

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATION



In the Matter of

1-800 CONTACTS, INC.,  
a corporation,

Respondent.

DOCKET NO. 9372

RESPONDENT'S RENEWED  
MOTION FROM THE COMMISSION PURSUANT TO

I.

On November 28, 2016, Respondent filed a Renewed Motion for Discovery from the Commission, Federal Trade Commission (the Motion (in Opposition)). Respondent's Motion is set forth below.

II.

Respondent's Motion seeks issuance of a subpoena of the FTC requiring the production of the following:

1. All reports, studies or analyses of
2. All reports, studies or analyses of, including the potential for confusion, or raise advertising in such advertising.
3. The most recent, as it has had availability of *Dispersion in Online and Offline Markets for Contact Lenses*, WORKING PAPER, NO. 283 (Original Version: April 2006 Revised: November 2006) Commission's 2006 report, *Dispersion in Online and Offline Markets for Contact Lenses*.

<sup>1</sup> Respondent's October 3, 2016 Motion

4. All data, studies, and information received in support of the 35 of the *FTC Staff Comment Before the North Carolina State Board of Commerce Concerning Proposed Regulation for Optical Retail Businesses* (Jan. 12, 2014, N110002) that “there is no information that the Commission’s 2007 findings about pricing and availability of contact lenses “ha[d] changed in the intervening years.”
5. All data, surveys, studies, and information received in support of the Commission’s 2015 Enforcement Policy Statement on Deceptively Dominated Advertisements that “consumers of search engines would expect a search engine to return results based on relevance to a search query, as determined by traditional criteria, not based on payment. Results that are included or ranked higher based on payment and not on traditional criteria are likely to influence consumers’ decisions. Thus, with regard to a search engine, and the results it delivers.”
6. All documents, data, information, or studies cited in the June 24, 2013 letters to Google and Microsoft regarding Search Engines that Commission staff cited in support of a decline in competition [2002 Search Engine Leadership Study] that “the features traditional search engines use to determine search results have become less noticeable to consumers.”

Motion Exhibits “A” through “G”

The Proposed Subject Matter is maintained by four bureaus: 1) the Office of Consumer Planning (OCP), 2) the Division of Advertising Practices and Division of Marketing Practices of the Bureau of Consumer Protection (BCP), 3) the Division of Marketing Practices Division of the Bureau of Competition (BC), and 4) the Office of Economic Research and Analysis (OERA) of the Bureau of Economic Analysis (BEA). The Commission’s investigative files or the litigation files of any FTC Bureau, or any other Bureau, excludes from its scope “draft reports, studies, or analyses, or any communications between Commission staff, or any other information or reports issued separately, or any other information.” Instruction 5<sup>24</sup>.

### III.

Respondent files its Motion and/or the author by submitting to the court in detail below, obtaining a subpoena pursuant to Rule 34 of the Federal Rules of Civil Procedure, or the material sought is relevant, reasonable in scope, requested with particularity, and cannot reasonably be obtained by other means. 16 C.F.R. § 3.96(a) (1).

<sup>2</sup> The abbreviations “BCP,” “BE,” and “BEA,” are used throughout this Motion to refer to these specified offices within each of these Bureaus.

Complaint Counsel contends that Rule 3.36 does not govern respondent's Proposed Subpoena that call for production by the Bureau of Competition and the Bureau of Economics, which are the two bureaus responsible for the jurisdiction and litigation of this matter. Complaint Counsel argues that Rule 3.36 governs "[a]n application for issuance of a subpoena for the production of documents . . . in the possession, custody, or control of . . . any Bureau or Office *not involved in the matter* . . ." 16 C.F.R. § 3.36(a) (emphasis added). Because the Bureau of Competition and the Bureau of Economics are or have been involved in this matter, Complaint Counsel argues that issuance of the Proposed subpoena, insofar as it affects these Bureaus, requires Respondent to demonstrate "good cause" as explained below. Complaint Counsel cites Rule 3.31(c)(2), which provides in pertinent part:

Complaint counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter or in the course of an investigation that are in the possession, custody or control of the Bureau or Office of the Commission that investigated the matter, including the Bureau of Economics. The Administrative Law Judge may authorize, for good cause additional discovery of materials in the possession, custody or control of those Bureaus or Offices or authorize other discovery pursuant to §3.36.

16 C.F.R. § 3.31(c)(2) (emphasis added).

Respondent's previous motion, titled "Motion for Discovery from the Commission Pursuant to Rule 3.36," sought documents from "the Commission" generally. The October 28 Order held, among other things, that by seeking documents from the "Commission" as it was broadly defined by Respondent, Respondent's document requests were not reasonable in scope. In the instant Motion, Respondent seeks documents from individual Bureaus or Offices.

