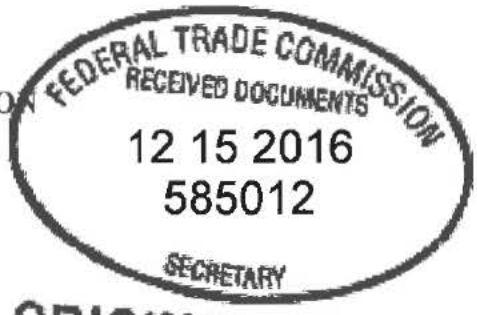
PUBLIC



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

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

ORIGINAL

COMPLAINT COUNSEL'S REPLY BRIEF IN FURTHER SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS IN RESPONSE TO REQUESTS FOR PRODUCTION 22-25

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 has proposed numerous ways for Respondent to 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 proposals. 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 competitors from advertising via one of those channels: [redacted] Documents containing Respondent's 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 Decl. (Ex. A to Nov. 29, 2016 Motion) Tab 1, at 1-800F_00030799);
- Another such report noted: [redacted]

[redacted] (Ex. A (Clair Decl.) Tab 1, at 1-800F_00030959); and

- Emails discussing other similar reports have: [redacted] (Ex. A-Tab 2, at 1-800F_00030980-81), and [redacted] (Ex. A-Tab 3, at 1-800F_00060190-91).

Respondent's suggestion that Complaint Counsel should have requested only the data underlying these reports ignores the reality that the reports themselves contain contemporaneous commentary and analysis, representing party admissions, for which data is no substitute.[1]

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 23 and 25 centers around burdens. RFPs 22 and 24 seek specific identified documents of the sort that are often centrally located or held by a given custodian or custodians. Respondent has not provided any evidence to suggest that these requests would in fact require searching numerous custodians. Nor has Respondent provided the Court assurances that its proposed search strategy is likely to find any reasonable number of the requested documents. Respondent proposes to search where searching is easiest (documents collected for the purpose of responding to other requests) but in light of Respondent's insufficient investigation,[2] it is unclear whether that collection is where the requested reports are most likely to be found. If Respondent's inquiry

[1] Additionally, contrary to any suggestion by Respondent that Complaint Counsel's Motion misrepresented the number of reports produced (Opposition at 2), at the time of Complaint Counsel's Motion, Respondent had produced its Weekly Website Overview for only 44 weeks.
[2] Motion at 3.

reveals that this approach will exclude unique, responsive reports, but the reports can be "readily" or "easily" pulled from other locations, Respondent should be required to turn to those other locations.[3]

As to RFPs 23 and 25, the request is not for all documents relating to, but, as negotiated, all documents that specifically contain the phrases at issue. Nor did Complaint Counsel "refuse" to "meet and confer . . . to narrow the scope" of the search for RFPs 23 and 25.[4] Rather, during the parties' meet-and-confer, Complaint Counsel proposed several ideas for reducing Respondent's burdens, such as limiting searches by file type or custodian or forgoing responsiveness review and producing all documents containing the reports' names, subject to a privilege filter and/or clawback provision. Complaint Counsel also narrowed the requests to cover only documents expressly referring to the reports by their full names. The concerns Respondent now raises about having to review task lists, reminders to pay invoices, or human resources records could have been ameliorated by engaging with Complaint Counsel about its suggestions. For example, Tab 1 to the Clark Declaration is an Excel file that could have been excluded by file type. Tab 2 is a less-than-half-page, 41-word list. Such documents take little time to review, and Complaint Counsel could have done that review itself had Respondent agreed to forgo responsiveness review.

Even without employing any of these suggestions, it remains unclear how many additional documents are implicated by RFPs 23 and 25. The Opposition references "thousands"[5]

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[3] Matheson Decl. (11/29/2016) Tab 6, at 2 (D. Matheson email) ("The search you propose may in fact result in a complete set of such reports. **But if it does not**, we believe you are obligated **to conduct an inquiry to determine whether any missing reports are reasonably accessible**—for example, they may be stored in a central location from which they can readily be pulled. And with respect to 'Conversion Dashboard' reports, there may be additional locations/custodians outside of the already-collected group from which a complete set of such reports could be easily obtained.").

[4] Opposition at 3.

[5] Clark Decl. ¶ 7.

(down from "20,000" just weeks ago).[6] Respondent cannot ask the Court to make a decision based on its burdens if it will neither quantify those burdens nor take advantage of existing opportunities to narrow them.[7]

Respondent's attempt to characterize these requests as a "fishing expedition" relies on inapposite cases involving discovery from *third parties* that was judged to be irrelevant. *See Henry v. Morgan's Hotel Group, Inc.*, 2016 WL 303114 (S.D.N.Y. Jan. 25, 2016) (discovery from plaintiff's past employer (a non-party) held irrelevant to defendant's alleged discrimination); *Rice v. Reliastar Life Ins. Co.*, 2011 WL 5513181 (M.D. La. Nov. 10, 2011) (discovery from "non-parties" held irrelevant "in part").

Likewise, this Court's October 28 Order rejecting Respondent's Rule 3.36 subpoena, and the cases cited therein, concerned additional discovery from sources other than the opposing party. Order at 3, 6 (citing *In re OSF Healthcare*, 2012 FTC LEXIS 31 (Feb. 14, 2012) (subpoena to non-party UnitedHealth) and *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 19 (Feb. 4, 2004) (subpoena to non-party Humana)). Moreover, in contrast to the requests this Court rejected in its October 28 Order, it is hard to imagine how Complaint Counsel could offer more "reasonable particularity" than already achieved here with requests that cover only documents that *explicitly mention particular reports by name*.

