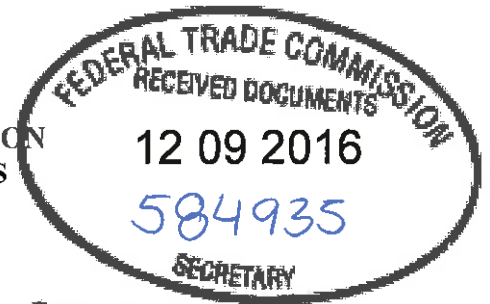


UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



\_\_\_\_\_  
In the Matter of )  
 )  
1-800 CONTACTS, INC., )  
a corporation, )  
 )  
Respondent )  
\_\_\_\_\_ )

DOCKET NO. 9372

ORIGINAL

**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 Complaint Counsel to do so. *Second*, Respondent seeks an analysis of numerous third parties' sales data. This is an analysis that Complaint Counsel has not performed on data that Respondent has already received, or that Complaint Counsel does not have. The Motion should be denied.

**FACTUAL BACKGROUND**

At issue are interrogatories that seek a detailed analysis regarding the dollar sales volumes of contact lenses in the United States, by channel and by seller, over a period of 13 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 each of the years from 2002 through 2015.”

Interrogatory 11 directs Complaint Counsel to “[i]dentify the dollar volume of retail sales of contact lenses in the United States, other than online sales of contact lenses, in total and individually by each Person who made such sales, for each of the years 2002 through 2015.”

Complaint Counsel has already turned over to Respondent all third-party materials, including market data, that have been received to date. Respondent now seeks further responses 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 Respondent**

Interrogatories 10 and 11 seek a detailed analysis regarding the retail sales of every seller of contact lenses in the United States for each year over a period of 13 years. Specifically, the interrogatories direct Complaint Counsel to identify “each Person” in the United States who has sold contact lenses “online” and “each Person” in the United States who has sold contact lenses through any other channel. The interrogatories then seek the calculation of each of those persons’ sales revenues, on a yearly basis, over a period of 13 years. Finally, the interrogatories seek the calculation of “total” sales revenues for each year, over a period of 13 years, for all sellers of contact lenses in the United States.

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 that both respondent and complaint counsel will receive from third parties at the same time in response to outstanding subpoenas. For example, in *In the Matter of OSF Healthcare System*, 2012 FTC LEXIS 30 (Feb. 13, 2012), this Court denied a motion to compel the production of documents as “unreasonably cumulative or duplicative,” where the respondent was already in possession of those documents. *Id.* at \*6. See *In The Matter of North Texas Specialty Physicians*, 2004 FTC LEXIS 12 (Jan. 21, 2004), at \*4 (denying motion to compel interrogatory responses where “the burden of deriving or ascertaining the answers from the documents produced [was] substantially the same” for the requesting party); *Leonia Amusement Corp. v. Loew’s, Inc.*, 18 F.R.D. 503, 507 (S.D.N.Y. 1955) (“It is elementary that a party has no right to require his opponent to make compilations of information when documents containing the material necessary for the compilations are available to the first party.”).<sup>1</sup> There is no question that it would be more burdensome for Complaint Counsel to have to parse and analyze Respondent’s own sales data than for Respondent to do so.

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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 Underlying Data Has Been Provided To Respondent, or Is Not Available to Complaint Counsel**

Interrogatories 10 and 11 also seek an analysis of third-party sales data that *has already been provided* to Respondent, or that is not in Complaint Counsel's possession, custody, or control. Complaint Counsel has informed Respondent that it "does not, at present, have documents sufficient to respond to [these] interrogator[ies]." Ex. 1 (Complaint Counsel's Amended Objections and Responses to Respondent's First Set of Interrogatories (Nov. 8, 2016), at 17 (Interrogatory 10); 18 (Interrogatory 11)). Nevertheless, in its Motion, Respondent asserts that Complaint Counsel must answer immediately, and "fully." Motion at 1.

