PUBLIC

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

585012

In the Matter of

1-800 CONTACTS, INC.,
a corporation,

Respondent

DOCKET NO. 9372

COMPLAINT COUNSEL'S REPLY BRIEF IN FURTHER SUPPORT OF MOTION TO COMPEL PRODUCTION

INTRODUCTION

The document production Complaint Counsel seeks is reasonable. RFPs 22 and 24 seek specifically identified, regularly-prepared reports. RFPs 23 and 25 seek documents discussing those same reports *by name*, and Complaint Counsel proposed that Respondent narrow its search. After taking a month to begin investigating even basic facts about these requests, Respondent failed to provide Complaint Counsel with information showing that its proposed search strategy is reasonable or even to discuss Complaint Counsel's proposal. As such, Complaint Counsel moved to compel on November 29 ("Motion").

A. The Requested Materials Are Relevant

Respondent does not dispute that the materials sought—reports containing and evaluating metrics regarding the channels through which consumers visit and purchase from Respondent, *and* contemporaneous discussions about those metrics—are relevant. Nor could it. One central claim in this case is that Respondent engaged in a concerted effort to block lower-priced competitive [redacted] advertising via one of those channels. Documents containing Respondent's [redacted] concerns about competition in this channel, and discussing the importance of this channel compared to others, are plainly relevant. For example:

- One Weekly Core Website Overview report noted that [redacted] (Matheson Dep. Tr. 800F_00030799);
- Another such report noted: [redacted]

[redacted] (Ex. A (Clair Decl.) Tab 1, at 1-800F_0003939); and [redacted] (Ex. [redacted] 81), and [redacted] (Ex. A-Tab 3, at 1-800F_00[redacted]).

Respondent's suggestion that Complaint Counsel should have requested only the data underlying these reports [redacted] reports themselves [redacted] commentary and analysis, representing party admissions, for which data is no substitute.

B. The Production Complaint Counsel Seeks is Reasonable and Described with Particularity

The dispute regarding RFPs 22 and 24 is extremely narrow, and the dispute regarding RFPs [redacted] the scope [redacted] has not provided any evidence to suggest that these requests would [redacted] numerous custodians.[1] Nor has Respondent provided [redacted] proposed search strategy is likely to find any [redacted] of the requested documents. Respondent proposes to search where searching is easiest [redacted] to other requests) but in light of Respondent's insufficient [redacted] that collection is [redacted] Respondent's motion.[2]

[1] Additionally, contrary to any suggestion by Respondent that [redacted] number of reports produced (O[redacted] produced its Weekly Website Overview for only 44 weeks.

[2] Motion at 3.

reveals that this approach will exclude unique, resp[redacted] “readily” or [redacted] other locations.[3]

As to R[redacted] and 25, the request is not for all documents[redacted] all documen[redacted] to “meet and co[redacted] the parties’ meet-a[redacted] Respondent’s burdens, such as limiting searches by file type or custo[redacted] responsiveness review a[redacted] privilege filter and/o[redacted] cover [redacted] Responden[redacted] raises about having to review task lis[redacted] res[redacted] ameliorated by engaging with Complaint Counsel about its suggestions. F[redacted] Tab 1 to the Clark Declaration is an Excel file that co[redacted] excluded by file type.[redacted] tim[redacted] agreed to f[redacted]

Even without employing any of th[redacted] additional documents are imp[redacted]

---

[3] Matheson Decl. (11/29/2016[redacted] complete set of such reports[redacted] whether any miss[redacted] from which they can readily be pulled. And[redacted] locations/cu[redacted] easily obtained.”).

[4] Oppositi[redacted]

[5] Clark Decl. ¶ 7.

