from the Commission (“Motion”). Specifically, Respondent, pursuant to Rule 3.36 of the Federal Trade Commission’s (“FTC”) Rules of Practice, requests an order authorizing the issuance of a subpoena *duces tecum* to the FTC requiring the production of certain documents for the purposes of discovery. On October 14, 2016, FTC Complaint Counsel filed an opposition to the Motion (“Opposition”). On October 18, 2016, Respondent filed a Motion for Leave to File a Reply, along with the proposed reply (“Reply”). See FTC Rule 3.22(d).

The Motion for Leave to File a Reply is **GRANTED**. The Motion for a Rule 3.36 Subpoena is **DENIED WITHOUT PREJUDICE**, as explained below.

II.

The Commission’s Complaint alleges that certain “Bidding Agreements” that Respondent made with various competing online contact lens sellers constitute a restraint of trade and an unfair method of competition in the alleged markets for the auctioning of keyword search online advertising and the retail sale of contact lenses, in violation of Section 5 of the FTC Act. Complaint ¶¶ 28-29, 31. According to the Complaint, search engine companies sell advertising space that appears on a search results page by means of auctions. Complaint ¶ 10. An advertiser may bid on particular keywords that might be contained in a search query. Complaint ¶ 10(b). When a consumer enters a search query, an algorithm reviews the relevant bids and the winner of the auction will have its advertisements displayed to the user on the search result page. If the user clicks through to the advertiser’s website, the advertiser pays a fee to the search engine company. Complaint ¶ 10(c). The Complaint avers that in response to a query containing a trademark name, such as “1-800 Contacts,” the user might be presented with advertisements for

multiple companies in addition to the owner of the trademark. Complaint ¶ 12. A bidding advertiser may also specify negative keywords, which will prevent its advertisement from appearing in response to queries with such terms. Complaint ¶ 13.

The Complaint also alleges that in or around 2004, Respondent sent cease and desist letters asserting trademark violation to competitors whose search advertisements appeared in response to user queries containing the term “1-800 Contacts” or its variations. Complaint ¶ 17. Thereafter, fourteen competitors entered into agreements restricting bidding in search advertising auctions. Complaint ¶ 20. Pursuant to these Bidding Agreements, the Complaint alleges, the competitors agreed not to bid in any online search advertising auction for the use of the search term “1-800-Contacts” or variations thereof, and to employ negative keywords in paid search advertising to prevent competitors’ advertising from appearing in response to a query for “1-800-Contacts.” Complaint ¶¶ 22, 24. Respondent agreed reciprocally with respect to the competitors’ trademarks. Complaint ¶ 23. According to the Complaint, the Bidding Agreements are not justified by trademark protection. Complaint ¶ 21.

Respondent’s Answer asserts, among other things, that the alleged Bidding Agreements were settlement agreements to resolve *bona fide* litigation over competitors’ use of its trademark, and denies that such agreements are anticompetitive or unlawful. Answer ¶¶ 20-24, 31, 33-34. Respondent’s Answer further avers that the Complaint fails to allege facts that would establish a relevant product market. Answer, Ninth Defense.

### III.

Respondent’s Motion, filed pursuant to FTC Rule 3.36, seeks issuance of a subpoena for the production of documents from the FTC. As discussed in detail below, a Rule 3.36 motion must show that the material sought is reasonable in scope; the material is relevant; the material cannot reasonably be obtained by other means; and the material is requested with reasonable particularity. 16 C.F.R. § 3.36(a), (b).

Respondent’s requested subpoena contains nine document requests, seeking (1) documents relating to reports, studies, or analyses of (a) competitive conditions in the market for contact lenses; and (b) the effects of paid search advertising on consumers; and (2) the documents upon which any of the foregoing such reports, studies, or analyses were based. Motion at 1; Declaration of Justin P. Raphael in Support of Respondent’s Motion, Exhibit A (“Requested Documents”).

As discussed below, Respondent asserts that the Requested Documents are relevant, reasonable in scope and requested with reasonable particularity, and cannot reasonably be obtained by other means.