CONCLUSION

For the reasons set forth above and in Complaint Counsel's November 29 Memorandum, the Motion should be granted.

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[6] Matheson Decl. (11/29/2016) Tab 6, at 3 (G. Sergi email).

[7] *E.g.*, *In re Lab. Corp. of Am.* Order Denying Hunter Labs.' Motion to Quash Subpoena *Duces Tecum*, at 4, FTC Docket No. 9345 (Feb. 28, 2011)(denying motion to quash third-party subpoena where movant "provided no specific information regarding the burden or expense involved . . .")(Ex. A-Tab 4).

Respectfully submitted,

/s/ Daniel J. Matheson

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Mika Ikeda

Counsel Supporting the Complaint

Dated: December 15, 2016

Ex. A

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	)	

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 at the Federal Trade Commission and Complaint Counsel in this proceeding. Attached to this declaration are the exhibits submitted in support of Complaint Counsel's Reply in Further Support of its 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 the Bates numbers 1-800F_00030958 through 1-800F_00030960.
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 Laura Schmidt in response to an earlier email from Rick Galan, bearing the 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

other employees of Respondent are carbon copied, bearing the Bates numbers 1-800F_00060190 through 1-800F_00060192.

6. Tab 4 is a true and correct copy of a decision cited in Complaint Counsel's Reply In Further Support of Motion to Compel Production of Documents in Response to Requests for Production 22-25 that appears to be unavailable on LEXIS or WESTLAW: *In re Laboratory Corporation of America*, Order Denying Hunter Labs.' Motion to Quash Subpoena *Duces Tecum*, FTC Docket No. 9345 (Feb. 28, 2011).

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 15th day of December, 2016 at Washington, DC.

/s/ Kathleen M. Clair
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Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
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Counsel Supporting the Complaint

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 LABORATORY CORPORATION OF AMERICA HOLDINGS, Respondents.	DOCKET NO. 9345

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"); 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 violation 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 defenses, and brought under a different statute than the present case, is not dispositive of the instant dispute. In this action, the Commission's Rules of Practice govern. Those rules set forth that the parties 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 relief, or to the defenses of any respondent. 16 C.F.R. § 3.31(c). The Commission's 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 applicable case law, that govern the issue of whether the Subpoena served in this action should be quashed.

B. Meet and Confer 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 attach a separate signed statement, but does state in its motion that counsel for *qui tam* plaintiffs promptly wrote to counsel representing LabCorp in the California action, asking them to withdraw the Subpoena, in light of the Special Masters' report and recommendation in the California action. LabCorp's counsel in the California action responded that it did not intend to withdraw the Subpoena and informed Hunter Labs to direct its questions regarding the Subpoena to counsel representing LabCorp in the FTC action. Respondents' counsel 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 Respondents' 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. 16 C.F.R. § 3.22(g). 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 is denied because Hunter Labs failed to demonstrate that the Subpoena imposes an undue burden.

C. Scope of the Subpoena

Discovery shall be limited by the Administrative Law Judge if he or she 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 outweigh its likely benefit. 16 C.F.R. § 3.31(c)(2). In addition, the Administrative Law Judge may deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to 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 with. 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 that the Lab-Corp-Westcliff integration would decrease competition in the Southern California market 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 would shed no light on the issues pertinent to the FTC action, the burden and expense of the Subpoena outweigh the likely benefit.

Respondents state that the founder of Hunter Labs is on Complaint Counsel's preliminary witness list, and that Complaint Counsel expects to call him to testify regarding his business organization, the capability of Hunter Labs to expand into Southern California, and Hunter Labs' ability to compete for capitated contracts.[1] Consequently, Respondents assert, the Subpoena seeks evidence of Hunter Labs' business plans and ability to compete in the market proposed by Complaint Counsel, as well as the alternative markets proposed by Respondents. Respondents further assert that the documents requested are relevant to Respondents' ability to prepare a defense, given that Hunter Labs' founder has already provided testimony in an investigational hearing and that Complaint Counsel expects him to provide additional testimony at trial regarding 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). "Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will

[1] Pursuant to Commission Rules 3.22(c) and 3.45(e), Respondents redacted certain information from their Opposition because it was subject to confidentiality protections pursuant to the Protective Order entered in this case. Where a document has been designated as Confidential, but the information revealed does not require *in camera* treatment, such material may be disclosed in a public version of an order. *See In re Polypore Int'l Inc.*, 2010 FTC LEXIS 17, *13 (March 1, 2010); 16 C.F.R. § 3.45(a) (the ALJ "may disclose 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 to the issues in the proceeding." *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 such as this one. *See In re North Tex. 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 company whose founder is listed as expected to testify at trial on its ability to enter and expand into a relevant market is relevant to the allegations of the Complaint and the defenses of Respondents.

Hunter Labs has provided no specific information regarding the burden or expense involved in producing the requested documents other than its unsupported statement that the requests would take months and tens or even hundreds of thousands of dollars to comply with. A movant's general allegation that a subpoena is unduly burdensome is insufficient to carry its burden of showing that the requested discovery should be denied. *In re Polypore Int'l, Inc.*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009). Hunter Labs has failed to meet its burden of demonstrating that the Subpoena is unduly burdensome or that the burden or expense of the discovery outweigh its likely benefit.

IV.

For the above stated reasons, Hunter Labs' Motion is DENIED. Respondents 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

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 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
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Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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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 15, 2016

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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 15, 2016

By: /s/ Daniel J. Matheson
Attorney