(down from "2[illegible]000" just weeks ago).[6] Respon[illegible]

bas[illegible]d on its burden[illegible] the burden[illegible] nor take advantage of existing

opport[illegible][7]

Res[illegible]onde[illegible] attempt to characterize these requests as a "fishing exp[illegible]ion" relies on

inapposite cases involving discovery from *third par*[illegible] judged [illegible] See

Henry v. Morgan's Hotel Group, Inc., 201[illegible] 303114 (S.D.N.Y. Jan. 25, 2016) (discovery

from plaintiff's past employer (a non-pa[illegible]y) held irrele[illegible] defend[illegible]

discr[illegible]

(discovery fr[illegible] "in part").

Likewise, this Court's October 28 O[illegible]ecting [illegible] Respondent's Rul[illegible].36 subpoena

the cases [illegible] concerned additional dis[illegible] sources other [illegible]

par[illegible] Order at 3, 6 (citing *In re OSF Healthcare*, 2012 FTC LEXIS 31 (Feb. [illegible] 2012)

(subpo[illegible] to non-party UnitedHealth) and *In re North Texas* [illegible] *Physicians*, 2004 FTC

LEXIS 19 (Feb. 4, 2004) (subpoena to non-party [illegible]

this Court rejected in its October 28 Order, it is hard [illegible] to imagine how Complain[illegible] Counsel could

offer more "reasonable particularity" than a[illegible] already achieved here with [illegible]

[illegible]uments that *explicitly mention* [illegible] *reports by name*.

CONCLUSION

For th[illegible]

the Mo[illegible] should be granted.

---

[6] Mat[illegible] (G. Se[illegible]

[7] *E.g.*, *In re Lab. Corp. of Am.* Order Denying Hunter Labs.' Motion to Quash Subpoena *Duces Tecum*, at 4, FTC Docket No. 934[illegible] (denying motion to quash third-party subpoena where movant "provided no specific information regarding [illegible] burden or expense involved . . .")(Ex. A, Tab 4).

Respectfully submitted,

/s/

Daniel J. Mathews

Jeffrey M.

Charles

Th

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Gustav P. Chiarello

Jo

Nath

Charlotte S. Slaiman

M

Counsel Sup

Ex. A

PUBLIC

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

In the Matter of

1-800 CONTACTS, INC.,
a corporation,

Respondent

DOCKET NO. 9372

DECLARATION OF KATHLEEN M. CLAIR

1. I have personal knowledge of the facts set forth in this Declaration and, if called as a witness I could and would testify competently under oath to such facts.

2. I am an attorney employed by the Federal Trade Commission and am counsel in the above-captioned proceeding. Attached to this Declaration are true and correct copies of documents that Complaint Counsel has received from Respondent in response to Complaint Counsel's Motion to Compel Production of Documents in Response to Requests for Production 22-25.

3. Tab 1 is a true and correct copy of a document produced by Respondent, consisting of a Weekly Core Website Overview report for the week of August 11-17, 2012, bearing Bates numbers 1-800F_00030980 through 1-800F_00030981.

4. Tab 2 is a true and correct copy of a document produced by Respondent, consisting of an August 13-14, 2012 email exchange between Joan Blackwood and Bryce Craven, in response to [illegible] email exchange from Rick Gall, bearing Bates numbers 1-800F_00030980 through 1-800F_00030981.

5. Tab 3 is a true and correct copy of a document produced by Respondent, consisting of an April 18, 2011 email exchange between Joan Blackwood and Bryce Craven, in which

800F_000

6. Tab 4 is a true and correct copy

Further Support of Mo

for Prod

Subpoena *Duces Tecum*,

I declare under the penalty of perjury that the foregoing is true and correct. Executed

15th day of December, 2016 at Washington, DC

Kathleen
Federal Trade Commission
Bureau of Competition
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Facsi
Emai:

Counsel

Tab 1

REDACTED IN ENTIRETY

Tab 2

REDACTED IN ENTIRETY

Tab 3

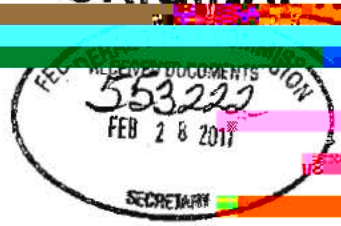
REDACTED IN ENTIRETY

Tab 4

PUBLIC

ORIGINAL

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



In the Matter of	)
LABORATORY CORPORATION OF AMERICA	)
and	) DOCKET NO. 9345
LABORATORY CORPORATION OF AMERICA HOLDINGS,	)
Respondents.	)

ORDER DENYING HUNTER LABORATORIES' MOTION TO QUASH SUBPOENA *DUCES TECUM*

I.

