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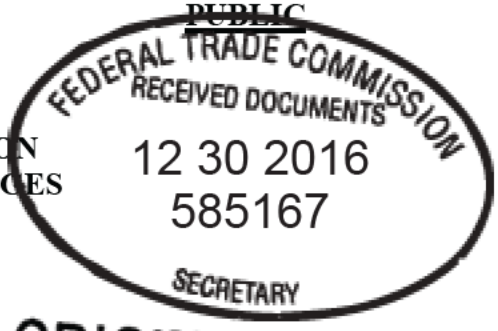

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES

In the Matter of

1-800 CONTACTS, INC.,
a corporation

PUBLIC

Docket No. 9372

ORIGINAL

RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR INTERLOCUTORY APPEAL OF THE COURT'S DECEMBER 20, 2016 ORDER

I. INTRODUCTION

Complaint Counsel seek interlocutory appeal of a December 20, 2016 order ("Order") finding that Respondent (1) satisfied Rule 3.36's requirements for discovery from the Office of Policy Planning ("OPP") and the Bureau of Consumer Protection ("BCP"), and (2) showed "good cause" under Rule 3.31(c)(2) for discovery from the Bureau of Competition ("BC") and the Bureau of Economics ("BE"). Complaint Counsel's motion falls well short of the strict standards for interlocutory review.

"Interlocutory appeals are disfavored, as intrusions on the orderly and expeditious conduct of the adjudicative process." *In re Daniel Chapter One*, Docket No. 9329, 2009 WL 1353465, at *1 (May 5, 2009) (Chappell, J.). "Accordingly, the movant must satisfy a very stringent three-prong test by demonstrating that: (1) the ruling involves a controlling question of law or policy; (2) there is substantial ground for difference of opinion as to that controlling issue; *and* (3) immediate appeal from the ruling may materially advance the ultimate termination of the litigation *or* subsequent review will be an inadequate remedy." *Id*. (citing 16 C.F.R. § 3.23(b)).

Complaint Counsel have not satisfied any part of this "very stringent" test.

First, Complaint Counsel's motion should be denied because they have not even addressed the third factor: whether subsequent review would provide an adequate remedy. The only harm Complaint Counsel identify is the time and effort required to produce discovery, which cannot suffice to show that appellate review would be inadequate. Were it otherwise, every order authorizing discovery would warrant interlocutory review. But the law is exactly the opposite: the Commission "generally disfavor[s] interlocutory appeals, particularly those seeking Commission review of an ALJ's discovery rulings." *In re Gillette Co.*, Docket No. 9152, 98 F.T.C. 875, 1981 WL 389438, at *1 (1981).

Second, Complaint Counsel have not shown that the Order involves a controlling question of law. And, it does not. It is well-settled that "[p]rocedural disputes and discovery disputes do not amount to controlling questions of law." *In re N. Carolina Bd. of Dental Examiners*, Docket No. 9343, 2011 WL 822921, at *3 (Mar. 1, 2011) (Chappell, J.). Similarly, "[i]nterlocutory appeals from discovery rulings merit a particularly skeptical reception, because [they are] particularly suited for resolution by the administrative law judge on the scene and particularly conducive to repetitive delay." *In re Bristol-Meyers Co.*, Docket Nos. 8917, 8918, 8919, 90 F.T.C. 273, 1977 WL 189043, at *1 (1977). Complaint Counsel has not cited any case permitting interlocutory appeal of an order requiring production of documents not containing confidential or privileged information.

Third, Complaint Counsel have not shown a substantial ground for difference of opinion, which "require[s] that the movant show a likelihood of success on the merits." *In re Daniel Chapter One*, 2009 WL 1353465, at *4.