In opposition to the Motion, Complaint Counsel asserts that it has produced, is in the process of producing, or will soon produce, all relevant, non-privileged documents collected, reviewed, and/or relied on in the investigation or prosecution of this matter, including documents collected or reviewed by the Bureau of Competition and the Bureau of Economics, documents pertaining to a separate FTC investigation, and documents reviewed by Complaint Counsel’s

testifying experts. Complaint Counsel, relying on Rule 3.31(c)(2), argues that the foregoing constitutes all that Respondent can require Complaint Counsel to produce.

Complaint Counsel further argues that Respondent has failed to make the required showing under Rule 3.36 to obtain documents beyond those that Respondent can obtain from Complaint Counsel. Complaint Counsel first argues that Respondent has not made a “special showing of need” for the Requested Documents because Complaint Counsel did not review or rely upon the requested materials in the pre-complaint investigation, and will not do so in the prosecution of this matter. *See* Declaration of Barbara Blank in Support of Complaint Counsel’s Opposition ¶ 3, Exhibit A. Second, Complaint Counsel contends, Respondent’s document requests are vague, imprecise, and overbroad, and therefore are neither reasonable in scope or stated with reasonable particularity as required by Rule 3.36. Complaint Counsel also argues that the requests call for documents protected by various privileges, and that reviewing the large universe of responsive documents, including for privilege, would impose a substantial burden.

In its Reply, Respondent states that Complaint Counsel fails to dispute that the Requested Documents are relevant, and argues that Complaint Counsel is incorrect in asserting that Rule 3.36 requires any “special showing of need.” Respondent further argues that Complaint Counsel has no support for its claim of a substantial burden imposed by searching for and producing the Requested Documents, or for Complaint Counsel’s assertions of privilege since, according to Complaint Counsel, Complaint Counsel has not conducted a review for the Requested Documents. Respondent states that it is willing to forego documents from investigative files, and that Respondent’s offer to Complaint Counsel to narrow the scope and wording of the requests was refused. Finally, Respondent argues that the remedy for any alleged overbreadth in the proposed subpoena is to deny the motion without prejudice, to allow Respondent to refile with a narrower proposed subpoena.

#### IV.

##### A.

At issue is not whether Complaint Counsel has fulfilled its obligations under FTC Rule 3.31(c)(2), when responding to a discovery request, to 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.” 16 C.F.R. § 3.31(c)(2). Rather, the issue is whether Respondent may obtain additional discovery from other sources within the FTC, as authorized under Rule 3.36. Rule 3.36 expressly allows issuance of a subpoena for documents “in the possession, custody, or control of the Commissioners,” or “any Bureau or Office not involved in the matter,” provided the movant makes 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 information or 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).

Complaint Counsel contends that Respondent may seek the Requested Documents “only if a ‘special showing of need’ provides a ‘strong justification.’” Opposition at 1. Relying on legislative history written by the Commission when it amended Rule 3.36 to allow discovery from the Commission, Complaint Counsel states that to obtain documents from officials or employees of the FTC beyond those officials and employees of the Bureaus or Offices of the Commission that investigated the matter, Respondent must make a “special showing of need.” Opposition at 5 (*citing* 74 Fed. Reg. 1804, 1815 (Jan. 13, 2009)). However, the showing that is required by Rule 3.36 is set forth in its express language, which does not include a “special showing of need.” 16 C.F.R. § 3.36. Because the language of Rule 3.36 is not ambiguous, there is no need to refer to the legislative history. *United States v. Turkette*, 452 U.S. 576, 580 (1981) (“In determining the scope of a statute, we look first to its language.”); *United States v. James*, 478 U.S. 597, 606 (1986) (citation omitted) (If the statutory language is unambiguous, “in the absence of ‘a clearly expressed legislative intent to the contrary,’ the language of the statute itself ‘must ordinarily be regarded as conclusive.’”). In any event, 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). An analysis on each of these requirements follows.