Two of the offices, within the Office of Energy Efficiency and Consumer Protection, according to Complaint Counsel, were not "involved in the investigation or litigation" of this matter. Opposite at 4. Accordingly, Rule 3.36 governs Respondent's application for issuance of a subpoena for the production of documents from those offices. 16 C.F.R. § 3.36(a). Under Rule 3.36, Respondent must make a showing that: (1) the material sought is reasonable in scope; (2) the material falls within the limits of discovery under § 3.31(c)(1) ("reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent(s)"); (3) the material sought cannot reasonably be obtained by other means; and (4) the subpoena meets the requirements of § 3.37 (including, among other requirements, that the document requests specify the requested material "with reasonable particularity"). 16 C.F.R. § 3.36(b).<sup>3</sup>

The other two offices, within the Bureau of Competition and the Bureau of Economics, as well as, according to Complaint Counsel, "responsible for this or their investigation or litigation"

<sup>3</sup> In opposition to Respondent's October 3 Motion, Complaint Counsel cited to 74 Fed. Reg. 1804, 1816 (Jan. 17, 2009) to argue that Rule 3.36 required a "special showing of need." The October 28 Order held that "by requiring a motion that must show not only relevance, but also reasonable scope, the Commission has established that materials cannot reasonably be obtained by other means, the language of Rule 3.36 is consistent with the notion of a 'special showing of need.'" 16 C.F.R. § 3.36(b). Oct. 28 Order at 4.

Opposition at 2. Accordingly, Rule 3.31(c)(2) governs Respondent's request for documents from these offices. 16 C.F.R. § 3.31(c)(2). Under Rule 3.31(c)(2), the Administrative Law Judge may authorize additional discovery of materials in the possession, custody, or control of those Bureaus or Offices that investigated the matter upon a showing of "good cause." 16 C.F.R. § 3.31(c)(2).<sup>4</sup>

Complaint Counsel contends that Respondent has failed to establish good cause because, according to Complaint Counsel, the Proposed Subpoena represents a "fishing expedition" and it is not enough to demonstrate that requested documents "may be relevant." Opposition at 10, citing *In re Schering-Plough*, 2001 FTC LEXIS 199, at \*8 (Sept. 7, 2001). However, as more fully discussed below, Respondent has demonstrated more than potential relevance; it has demonstrated a certain relevance of the materials sought by the Proposed Subpoena in addition with the information provided by its other, previously obtained documents. Respondent's requested discovery is reasonable in scope and stated with reasonable particularity. Furthermore, as non-public documents, Respondent has established the requested materials are not obtainable through other means. Based on the record presented, this demonstration also supports a finding of good cause for additional discovery from the Bureau of Competition and the Bureau of Economics.

#### IV.

##### A. Reports, Studies, and Analyses of Competition in the Market for Contact Lenses and Advertising on Consumers' (Requests 1 and 2)

In the October 28 Order, it was held that "reports, studies, and analyses of competition in the market for contact lenses are relevant" and that "reports, studies, and analyses of retail store advertising's effect on consumers, including the potential of such advertising to cause confusion, deception, and dilution, are relevant." October 28 Order at 5. Specifically, such reports, studies or analyses are relevant to the allegations in the Complaint that (1) Respondent's alleged Retailer Agreements regarding price setting and other terms of sale for contact lenses, (2) Respondent's alleged Retailer Agreements regarding price setting and other terms of sale for contact lenses, (3) Respondent's alleged Retailer Agreements regarding price setting and other terms of sale for contact lenses, and (4) Respondent's alleged Retailer Agreements regarding price setting and other terms of sale for contact lenses. Complaint at ¶¶ 21, 25, 29, and 32. Respondent's alleged Retailer Agreements impaired the quality of information provided to consumers by competing companies, prevented retailers from providing non-confusing information about their products and prices, and increased consumers' search costs in acquiring and purchasing contact lenses. Complaint at ¶¶ 21, 25, 29, and 32.

Requests 1 and 2 are patterned specifically after the language of the October 28 Order. Complaint Counsel does not deny that Requests 1 and 2 seek relevant information regarding Respondent's alleged Retailer Agreements. Complaint at ¶¶ 21, 25, 29, and 32.