Both Complaint Counsel and Respondent have issued a number of subpoenas in Part 3 to third parties that seek the types of data that would form the basis of the analyses sought by Interrogatories 10 and 11. Respondent has already received – or will receive, to the extent Complaint Counsel and Respondent have not yet received full productions from third parties – *all* of these materials, including the raw data, submitted by these third parties. Respondent has equal ability to review that data and to determine dollar sales volumes by seller, by channel, and in "total," on a year-by-year basis, for itself. If the data obtained by Respondent from these third parties is insufficient, Respondent is certainly free to identify "each Person" who has sold contact lenses in the United States over a 13-year period, and subpoena each of those "Persons" 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, particularly through the development of an expert report, which Respondent will receive in accordance with this Court's Scheduling Order. *Cf. In the Matter of Basic Research, LLC, 2004*

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 established for the production of expert reports"). Beyond this, Complaint Counsel has not performed, and is not obligated to perform, an analysis of data that is not in its possession, or that is *already in Respondent's possession*, on behalf of Respondent.

**III. Respondent's Assertion that the Detailed Data Analysis Sought By Interrogatories Should Have Been Performed Prior to Issuing Complaint Is Without Merit**

To the extent that a detailed analysis of the sales data sought by Interrogatories 10 and 11 will be germane to prove one or more relevant markets,<sup>2</sup> Respondent asserts that Complaint Counsel *should have* been in possession of this data prior to issuing its Complaint. Specifically, Respondent asserts that Complaint Counsel's position raises "serious cause for concern" in that Complaint Counsel "filed [its] Complaint without having conducted a thorough economic analysis of the relevant market that [Complaint Counsel] alleged." Motion at 1. Respondent misstates the law, as well as the factual basis for the Complaint.

First, the Complaint alleges that the "Bidding Agreements" entered into by Respondent are "inherently suspect." Compl. ¶ 32. As such, Complaint Counsel has no obligation to collect and analyze the type of detailed market data sought by Respondent. The Commission, as well as numerous courts, have held that no elaborate or detailed market analysis is necessary in order to establish liability for conduct challenged as "inherently suspect." *See In re Realcomp II, Ltd.*, 2009 FTC LEXIS 250, at \*51 (Oct. 30, 2009) (where conduct is "inherently suspect," and there

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<sup>2</sup> Complaint Counsel disputes the notion that the identification of each and every seller of contact lenses in the United States over a period of 13 years, as well as the individual dollar volume of each and every seller's sales over that same time frame, is necessary to prove one or more relevant antitrust markets in this case.

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] Respondent did not meet its burden of establishing a legitimate justification for [its] inherently suspect practices”), *aff’d, N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008); *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 2003 FTC LEXIS 120 (2003) at \*344-45 (same), *aff’d, Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005); *California Dental Ass’n v. FTC*, 526 U.S. 756, 769-71 (1999).

Second, to the extent that Complaint Counsel has based any allegations in its Complaint on the combined market power of the parties to the Bidding Agreements instigated by Respondent, there can be no serious dispute that these parties, collectively, possess an overwhelming share of the online retail sales of contact lenses. The Complaint’s allegation to this effect (Compl. ¶ 14) comes directly from a document *produced by Respondent*, which states that Respondent alone captures approximately █ percent of the online retail sales of contact lenses, and that the combined share of Respondent and a handful of the other parties to the Bidding Agreements █ constitutes approximately █ percent of the online market. *See Ex. 2* (CX0466, at 39-41). No detailed analysis of every contact lens seller in the United States over a period of 13 years is necessary to confirm a finding made 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,

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# Ex. 1

REDACTED IN ENTIRETY



# Ex. 2

REDACTED IN ENTIRETY

**CERTIFICATE OF SERVICE**

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  
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Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
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The Honorable D. Michael Chappell  
Administrative Law Judge  
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I also certify that I delivered via electronic mail a copy of the foregoing documents to:

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*Counsel for Respondent 1-800 Contacts, Inc.*

Dated: December 9, 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 9, 2016

By: /s/ Daniel J. Matheson  
Attorney