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

In the Matter of	)	
Impax Laboratories, Inc., a corporation,	)	DOCKET NO. 9373
Respondent.	)	

ORDER DENYING COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONSE TO INTERROGATORY NOS. 2 AND 3

I.

On June 1, 2017, Federal Trade Commission ("FTC" or "Commission") Complaint Counsel filed a Motion to Compel Response to Interrogatory Nos. 2 and 3 ("Motion"). Impax Laboratories, Inc., ("Impax" or "Respondent") filed an Opposition on June 8, 2017 ("Opposition"). For the reasons set forth below, the Motion is DENIED.

II.

The Complaint in this case challenges an agreement between Impax and Endo Pharmaceuticals Inc. ("Endo") "to obstruct lower-cost generic competition to Opana ER, one of Endo's core branded prescription drug products."[1] Complaint ¶ 1. In its Answer to the Complaint, Respondent asserted ten affirmative defenses, including its eighth defense:

> The alleged conduct had substantial pro-competitive justifications, benefited consumers and the public interest, and avoided potential infringement of valid patents. These pro-competitive justifications outweigh any alleged anticompetitive effects of the alleged conduct. There were no less restrictive alternatives that could have achieved these same pro-competitive outcomes.

Complaint Counsel seeks an order requiring Respondent to provide a substantive

[1] Respondent characterizes the alleged conduct as relating to two agreements between Impax and Endo: the Settlement & License Agreement and the Development & Co-Promotion Agreement. Collectively, these are referred to herein as "the Challenged Agreement."

response to Interrogatories 2 and 3 of Complaint Counsel's First Set of Interrogatories (the "Interrogatories"). The Interrogatories are:

> **Interrogatory No. 2**
> Identify all procompetitive justifications and benefits to consumers and the public interest referenced in the Eighth Defense in Your Answer to the Complaint in this case, and explain the factual basis for Your answer to this Interrogatory, including identifying all facts and documents You rely on in Your answer to this Interrogatory.
>
> **Interrogatory No. 3**
> For each procompetitive justification and benefit identified in response to Interrogatory No. 2, explain how the No-AG Provision and the Endo Credit provision contained in the Opana ER Settlement and License Agreement were reasonably necessary to achieve that benefit, including identifying all facts and documents You rely on in Your answer to this Interrogatory.

In its response to these interrogatories, Respondent objected to each on grounds that it "involves an opinion or contention that relates to fact or the application of law to fact. Therefore, under Federal Trade Commission Rule of Practice § 3.35(b)(2), no answer is required until the close of discovery. Impax will supplement its response to [the] Interrogatory. . . in due course."

Complaint Counsel contends that these interrogatories seek discovery at the heart of this case: whether Impax can demonstrate legitimate, cognizable, procompetitive justifications for the Challenged Agreement. Complaint Counsel further asserts that both interrogatories can be answered at this time and Impax has no need to take its own discovery to identify its alleged procompetitive justifications. Complaint Counsel argues that by refusing to answer these interrogatories until the "close of discovery, if at all," Impax is denying Complaint Counsel the opportunity to conduct meaningful discovery into the bases for Impax's affirmative defense. Complaint Counsel further argues that if Impax is not required to respond to these interrogatories now, Complaint Counsel must seek discovery on every conceivable procompetitive justification, without knowing whether Impax will in fact rely on such justification at trial.

Respondent asserts the Interrogatories are contention interrogatories and that, under the FTC's Rules of Practice, contention interrogatories need not be answered until the end of discovery. Respondent further asserts that Complaint Counsel does not need the responses now in order to "conduct meaningful discovery" (Motion 1-2), because Complaint Counsel already has information from Respondent on its reasons for asserting that the Challenged Agreement is procompetitive. Specifically, Respondent states that in the course of the FTC staff's ("Staff") two-year investigation, Respondent explained the competitive benefits of the Challenged Agreement in narrative CID responses, in white papers and letters, and in meetings with the Staff, the acting Bureau Director, and five Commissioners. Respondent argues that because discovery is ongoing, any answers it provides at this time would be incomplete and require supplementation when discovery ends, and that ordering multiple rounds of responses to the same interrogatories is

unnecessary and inefficient.

III.

