

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



In the Matter of \_\_\_\_\_ )  
\_\_\_\_\_)  
\_\_\_\_\_)  
1-800 CONTACTS, INC., \_\_\_\_\_ )  
a corporation, \_\_\_\_\_ ) DOCKET NO. 9372  
\_\_\_\_\_)  
Respondent \_\_\_\_\_ )  
\_\_\_\_\_ )

COMPLAINT COUNSEL'S OPPOSITION TO  
RESPONDENT'S MOTION TO COMPEL COMPLAINT COUNSEL TO ANSWER  
RESPONDENT'S INTERROGATORIES NOS. 10 AND 11

Complaint Counsel submits this Opposition to Respondent 1-800 Contacts, Inc.'s Motion to Compel Complaint Counsel to Answer Respondent's Interrogatories Nos. 10 and 11 ("Motion").

Respondent's Motion should be denied. *First*, Respondent seeks the analysis of Respondent's *own sales data*. This data is plainly within Respondent's custody and control, and

~~it will be significantly less burdensome for Respondent to parse and analyze that data than for~~  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

At issue are interrogatories that seek a detailed analysis regarding the dollar sales

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
years:

Interrogatory 10 directs Complaint Counsel to “[i]dentify 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 the period from 2000 to 2005.”  
[REDACTED]

to these interrogatories.

**ARGUMENT**

**I. Interrogatories Seek Analysis of Respondent’s Own Data, and the Burden of Performing this Analysis is More Onerous for Complaint Counsel than for**

[REDACTED]

At least a portion of the underlying data that would be responsive to such an analysis comes from Respondent itself, since it is by far the largest online retailer of contact lenses in the United States. Rule 3.31 provides 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).

Here, of course, the application of that rule is self-evident when some part of the information Respondent seeks is already in its own hands. Indeed, this Court has previously rejected attempts to seek discovery of materials already in possession of the requesting party, or

[REDACTED]

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<sup>1</sup> Respondent is also in possession of both internal and external market or revenue estimates for most or all of its major competitors.

II. Interrogatories Seek Analysis Not Performed by Complaint Counsel Where

[REDACTED]

Underlying Data Has Been Provided To Defendant on 12/14/11

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

for additional sales data.

In any event, Complaint Counsel has not refused to respond to Interrogatories 10 and 11 to the extent that Complaint Counsel ultimately performs an analysis of the relevant market data

[REDACTED]

FTC LEXIS 210 (Nov. 4, 2004), at \*8-9 (rejecting motion to compel fuller interrogatory response from complaint counsel where respondent's interrogatory "undermine[d] the schedule

[REDACTED]

are no cognizable procompetitive justifications, the Commission can condemn it “without proof of market power or actual effects”), *aff’d, Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (6th Cir. 2011); *In re North Texas Specialty Physicians*, 140 F.T.C. 715, 2005 FTC LEXIS 173 (F.T.C. 2005) at \*771 (“[P]roof of market definition and market power is not required [where]

[REDACTED]

[REDACTED]

by Respondent itself.

CONCLUSION

For the foregoing reasons, the Court should deny Respondent’s Motion to Compel Complaint Counsel to Answer Respondent’s Interrogatories Nos. 10 and 11.

Dated: December 9, 2016

Respectfully submitted,

/s/ Daniel J. Matheson

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# Ex 1

[REDACTED]



# Ex. 2

REDACTED IN ENTIRETY

  
I hereby certify that on December 9, 2016, I filed the foregoing documents 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  
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The Honorable D. Michael Chappell  
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I also certify that I delivered via electronic mail a copy of the foregoing documents to:

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Dated: December 9, 2016

By: /s/ Daniel J. Matheson  
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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.

December 9, 2016

By: ~~/s/ Daniel J. Matheson~~

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