



UNITED STATES OF AMERICA

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In the Matter of)

1-800 CONTACTS, INC.,)

DOCKET NO. 9372

Respondent.)

COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENT'S RENEWED MOTION FOR DISCOVERY FROM THE COMMISSION

Respondent has renewed its effort to serve several document requests on the Federal Trade Commission, trying to correct the defects in the first subpoena that the Commission issued. [REDACTED]

BACKGROUND

On October 2, 2016, Respondent first [REDACTED]

not limited the requests “only to discrete and identifiable studies, reports, and analyses.” Order

[REDACTED]

ARGUMENT

[REDACTED]

[REDACTED]

[REDACTED]

requests, in an attempt to cure these defects. However, the revised set of requests suffers the same type of defects.

Respondent Cannot Show Good Cause for Additional Discovery from the Bureau of Competition or the Bureau of Economic Analysis (BCEA) (D. Minn. 11-15-16)

In the absence of a showing of good cause, Respondent has not provided a basis for approval of Requests 1, 4, 5, and 6 (and portions of requests 2 and 3) seeking additional discovery from either BC or BE.

II. Respondent Has Not Shown a Need for Discovery from BCP or OPP (Requests 2-6).

A. Respondent Is Entitled to Discovery from BCP or OPP Only Upon

Meeting the Requirements of Rule 3.36.

Neither the Bureau of Consumer Protection (“BCP”) nor the Office of Policy Planning (“OPP”) were involved in the investigation or this litigation. For such bureaus or offices, Rule 3.31(c)(2) cross-references Rule 3.36, which governs subpoenas directed to “any Bureau or Office *not* involved in the matter.” Rule 3.36 establishes exacting standards for such discovery.

As the Court explained in its Order, a respondent must meet the following requirements:

[REDACTED]

B. Request 2 Does Not Meet the Requirements of Rule 3.36.²

In Request 2 Respondent would seek production of:

[REDACTED]

provide for such discovery.

This conclusion is supported by *In re Intel Corp.*, 2010 FTC LEXIS 56 (June 9, 2010),

[REDACTED]

serve Request 2 on the Commission should be denied because just like Respondent's first

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<https://www.ftc.gov/sites/default/files/documents/reports/strength-competition-sale-rx-contact->

[REDACTED]

[REDACTED]

II), 2015 WL 2193777, at *4 (denying motion to compel production of “general background information” about the industry).

~~An examination of the reports simply compares the economic data of the industry to the~~

~~_____~~

~~_____~~

~~_____~~

D.

~~_____~~

~~_____~~

~~_____~~

~~_____~~

~~_____~~

~~_____~~

~~_____~~

forming an opinion).

⁶ ~~Id. We also are concerned that if articles independently published by FTC personnel are automatically subject to~~
~~_____~~

First, the January 13, 2011 letter was prepared by BE and BC, as well as OPP, and therefore the request should be evaluated under the good cause standard of Rule 3.31(c)(2).

~~_____~~

documents.

Second, Respondent's suggestion of the relevance of materials is based on conjecture:

- The January 13, 2011 FTC letter "*could*" be used to refute the Commission's contentions . . .
- With respect to the 2015 Policy Statement, "[o]ne *assumes* that the Commission conducted surveys, focus groups or other consumer research . . ."

~~_____~~

"clearly relevant."

Respondent's Brief at 6, 7. None of these requests meets the exacting Rule 3.36 standards the Court set forth in *Intel*.

Third, the requests themselves do not meet the "reasonable particularity" requirement of

~~_____~~

Rule 3.36. Unlike the subpoena that the Court approved in *Intel*, Requests 4 and 5 seek "*all data,*

~~_____~~

~~_____~~

~~_____~~

~~_____~~

extent that either BC or BCP attorneys prepared materials to give legal advice in conjunction

[REDACTED]

CONCLUSION

For the foregoing reasons, we respectfully request that the Court deny Respondent's renewed motion for issuance of a Rule 3.36 Subpoena.⁷

Dated: December 8, 2016

Respectfully submitted,

/s/ Daniel J. Matheson
Daniel J. Matheson

Federal Trade Commission
Bureau of Competition
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[REDACTED]

⁷ The Commission reserves the right to raise specific objections to these comments, including [REDACTED]

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL TRADE COMMISSION	:	CIVIL ACTION
	:	
v.	:	
	:	
CEPHALON	:	No. 08-2141

ORDER

AND NOW, this 28th day of February, 2011, having considered Defendant Cephalon's Motion to Compel Documents From Plaintiff Federal Trade Commission ("FTC") (Doc. 84),

Plaintiff FTC's Response (Doc. 86) and Generic Defendants' Response (Doc. 89) to Plaintiff's Motion to Compel Documents From Plaintiff FTC (Doc. 84),

1. Defendant's Motion to Compel (Doc. 84) is DENIED.¹ It is further ORDERED that Plaintiff FTC is not precluded from citing the publicly-available studies at issue: *Generic Drug Entry Prior to Patent Expiration: An FTC Study* or *Pay for Delay: How Drug Company Pay-Offs Cost Consumers Billions*.

¹ The Court finds the parties' written submissions sufficient to render a decision regarding Defendant Cephalon's Motion to Compel. Therefore, the Court declines to hold oral argument, which was tentatively scheduled for March 4, 2011.

The FTC has stipulated that it “[h]as no intention to offer the two studies into evidence,”

[REDACTED]

purpose.

3. Third Party Pharmaceutical Companies’ Motion for Protective Order (Doc. 88) is DENIED as moot, in light of the denial of Defendant’s Motion to Compel.

BY THE COURT:

/s/ L. Felipe Restrepo
L. Felipe Restrepo
United States Magistrate Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2016, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

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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 documents to:

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Dated: December 8, 2016

By: /s/ Daniel J. Matheson
Attorney

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.

December 8, 2016

By: /s/ Daniel J. Matheson
Attorney