Contention interrogatories ask a party "to state what it contends; to state whether it makes a specified contention; to state all facts upon which it bases a contention; to take a position, and explain or defend that position, with respect to how the law applies to facts; or to state the legal or theoretical basis for a contention." *B. Braun Med. Inc. v. Abbott Labs.*, 155 F.R.D. 525, 527 (E.D. Pa. 1994) (quotation omitted) (interpreting Fed. R. Civ. Pro. 33(a)(2)).[2]

Interrogatories 2 and 3 ask Respondent to "commit to a position and give factual specifics supporting its claims." *Ziemack v. Centel Corp.*, 1995 WL 729295, at *2 (N.D. Ill. Dec. 7, 1995). By asking Respondent to identify all procompetitive justifications and explain the factual bases therefor, the Interrogatories seek "an opinion or contention that relates to fact or the application of law to fact." 16 C.F.R. § 3.35(b)(2).

Under Commission Rule 3.35(b)(2), "[a]n interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but such an interrogatory need not be answered until after designated discovery has been completed, but in no case later than 3 days before the final prehearing conference." 16 C.F.R. § 3.35(b)(2). The Commission, when it amended its Rules of Practice, stated that the Rule is intended to "conform Commission practice with federal court practice and consistently allow a party to delay answering a contention interrogatory until fact discovery is almost complete." Rules of Practice; Final Rule, 74 Fed. Reg. 1804, 1815 (Jan. 13, 2009) (amending 16 C.F.R. pt. 3 and 4). Although federal court practice is not always to defer an answer to contention interrogatories until the close of discovery, such deferral is the default position required by the FTC's amended Rule 3.35(b)(2). *Compare* Fed. R. Civ. Pro. 33(a)(2) ("[T]he court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.").

Complaint Counsel acknowledges that "the FTC's Rules of Practice presume that a party may wait to answer contention interrogatories until the end of discovery[,]" but argues that "in appropriate circumstances[,] contention interrogatories should be answered at an earlier stage." Motion at 3-4 (citing Rules of Practice; Final Rule, 74 Fed. Reg. 1804, 1815 (Jan. 13, 2009) (amending 16 C.F.R. pt. 3 and 4) ("[T]he proposed Rule also allowed a party posing a contention interrogatory to secure an earlier answer, if one was necessary, by filing a motion seeking an earlier answer. The Rule is not intended to allow an answering party to evade an answer, but to postpone answering until it has all the information it needs to supply a full answer."); *see also* Rules of Practice; Proposed

[2] Where the Federal Rules of Civil Procedure are similar to the Commission's Rules of Practice, those rules and case law interpreting them may be useful, though not controlling, in adjudicating a dispute. *In re L.G. Balfour Co.*, No. 8435, 61 F.T.C. 1491, 1492, 1962 FTC LEXIS 367, *4 (Oct. 5, 1962); *In re Gemtronics, Inc.*, 2010 FTC LEXIS 40, *10 (April 27, 2010).

Rule, 73 Fed. Reg. 58832, 58839 (Oct. 7, 2008) (amending 16 C.F.R. pt. 3 and 4) ("If a party poses a contention interrogatory that is capable of being answered at an earlier time, there is no reason it could not move to compel a more expeditious response.").

In its motion seeking an earlier answer, Complaint Counsel has not demonstrated appropriate circumstances for requiring that the contention interrogatories be answered before the close of discovery. In light of Impax's CID responses, written submissions, and in-person meetings with FTC staff, Complaint Counsel has already received extensive information on Respondent's reasons for contending that the Challenged Agreement is procompetitive. Thus, Complaint Counsel has not shown that it needs immediate responses to Interrogatories 2 and 3 in order to conduct "appropriate discovery." (Motion at 7). Furthermore, Complaint Counsel has not demonstrated that the contention interrogatories are capable of being answered at an earlier time than the close of discovery as, according to Respondent, Respondent is still in the process of reviewing tens of thousands of documents in response to Complaint Counsel's requests for production of documents, over a dozen depositions of current and former Impax employees still remain, and third-party depositions and document discovery is ongoing. Opposition at 5. Accordingly, Complaint Counsel has not met its burden of showing that an earlier answer to its contention interrogatories is necessary.

IV.

For the above stated reasons, Complaint Counsel's Motion is DENIED.

ORDERED:

D M Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date: June 12, 2017