<sup>4</sup> The legislative history confirms that the 3.31(c)(2) good cause standard applies to the Bureaus and Offices of the Commission that investigated the matter, whereas the 3.36 standard applies to Bureaus and Offices that have not investigated the matter. 73 Fed. Reg. 58832, 58834, 58837-39 (Interim Rules) (October 7, 2008). See also 74 Fed. Reg. 1804, 1812 (Interim final rules with request for comment) (Jan. 17, 2009) (proposed rule 3.31(c)(2) is not applicable to Bureaus and Offices that have not investigated the matter). 73 Fed. Reg. 58832, 58834, 58837-39 (Interim Rules) (October 7, 2008). See also 74 Fed. Reg. 1804, 1812 (Interim final rules with request for comment) (Jan. 17, 2009) (proposed rule 3.31(c)(2) is not applicable to Bureaus and Offices that have not investigated the matter).

With regard to the scope of the requested documents, Limit 1 is not sufficiently particularized. Respondent's deposition testimony provides guidance on what would constitute reasonable consumer responses and the Commission's public comments confirm that the Commission has similar administrative conditions in the market for transactions and the stated purpose of said search advertising on consumers. Furthermore, Respondent points to the provisions of 16 C.F.R. § 16.104, which, summarized above, that limit the required search to offices and divisions which, Respondent argues, are likely to have produced the requested reports, studies and analyses.

Complaint Counsel's Opposition does not address the merits of Respondent's Opposition. Complaint Counsel contends that the October 29 Order dictates that to be deemed reasonable, Respondent's requests must set forth discrete and identifiable studies, reports, and analyses. Complaint Counsel's interpretation of this October 29 Order is not consistent with the October 29 Order. Respondent's argument that its requests for all documents, including reports, papers, working papers, studies or analyses, relating to contact lens advertising sought "discrete and identifiable" studies, reports, analyses, and studies, along with other factors, to the determination that Respondent had sufficient particularity demonstrating that its involvement requests were reasonable to conduct such a search. In contrast to Respondent's prior 3/26 subpoena requests, however, Requests 1 and 2 do not seek "discrete and identifiable" studies, reports, analyses or other documents relating to the contact lens industry or paid search advertising. In addition, Requests 1 and 2 omit the reference to "discrete and identifiable" studies, reports, analyses, and studies.

Complaint Counsel also argues that Requests 1 and 2, to the extent they seek any documents, such as internal studies or analyses, are unreasonable because compliance with the requests would require, "for example, . . . a review of individual FTC employees' emails for responsive materials." Complaint Counsel's argument is not sufficient to warrant the conclusion that Requests 1 and 2 are unduly burdensome in scope or for failure to be stated with reasonable particularity.

In addition, Complaint Counsel's reliance on *United Tech. Corp. v. BSA*, 2007 FC 658 (June 9, 2010), providing reasonable notice for compliance with 3/26 deposition subpoena, noting that the requested deposition was limited to two hours or less, and the inquiry was limited to the topics of the 3/26 deposition. The decision in *United Tech. Corp. v. BSA* was based on an evaluation of the particular discovery sought, and does not purport to set out a general rule as to what constitutes reasonable scope or reasonable particularity. Whether a proposed subpoena meets the requirements of reasonable scope or reasonable particularity is a matter that must be resolved on a case-by-case basis.

Regarding whether the materials sought by Requests 1 and 2 can be obtained through other means, the October 29 Order held that Respondent has demonstrated that "non-internal reports, analyses, and studies" could not be obtained by other means. In this Motion, Respondent has failed to demonstrate that it cannot obtain reports, analyses, and studies from through other means, such as the FTC.

<sup>5</sup> See Opposition at 10.

In conclusion, Respondent has demonstrated that the information, are reasonable and stated with respect to non-public reports, analyses and studies cannot be obtained by other means. In addition, Respondent has shown good cause to limit disclosure of information in the possession of the FTC regarding Respondent's Motion for Protective Order to those Requests, as modified to exclude publicly available materials.

## B. Data and Information Relied Upon in Summary Certain Public Statements (Requests 3-6)

In summary, Requests 3 and 6 of the Complaint seek disclosure of data and information relied upon for certain public statements of the FTC regarding the market for contact lenses and the effect of price-sensitive consumers on the market for contact lenses.

### 1. Support for FTC Statements Regarding Contact Lenses and Pricing (Requests 3 and 4)

Request 3 pertains to a 2005 public report entitled *The Economics of Competition in the Sale of Rx Contact Lenses* ("the 2005 Report"), and a related Working Paper ("Working Paper").<sup>7</sup> Respondent states that according to the 2005 Report, FTC staff collected price data on 10 different contact lenses from 20 online and 14 offline retailers and determined that contact lenses are on average 13.4% less expensive online than offline. Request 4 seeks the contact lens pricing data available by a direct purchase from the 2005 Report.

