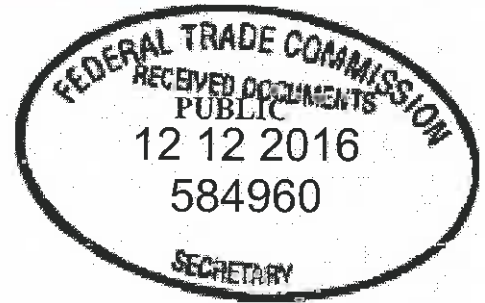


ORIGINAL



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

In the Matter of

1-800 Contacts, Inc.,
a corporation,

Respondent.

DOCKET NO. 9372

**ORDER DENYING RESPONDENT'S MOTION TO COMPEL
COMPLAINT COUNSEL TO ANSWER
RESPONDENT'S INTERROGATORIES NOS. 10 AND 11**

I.

On November 30, 2016, Respondent 1-800 Contacts, Inc. ("Respondent") filed a Motion to Compel Complaint Counsel to Answer Respondent's Interrogatories Nos. 10 and 11 ("Motion"). On December 7, 2016, Federal Trade Commission ("FTC") Complaint Counsel filed an Opposition to the Motion ("Opposition"). For the reasons set forth below, Respondent's Motion is DENIED.

II.

According to the Motion, Respondent served Complaint Counsel with its First Set of Interrogatories on September 9, 2016.

Interrogatory Number 10 asked Complaint Counsel to:

Identify the dollar volume of online retail sales in the United States of contact lenses for each Person who is or was an "online seller of contact lenses" at retail for each of the years from 2002 through 2015.

Interrogatory Number 11 asked Complaint Counsel to:

Identify the dollar volume of retail sales of contact lenses in the United States, other than online sales of contact lenses, in total and individually by each Person who made such sales, for each of the years from 2002 through 2015.

(Motion, Ex. 1) (hereafter, collectively, the "Interrogatories").

Complaint Counsel provided its Objections and Responses to Respondent's First Set of Interrogatories on October 11, 2016, objecting that the Interrogatories seek information that is already in Respondent's possession or control, or is a matter of public record; seek information that is not in possession, custody, or control of Complaint Counsel, and is beyond the scope of information that Complaint Counsel is required to provide pursuant to Rule 3.31(c)(2); and are unduly burdensome to the extent they seek to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. (Motion, Ex. 2) The Parties subsequently met and conferred. On November 8, 2016, Complaint Counsel provided Respondent with Amended Responses and Objections to the interrogatories, which asserted the following additional objection to both Interrogatory 10 and 11:

Complaint Counsel does not, at present, have documents sufficient to respond to this interrogatory. Complaint Counsel will supplement its answer, as appropriate, after the close of discovery.

The parties met and conferred again, but were unable to resolve their dispute. Respondent's Motion followed.

Respondent asserts that the Complaint alleges a "relevant product market or line of commerce in which to analyze the competitive effects" of Respondent's alleged conduct consisting of the retail sale of contact lenses, including online sales. Motion at 4. Accordingly, Respondent argues, the information regarding the dollar volume of retail sales by each retailer of contact lenses, broken down between sales online and not online, is clearly relevant. Motion at 1. Respondent asserts that, to the extent Complaint Counsel has responsive factual information, Complaint Counsel should produce what it has now and can provide a supplemental response if additional responsive information becomes available during the course of discovery or following consultation with its experts. *Id.*

Complaint Counsel does not dispute that the requested information is relevant. Instead, Complaint Counsel contends that the Interrogatories call for a detailed analysis of the retail sales of every contact lenses seller in the United States for each year over a period of 13 years, including a calculation of each seller's sales revenues, on a yearly basis, over a period of 13 years, and a calculation of total sales revenues for each year, over a period of 13 years, for all sellers of contact lenses in the United States. Opposition at 2. Complaint Counsel further asserts that it has not yet prepared any such analysis, and that Respondent cannot require Complaint Counsel to create one. In this regard, Complaint Counsel notes, any such analysis would be based on data and documents that are, or will be, in Respondent's possession, including Respondent's own sales data – as the largest online retailer of contact lenses in the United States – and sales data from third party retailers, which has been subpoenaed by both Respondent and Complaint Counsel. *Id.* at 2-4. Complaint Counsel further states that Complaint Counsel has not yet received all the sales data requested from third parties, and therefore does not presently have sufficient documents to compile the analysis requested by the Interrogatories in any event. *Id.* at 4-5.

III.

FTC Rule 3.31(c)(2)(i) sets forth that discovery may be limited where “[t]he discovery sought from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.” 16 C.F.R. § 3.31(c)(2)(i). Although Complaint Counsel has noted objections based on the foregoing discovery limitations, Complaint Counsel states that it “has not refused to respond to Interrogatories 10 and 11.” Opposition at 4. Rather, Complaint Counsel explains that it has not performed the sales volume analysis requested by the Interrogatories, and that it does not, at present, have sufficient data to perform such analysis.¹ Respondent does not challenge this assertion. Respondent cannot compel Complaint Counsel to provide information that Complaint Counsel does not presently possess. In addition, to the extent that the Interrogatories require Complaint Counsel to provide an analysis of sales data, such data consists largely of Respondent’s own sales data, or third party data that both parties have received, or will receive, pursuant to their respective subpoenas. Such data is, or will be, within Respondent’s custody and control, and it is less burdensome for Respondent to analyze its own data than for Complaint Counsel to do so. See *In re N. Tex. Specialty Physicians*, 2004 FTC LEXIS 12, at *4 (Jan. 21, 2004) (denying motion to compel interrogatory responses where “the burden of deriving or ascertaining the answers from the documents produced [was] substantially the same for” the requesting party).

IV.

Based on all of the foregoing, Respondent’s Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: December 12, 2016

¹ Although Respondent asserts that this is essentially an admission by Complaint Counsel that it has no support for the Complaint’s relevant market and market share allegations, whether or not Complaint Counsel can ultimately prove the allegations of the Complaint is not the question presented on a motion to compel.