On February 8, 2011, third party Hunter Laboratories ("Hunter Labs") filed a Motion to Quash Subpoena ("Motion"). On February 18, 2011, Respondents filed an Opposition to Hunter Labs' Motion. For the reasons set forth below, Hunter Labs' Motion is DENIED.

II.

Hunter Labs moves to quash the Subpoena Duces Tecum served on it by Respondents Laboratory Corporation of America and Laboratory Corporation of America Holdings (collectively, "Labcorp") on February 1, 2011 ("Subpoena"). Hunter Labs asserts that the Subpoena violates a discovery ruling in a civil action pending in the State of California ("California Action"), and that the discovery sought is unreasonably cumulative or duplicative, is obtainable from some other source that is more convenient, less burdensome, and less expensive; and that the burden and expense of the proposed discovery outweigh its likely benefit.

Respondents oppose the Motion, arguing that Hunter Labs failed to comply with Commission Rule 3.22(g) and that the state court order denying discovery is irrelevant. Respondents further contend that Hunter Labs has not demonstrated that the requested documents are irrelevant and has not shown undue burden.

III.

A. The California Action

Hunter Labs states that it filed a *qui tam* action against LabCorp and other defendants for violations of the California False Claims Act and that, in that action, the court-appointed Special Master denied LabCorp's motion to compel responses from Hunter Labs to certain discovery requests. The resolution of a discovery dispute in another action involving different parties, claims, and [illegible] under a different statute than the present case, is not dispositive of the instant dispute. In this action, [illegible] may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed [illegible] or to the defenses of any respondent. 16 C.F.R. § 3.31(c)(1). Rules provide that the Administrative Law Judge may limit discovery if he determines that the discovery sought is unreasonably cumulative or unduly burdensome. 16 C.F.R. § 3.31(c). It is these factors, as stated in the Commission's Rules, and not [illegible], that govern the issue of whether the Subpoena served in this action should be quashed.

B. [illegible] Requirement

Rule 3.22 of the Commission's Rules of Practice requires that each motion to quash shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. 16 C.F.R. § 3.22(g). Hunter Labs does not [illegible] statement, but asserts that counsel for Hunter Labs sent a letter to counsel representing LabCorp in the California action, asking them to withdraw the Subpoena, in light of the Special Masters' recommendation in the California action. LabCorp's counsel in the California action responded to withdraw the Subpoena and informed Hunter Labs to direct its questions regarding the Subpoena to counsel representing LabCorp in the FTC [illegible]. Hunter Labs in this action states that, besides copying them on the letter to counsel in the California action, Hunter Labs took no other step to contact Respondent's counsel prior to filing the instant motion.

Pursuant to Rule 3.22, counsel have a duty to make an effort in good faith to confer with opposing counsel before filing a motion to quash. The efforts undertaken by Hunter Labs do not amount to an effort in good faith to resolve the dispute. Because Hunter Labs failed to comply with Rule 3.22(g), its motion could be rejected on that basis. However, as set forth below, Hunter Labs' motion fails because Hunter Labs failed to demonstrate that the Subpoena imposes an undue burden

C. Scope of the Subpoena

Discovery shall be limited by [illegible] determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; . . . or (iii) the burden and expense of the proposed discovery outweighs its likely benefit. 16 C.F.R. § 3.31(c)(2). In addition, [illegible] deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue [illegible] prevent undue delay in the proceeding. 16 C.F.R. § 3.31(d).