Request 4 pertains to a January 2011 statement in an FTC staff comment to the North Carolina State Board of Opticians that "given the information that the Commission has received, this report regarding the economics of contact lenses is not a reliable source of information." ("Comment")<sup>8</sup>

Respondent argues that the data underlying the Commission's conclusion that contact lenses pricing could be used to increase competition in the alleged market for contact lenses, including through lower prices. See Complaint ¶¶ 20, 24 (3). Respondent further argues that the Commission's analysis of sales and prices across retail channels is not reliable and that the Commission's data is not a reliable market for contact lenses and that online retailers account for only a small fraction of total sales. In addition, Respondent argues that the FTC's use for the 2005 Report of the economics published by the Commission supports Respondent's position that most consumers would also seek to purchase contact lenses

<sup>6</sup> Available at: <https://www.ftc.gov/sites/default/files/documents/reports-study-competition-sale-contact-lenses-ftc-study/020214contactlenspaper.pdf>

<sup>7</sup> Available at: <https://www.ftc.gov/sites/default/files/documents/reports/price-dispersion-online-and-offline-retailers-are-contact-lenses-2005-11-2011.pdf>. See 6.ppt.

<sup>8</sup> See <https://www.ftc.gov/sites/default/files/documents/press-releases/ftc-staff-comment-11-2011-state-board-opticians-concerning-proposed-regulations-regarding-contact-lenses-11-2011.pdf>

contact lenses, rather than the trademarked name, "PROSOL" 2000, and therefore a highly relevant Bidding Agreement, as well as the time spent in the market.

Arguing against relevance, Complainant argues that the data from 2002, and the Working Paper uses data from 2004, is not questioned whether ten-year-old documents are reasonably relevant. However, the Staff Comment that "there is no indication" that the data has changed in the intervening years," which indicates that the data has maintained its validity, at least through the date of the Staff Comment. Complainant's argument that the Working Paper era "was primarily an advisory role" is contradicted by the fact, including by expert testimony, that the Working Paper was examined, and "such limited evidentiary value" and "any other evidence" is not the standard for discoverability. It is not the standard for discoverability whether the requested discovery is reasonably calculated to lead to the discovery of admissible evidence. 16 C.F.R. § 3.31(c)(1). Regarding the relevance of the Request 4 for information underlying the Staff Comment, Complainant argues that the Working Paper is not relevant as OPP, and argues that Respondent could explain why there is no one capable to provide the data. In addition, Complainant charges that Respondent's assertions are conjectural and speculative.

Based on the foregoing, Request 4 and the relevant materials sought to yield information relevant to the allegations of the Complainant and/or Respondent's defenses thereto, and are therefore relevant for purposes of discovery.

It also appears from the nature of the data sought through Request 3, and the materials sought are not available through other means, and there is no contention to the contrary. With respect to Request 4, the data sought is not reasonably available through other means, and there is no contention to the contrary. In support of the identified relevance of the data, this information is requested pursuant to reasonable efforts to identify and seek the data sought, and information is available upon for the statement in the identified Staff Comment. In regards to the information, as well as data and studies, Request 4 is not reasonably relevant. It is not clear how the data could encompass specific or definitive materials that may not be discoverable. Rule 3.31(c)(4). Accordingly, Request 4 is not reasonably relevant to the data and information.

In conclusion, Respondent has demonstrated that Request 4 and 5 are relevant, reasonable in scope, and available through other means, and that Respondent has shown good cause for this discovery as modified to the extent the Request call for information that is not reasonably available. Therefore, the Request is GRANTED as to those Requests as set forth herein.

## 2. Support for FTC statements regarding Consumer search confusion (Adopted as amended)

Request 5 seeks information supporting the FTC's statements in the 2015 Enforcement Policy Statement on Deceptively Permitted Advertising that "many consumers of information will expect a search engine to return search results based on a search query, and that information."

criteria not based on payment for a third party, and that following which search results are included or ranked higher by consumers' decisions in a search engine. Plaintiff's expert testimony is supported by information supporting statements in a June 20, 2013, letter from the FTC to Google, Inc., signed by K. Engle stating that "it is significant that search engines use algorithms to differentiate advertising from natural search results and have received economic benefits from consumers."

The above statements refer to consumer conduct and the effect of that conduct on advertising on consumer decisions with respect to search engines. Plaintiff's expert testimony on these issues are relevant, pointing to the Commission's findings in the *Google* case. Plaintiff's Complaint that the claim established by the evidence submitted by Plaintiff is that search engines to consumers by search engine algorithms that have been developed to provide information about products and prices, and to increase sales, and that the evidence submitted to the online purchase of goods and services, and to the extent these data are used for advertising purposes, focus groups or similar consumer research in which the FTC has conducted such to the extent these data are used for advertising purposes, are reasonably expected to be relevant to the allegations. Respondent also states that Plaintiff's Complaint is not supported by the evidence presented and other information submitted in support of Plaintiff's Complaint. Plaintiff's Complaint Counsel maintains that its expert testimony is relevant to the issues presented.

