





reviewed, and does not intend to rely upon the prosecution of this matter.



9320, 2007 WL 6936319, at \*5 n.1, \*24 n.17 (Oct. 30, 2007) (citing public Commission reports on the real estate industry), re N. Tex. Specialty Physicians, 40 F.T.C. 715, 717 & n.2, 728, 736 (Sept. 16, 2003) (citing public reports, hearing policy statements, and opinion letter). Neither case involved any citation to the underlying materials that formed the basis for public Commission reports. And neither case involved the Commission citing a nonpublic report or to the underlying materials that formed the basis for a nonpublic report.

Further, Respondent argues that the subject matter of the materials sought may overlap with the subject matter of this litigation. Motion 2-6. But this in no way justifies the relief Respondent seeks. Simply because the Commission possesses “documents that may be relevant does not entitle respondents to them. . . . Respondent’s rights . . . to present evidence

that “[t]he mere hope that some of the material might be useful does not constitute good cause” to order additional discovery under Rule 3.36. *In re The Kroger Co.*, 1977 FTC No. 9102 C, 1977 FTC LEXIS 55, at \*4-5 (Oct. 27, 1977). Yet Respondent offers nothing beyond “mere hope.” For example, Respondent speculates that the materials it seeks might prove useful “if the Commission and its experts rely upon the conclusions in” a publicly available report. Motion at 4. But this hypothetical concern does not show a compelling need for the materials sought, particularly because Rule 3.31A(c) already mandates the disclosure of all necessary materials considered by a hypothetical expert. Moreover, as noted above, Complaint Counsel has not reviewed let alone relied upon, any of the materials sought by Respondent not in its pre-complaint investigation, and not the prosecution of this matter. Nor does Complaint Counsel intend to do so. See Ex. A (Declaration of Barbara Blank) ¶ 3.

Finally, Respondent points out that Complaint Counsel has sought from Respondent discovery of relevant documents and analyses, and has refused to provide reciprocal production of all such analyses and related documents. Motion at 4, 6. This complaint misses the mark, as it ignores the explicit limitation on Complaint Counsel’s obligation to search provided by Rule 3.31(c)(2). See *In re Abbott Labs.*, 1992 FTC No. 9253, 1992 FTC LEXIS 296, at \*\*7-8 (Dec. 15, 1992) (striking provisions of respondent’s subpoena “to the extent it purports to require a search of the entire Commission for responsive documents, only files in the custody or control of complaint counsel need be searched”); *Kroger Co.*, 1977 FTC LEXIS 55, at \*4 (striking specifications from a Rule 3.36 subpoena seeking documents from “[t]he Commission’s prior proceedings, including formal proceedings, investigations, compliance proceedings and proposed rulemaking proceedings” as “clearly relevant” and “beyond the scope of legitimate discovery”).

II. Respondent Has Not Made the Showings Required by Rule 3.36

In addition, Respondent's Motion should be denied because its enormously burdensome proposed subpoena fails the "reasonable particularity" and "reasonable scope" requirements of Rules 3.36(b)(1) and (b)(5), and represents precisely the type of fishing expedition that the rules forbid. Intel, which Respondent cites, provides an instructive contrast. There, the court granted an unopposed Rule 3.36 motion to depose a Bureau of Statistics official for "two hours or less," on "six narrow topics" regarding prices of a single series of microprocessors. In re Intel

Respondent's defenses, as required by Rule 3.36(5) generally Assoc. Merchandising Corp. FTC No. 8651, 72 F.T.C. 1030, 1967 WL 94071\*2 (Dec. 11, 1967) (denying the respondents' broad discovery request, which "can only be evaluated difficulty, if at all, against the standards of the rule" as some Commission files "would have no relevance to the issues involved in litigation"). Broadly formulated and imprecise requests are generally disfavored. See, e.g., In re OSF Healthcare Sys., FTC No. 9349, 2012 FTC LEXIS 31, at \*4-5 (Feb. 14, 2012) ("[S]ubpoena requests that seek documents 'concerning' or 'relating to' have been found to lack the 'reasonably particularity' required."); see also In re North Texas Specialty Physicians, FTC No. 9312, Dkt. No. 2004 FTC LEXIS 19, at \*12 (Feb. 4, 2004). And such discovery requests are particularly inappropriate in the context of a Rule 3.36 motion, where Respondent must demonstrate a "strong justification" and a "special showing of need" for the particular discovery it seeks.

Finally, Respondent's request is particularly onerous because it will require the review of an enormous quantity of privileged documents, a burden anticipated by the Commission's instruction that Rule 3.36 subpoenas should not be approved "without strong justification" in part due to "the burden (and delay) of searches for responsive records and the creation of privilege logs." 74 Fed. Reg. 1804, 1815 (emphasis added). Here, Respondent's 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.<sup>3</sup> The process of reviewing an enormous number of

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<sup>3</sup> If the Court grants Respondent's Rule 3.36 motion, Complaint Counsel reserves the right to have the appropriate Commission personnel formally claim any applicable executive privileges after a motion to compel has been filed. See In re Sealed Case, 121 F.3d 729, 741 (D.C. Cir. 1997) (executive privileges need not be claimed until motion to compel filed).





# EXHIBIT A

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

4. As of October 14, 2016, Complaint Counsel has produced to Respondent 11,264 pages of documents bearing the Bates numbers FTC-PROD-0000001 through FTC-PROD-0011264.
5. As of October 14, 2016, Complaint Counsel has produced to Respondent the following categories of documents, electronically stored information, and tangible things (“documents”) in the possession, custody, or control of the Commission:
  - a. Documents produced by third parties to the Commission in response to the subpoenas *duces tecum* and Civil Investigative Demands issued by the Commission in the course of the investigation bearing the FTC File No. 141-0200;
  - b. Documents produced by third parties to the Commission voluntarily in lieu of process during the Commission’s investigation in FTC File No. 141-0200;
  - c. Retained correspondence with market participants that took place in the course of the Commission’s investigation in FTC File No. 141-0200;
  - d. Transcripts of investigational hearings of employees of Respondent and other persons taken by the Commission in FTC File No. 141-0200;
  - e. One declaration received by the Commission in FTC File No. 141-0200.
6. In addition, Complaint Counsel is in the process of responding to two sets of document requests Respondent served on September 16, 2016 and September 20, 2016.
7. On or before October 18, 2016, Complaint Counsel intends to produce all non-privileged documents responsive to Respondent’s Request for Production dated

September 16, 2016, for documents produced by Walgreens Boots Alliance, Inc. or Johnson & Johnson, Inc. in connection with the investigation of the proposed purchase of Vision Direct by Respondent (FTC File No. 161-0106), specifically: business plans and analysis relevant to Walgreens, and pricing data and analysis relevant to Vistakon and ABB, to the extent such documents were collected or reviewed by the Bureau of Competition or the Bureau of Economics as part of the Commission's investigation in File No. 141-0200.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on October 14, 2016 in Washington, D.C.

*/s/ Barbara Blank*

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Barbara Blank

**CERTIFICATE OF SERVICE**

I hereby certify that on October 14, 2016, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

I also certify that I delivered via electronic mail a copy of the foregoing document to:

Gregory P. Stone  
Steven M. Perry  
Garth T. Vincent  
Stuart N. Senator  
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**CERTIFICATE FOR ELECTRONIC FILING**

I 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.

October 14, 2016

By: s/ Dan Matheson  
Attorney