Hunter Labs argues that the Subpoena seeks unreasonably cumulative discovery and that the burden and expense of the proposed discovery outweighs its likely benefit. Hunter Labs states, without providing factual support, that the requests would take months and tens or even hundreds of thousands of dollars to comply [illegible] Hunter Labs further states that it is unclear what, if any relevance, the requested documents have to the instant action, as it is Hunter Labs' understanding that this action alleges the [illegible] integration would decrease competition in the Southern California [illegible] for capitated contracts, while Hunter Labs is a Northern California lab that does not offer capitated contracts. Because, according to Hunter Labs, their business practices [illegible] shed no light on the issues pertinent to the FTC action, the [illegible] the Subpoena outweigh the likely benefit.

Respondents state that the founder of Hunter Labs [illegible] is on Complaint Counsel's preliminary witness list, and that Complaint Counsel expects to call him to testify regarding his business org[illegible] Southern California, and Hunter Labs' ability [illegible] Consequently, Respondents assert, the Subpoena seeks evidence of Hunter Labs' business [illegible] as well as the alternative markets proposed by Respondents. [illegible] the documents requested are relevant to Respondents' ability to prepare a defense [illegible] that Hunter Labs' [illegible] already provided testimony in an investigational hearing and that Complaint [illegible] Hunter Labs' business position and ability to enter and expand into the relevant market.

A party seeking to quash a subpoena has the burden of demonstrating that the request is unduly burdensome. *FTC v. Dresser Indus., Inc.*, 1977 U.S. Dist. LEXIS 16178 at *12 (D.D.C. 1977); *In re Intel*, 2010 WL 2143904 (May 19, 2010); *In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 41, at *9 (Jan. 15, 2009) [illegible] subpoenaed third party adequately demonstrates that compliance with a subpoena w[illegible]

[1] Pursuant to Commission Rules 3.22(c) and 3.45(e), Respondents redacted certain information from their Opposition beca[illegible] this case. Where a document has been designated as Confidential, but the inf[illegible] req[illegible] in camera treatment, such material may be disclose[illegible] *Polypore Int'l Inc.*, 2010 FTC LEXIS 17, *13 (March [illegible], 2010); 16 C.F.[illegible] such *in camera* material to the extent necessary for the proper disposition of the proceeding").

impose a substantial degree of burden, inconvenience, and cost that will not excuse producing information that appears generally relevant [illegible] *In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009); *In re Kaiser Alum. & Chem. Co.*, 1976 FTC LEXIS 68 at *19-20 (Nov. 12, 1976). Information from competitors is frequently crucial in proceedings [illegible] *Specialty Phys.*, 2004 FTC LEXIS 20, *4 (Feb. 5, 2004) (citing *Service Liquor Distributors, Inc. v. Calvert Distillers Corp.*, 16 F.R.D. 507, 509 (S.D.N.Y. 1954)). Information from a co[illegible] ability to enter and expand into a relevant mar[illegible] relevant to the allegations of the Complaint and the defenses of [illegible]

Hunter Labs has provided no specific information regarding the burden or expense involved in producing the requested documents other than its unsupported [illegible] dollars to comply with. A movant's general allegation that a subpoena is unduly burdensome is insu[illegible] sho[illegible] Hunter Labs has failed to meet its burden of demonstrating that the Subpoena is unduly burdensome or that the bu[illegible] expense of the discovery outweigh its likely ben[illegible]

IV.

For the abov[illegible] reasons, Hunter Labs' Motion is DENIED. Respondent and Hunter Labs are encouraged to meet and confer to minimize any burden that might result from compliance with the Subpoena.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: February 28, 2011

PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2016, I filed the foregoing documents electronically using the [illegible] notification of such filing[illegible]

Donald S. Clark
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The [illegible]
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I also certify that I delivered via electronic mail a copy of the foregoing [illegible]

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Dated: December 15, 2016

By: /s/ Daniel J. Matheson
Attorney

CERTIFICATE

I certify that the

and cor

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Attorney