Based on the foregoing, Requests 5 and 6 seek information that is not reasonably expected to yield information relevant to the claims asserted by Plaintiff, and are therefore relevant for purposes of the *Google* case, but the information sought does not appear to be available to Respondent through other means.

However, Requests 5 and 6 do not seek information that is not reasonably expected to be relevant to the claims asserted by Plaintiff, but rather seek information that is reasonably expected to be relevant to the claims asserted by Plaintiff. Plaintiff's Complaint and 6 shall be modified to request information that is not reasonably expected to be relevant to the claims asserted by Plaintiff.

In conclusion, Respondent has demonstrated that Requests 5 and 6 are not reasonably in scope, state and where available, seek information that is not available through other means, except to the extent that the information sought is not available through other means, except to the extent that the information sought is not available through other means. In addition, Respondent has shown good cause for this discovery, as indicated, to the extent the Requests call for information in the possession of RC or BE. Accordingly, Respondent's Motion is GRANTED as to these Requests, as modified herein.

### 3. Privileges

Complaint Counsel contends that Requests 5 and 6 are not prepared "in connection with" opinion, recommendations, and advice about Agency decisions. Respondent states that the supporting information and information provided by Respondent seeks is only factual information, and is not privileged.





## Notice of Electronic Service

I hereby certify that on December 20, 2016, I filed an electronic copy of the foregoing Order on Respondent's Renewed Motion for Discovery from the Commission Pursuant to Rule 3.36, with:

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
Suite 110  
Washington, DC, 20580

Donald Clark  
600 Pennsylvania Ave., NW  
Suite 172  
Washington, DC, 20580

I hereby certify that on December 20, 2016, I served via E-Service an electronic copy of the foregoing Order on Respondent's Renewed Motion for Discovery from the Commission Pursuant to Rule 3.36, upon:

Thomas H. Brock  
Attorney  
Federal Trade Commission  
TBrock@ftc.gov  
Complaint

Barbara Blank  
Attorney  
Federal Trade Commission  
bblank@ftc.gov  
Complaint

Gustav Chiarello  
Attorney  
Federal Trade Commission  
gchiarello@ftc.gov  
Complaint

Kathleen Clair  
Attorney  
Federal Trade Commission  
kclair@ftc.gov  
Complaint

Joshua B. Gray  
Attorney  
Federal Trade Commission  
jbgray@ftc.gov  
Complaint

Geoffrey Green  
Attorney  
Federal Trade Commission  
ggreen@ftc.gov  
Complaint

Nathaniel Hopkin  
Attorney  
Federal Trade Commission  
nhopkin@ftc.gov

## Complaint

Charles A. Loughlin  
Attorney  
Federal Trade Commission  
cloughlin@ftc.gov  
Complaint

Daniel Matheson  
Attorney  
Federal Trade Commission  
dmatheson@ftc.gov  
Complaint

Charlotte Slaiman  
Attorney  
Federal Trade Commission  
cslaiman@ftc.gov  
Complaint

Mark Taylor  
Attorney  
Federal Trade Commission  
mtaylor@ftc.gov  
Complaint

Gregory P. Stone  
Attorney  
Munger, Tolles & Olson LLP  
gregory.stone@mto.com  
Respondent

Steven M. Perry  
Attorney  
Munger, Tolles & Olson LLP  
steven.perry@mto.com  
Respondent

Garth T. Vincent  
Munger, Tolles & Olson LLP  
garth.vincent@mto.com  
Respondent

Stuart N. Senator  
Munger, Tolles & Olson LLP  
stuart.senator@mto.com  
Respondent

Gregory M. Sergi  
Munger, Tolles & Olson LLP  
gregory.sergi@mto.com  
Respondent

Justin P. Raphael  
Munger, Tolles & Olson LLP  
Justin.Raphael@mto.com  
Respondent

Sean Gates

Charis Lex P.C.  
sgates@charislex.com  
Respondent

Mika Ikeda  
Attorney  
Federal Trade Commission  
mikeda@ftc.gov  
Complaint

Zachary Briers  
Munger, Tolles & Olson LLP  
zachary.briers@mto.com  
Respondent

Chad Golder  
Munger, Tolles, and Olson  
chad.golder@mto.com  
Respondent

Lynnette Pelzer  
Attorney