## B.

### (1) Whether the material is relevant

First, Respondent asserts that reports, studies, and analyses of competitive conditions in the market for contact lenses directly bear on the allegations that the alleged Bidding Agreements relating to paid search advertising harmed competition in an alleged market for the retail sale of contact lenses and thus are squarely relevant. Respondent also seeks the documents upon which the reports and analyses of contact lens prices or competition were based, including the documents upon which publicly available reports were based. In addition, Respondent asserts that staff’s analysis of sales and prices across channels demonstrates that the relevant market is the broad retail market for contact lenses, that online retailers account for only a small fraction of sales, and that those facts can be offered to refute Complaint Counsel’s contention that the entities that entered into the Bidding Agreements with Respondent have market power. Respondent further asserts that none of the FTC reports at issue discloses the complete data, calculations, methodology, or other materials on which staff relied in reaching their conclusions, and that it is this underlying evidence and supporting material that may prove most useful for evaluating the effects on competition of the challenged Bidding Agreements. Respondent notes that Complaint Counsel has requested that Respondent produce its own market and pricing studies, and argues that the FTC’s own analyses of prices and competition are as relevant to the issues here as Respondent’s and should therefore be produced.

Second, Respondent asserts 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 because any analysis of whether advertisements using another company's trademark confuses consumers searching for the trademark owner's site or increases their search costs could directly refute the allegations of the Complaint. Respondent also seeks the materials upon which these reports or statements were based, arguing that such data would be highly relevant to the Parties' contentions about consumers' intentions and propensity for confusion when looking at paid advertisements.

Complaint Counsel does not directly argue that the Requested Documents are not relevant. Instead, Complaint Counsel asserts that Respondent has not shown a "special need" for materials that were not reviewed or relied upon by Complaint Counsel in the investigation or lawsuit. The showing of relevance required under Rule 3.36 is not whether Complaint Counsel has reviewed or relied upon the requested material. Rather, Rule 3.36(b)(2) incorporates the standard described in Rule 3.31(c)(1), which is whether the requested material may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. 16 C.F.R. §§ 3.31(c)(1), 3.36(b)(2).

The Commission's Complaint charges that the alleged Bidding Agreements regarding paid search advertising harmed competition in an alleged market for "the retail sale of contact lenses." Complaint ¶¶ 29, 31. Therefore, the Commission's reports, studies, and analyses of competition in the market for contact lenses are relevant. The Commission's Complaint also alleges that the 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). Therefore, the Commission's 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.

It is not clear at this time that the documents upon which any of the foregoing reports, studies, or analyses were based are relevant. Moreover, it is not clear that documents that are over a decade old are relevant.<sup>1</sup> As set forth below, this Order permits Respondent to file a renewed motion with a narrower subpoena, and should Respondent include a request for such documents in a future motion, Respondent shall make a showing of relevance at that time.

**(2) Whether the material sought is reasonable in scope and the requests are made with reasonable particularity**

Respondent argues that the document requests are reasonable in scope because, although the subpoena is directed to "the Federal Trade Commission," Respondent does not seek documents from the Commissioners themselves, and does not seek documents or communications among staff regarding contact lenses or paid search advertising. In addition, Respondent asserts, the document requests are limited to discrete and identifiable studies, reports

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<sup>1</sup> Respondent's proposed subpoena instructs, "[u]nless otherwise indicated, each request covers documents and information dated, generated, received, or in effect from January 1, 2002, to the present." Many of the Specifications of Respondent's proposed subpoena seek documents that are over a decade old. *E.g.*, Specification 2 (2005), Specification 3 (2004), Specification 7 (2002). Motion, Exhibit A.

and analyses of the kind that the public record shows that the FTC has undertaken over the past decade.

Complaint Counsel responds that the proposed subpoena is enormously burdensome and fails the reasonable particularity and reasonable scope requirements of Rules 3.36(b)(1) and (b)(5). Complaint Counsel further argues that the enormous scope of the subpoena is compounded by Respondent's vague requests for "All Documents Relating to" an unspecified and potentially vast body of "reports," "papers," "studies," and "analyses" – none of which are defined by Respondent. *See* Motion, Exhibit A, Definitions. In addition, Complaint Counsel asserts that the document requests squarely target materials that are protected from disclosure by several privileges, including the work product doctrine, attorney-client privilege, the government deliberative process privilege, and the law enforcement (or investigatory files) privilege and thus are particularly onerous.

Respondent replies that Complaint Counsel should not now complain about the breadth of the document requests, as Complaint Counsel expressly declined to offer any suggestions to narrow the proposed discovery during the Parties' meet-and-confer session. Respondent further replies that the Commission cannot avoid discovery of documents because some of them contain confidential material. Lastly, Respondent argues that Complaint Counsel cannot properly assert privilege over documents it claims never to have read and has failed to substantiate its privilege claim.

As an initial matter, the proposed subpoena defines the terms "Commission," "You," or "Your," to mean "the Federal Trade Commission and all employees, agents, attorneys, representatives, and all other persons acting or purporting to act or that have acted or purported to have acted on behalf of any of the foregoing." Motion, Exhibit A, Definitions. With this definition, the scope of the document requests is so broad as to require searching the Bureau of Consumer Protection, the Offices of the Administrative Law Judges, General Counsel, Policy Planning, and Public Affairs, and other offices that are not likely to possess responsive documents. By defining the terms "Commission," "You," and "Your" in such a broad manner, the document requests are not reasonable in scope.

A review of the proposed subpoena shows that the requests are not, as Respondent argues, limited only to discrete and identifiable studies, reports, and analyses. For example, Request 1 seeks "[a]ll Documents" from 2002 to present "[r]elating to reports, papers, working papers, studies or analyses relating to competition in the contact lens industry." The term "Documents" is broadly defined to include all computer files, including emails, drafts, and copies of documents that are not identical duplicates to the originals. Compliance would require searching for any documents "relating to" the sale of contact lenses since 2002, as well as for all underlying materials. Respondent's other requests, Requests 2 through 9, seek "[a]ll Documents" from 2002 to present "[r]elating to" specifically identified studies. "[S]ubpoena requests that seek documents 'concerning' or 'relating to' have been found to lack the 'reasonable particularity' required." *In re OSF Healthcare Sys.*, 2012 FTC LEXIS 31, at \*4-5 (Feb. 14, 2012) (*citing In re North Texas Specialty Physicians*, 2004 FTC LEXIS 19, at \*12 (Feb. 4, 2004)).

The document requests here stand in marked contrast to *Intel*, where respondent's Rule 3.36 motion was granted. There, respondent sought to depose a Bureau of Labor Statistics official for "two hours or less," on "six narrow topics" regarding prices of a single series of microprocessors. *In re Intel Corp.*, 2010 FTC LEXIS 56, at \*\* 1-2, 8 (June 9, 2010). The limited scope, duration, and burden imposed on a single individual in *Intel* bears no resemblance to the discovery sought here.

Respondent has not demonstrated that its document requests are reasonable in scope and stated with reasonable particularity.

**(3) Whether the material sought cannot reasonably be obtained by other means**

Lastly, Respondent contends that it has no other means to obtain non-public reports, analyses, and studies, or the documents upon which they were based. Respondent asserts that if the Commission disclosed some of these materials to non-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. Respondent also asserts that 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. Complaint Counsel does not address this argument.

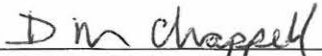
Respondent has demonstrated that the Requested Documents cannot reasonably be obtained by other means.

**V.**

In *In re Associated Merch. Corp.*, 72 F.T.C. 1030, 1967 FTC LEXIS 163, at \*6 (Dec. 11, 1967), the remedy for an overly broad request for documents from the Commission was to deny the motion without prejudice with leave to renew the motion as to a narrower subpoena. The same remedy is appropriate here.

For all the above stated reasons, Respondent's Motion is **DENIED WITHOUT PREJUDICE**. Should Respondent wish to file a new motion, Respondent shall prepare a narrower subpoena, shall meet-and-confer with Complaint Counsel, and may file a new motion pursuant to Rule 3.36 in conformity with this Order.

ORDERED:

  
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D. Michael Chappell  
Chief Administrative Law Judge

Date: October 28, 2016