II. THE DISCOVERY ORDER DOES NOT WARRANT INTERLOCUTORY REVIEW

A. Complaint Counsel Have Not Demonstrated that Subsequent Review Would Be An Inadequate Remedy

Complaint Counsel make no showing that "subsequent review will be an inadequate remedy." 16 C.F.R. § 3.23(b). *Cf. In re Rambus Inc.*, Docket No. 9302, 2003 WL 1866416, at *4 (Mar, 26, 2003) ("non-dispositive nature" of issues involved in ruling means that appealing party "will not be harmed by delaying review"). Complaint Counsel do not identify any harm from producing the discovery authorized by the Order beyond the time and effort required to do so. But finding this sufficient would trivialize the "inadequate remedy" prong of the "very stringent test" for interlocutory appeal, *Daniel Chapter One*, 2009 WL 1353465, at *1, because every appellant ordered to produce discovery stands to suffer the burden of doing so.

Clear precedent disfavoring interlocutory review of discovery orders forecloses that result. Subsequent review plainly will be adequate to redress any substantive harm.[1]

B. The Order Does Not Involve Any Controlling Question of Law or Policy

Complaint Counsel also have failed to demonstrate that the Order "involves a controlling question of law or policy." 16 C.F.R. § 3.23(b). A question of law "is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases." *N. Carolina Bd.*, 2011 WL 822921, at *3 (quotation marks omitted). The legal standard for discovery from the Commission does not meet this test. "Procedural disputes and discovery disputes do not amount to controlling questions of law." *Id.*; *see also In re Gillette Co.*, 1981 WL 389438, at *1; *Bristol-Meyers Co.*, 90 F.T.C. 273, 1977 WL 189043, at *1. Rather, "resolution of discovery issues, as a general matter, should be left to the discretion of the ALJ." *Gillette Co.*, 98 F.T.C. 875, 1981 WL 389438, at *1. Accordingly, motions for interlocutory appeal of discovery rulings are regularly denied.[2]

None of Complaint Counsel's authorities requires a different result here. "Complaint Counsel's application" in *In re Exxon Corp.*, Docket No. 9130, 98 F.T.C. 107, 1981 WL 389420, at *2 (1981) (cited Mot. at 1, 4, 6), "raise[d] issues that go beyond the proper exercise of an ALJ's discretion in ruling upon discovery requests," namely, whether Complaint

[1] Complaint Counsel do not argue that an immediate appeal "may materially advance the ultimate termination of the litigation," 16 C.F.R. § 3.23(b). Such a principle would "make every ruling in every case appealable as to the relevance and propriety of any areas of discovery allowed by an administrative law judge." *N. Carolina Bd.*, 2011 WL 822921, at *5 (quotation marks omitted).

[2] *See, e.g.*, *N. Carolina Bd.*, 2011 WL 822921; *In re Telebrands Corp.*, Docket No. 9313, 2004 WL 5911685, at *4 (Mar. 25, 2004) (denying Complaint Counsel's motion); *In re Schering-Plough Corp.*, Docket No. 9297, 2002 WL 31433937 (Feb. 12, 2002); *In re Intel Corp.*, Docket No. 9288, 1998 WL 34060099 (July 31, 1998); *See In re Exxon Corp.*, Docket No. 9130, 1981 FTC LEXIS 112 (Feb. 13, 1981); *In re Bristol-Meyers Co.*, Docket Nos. 8917, 8918, 8919, 90 F.T.C. 273, 1977 WL 189043; *In re Suburban Propane Gas Corp.*, Docket No. 8672, 74 F.T.C. 1602, 1968 WL 94797 (1968).

Counsel could use special reports under Section 6(b) as a discovery device even though the Commission's Rules of Practice did not expressly provide for the practice. *Id.* at *2-*3. Here, by contrast, the Rules of Practice expressly authorize discovery from the Commission beyond what Complaint Counsel "collected or reviewed in the course of the investigation of the matter or prosecution of the case." 16 C.F.R. § 3.31(c)(2). The only issue was the application of the Rules in particular circumstances, which is not appropriate for interlocutory review.

Complaint Counsel's other authorities are inapposite. *In re Bristol-Meyers Corp.*, Docket Nos. 8917, 8918, 8919, 90 F.T.C. 455, 1977 WL 189054 (1977), granted review of an order rejecting *in camera* treatment of documents containing allegedly sensitive competitive information that, if disclosed, could have caused "serious injury." *Id.* at *1. Complaint Counsel do not identify any similar harm here beyond the burden of responding to discovery. Finally, *In re Hoechst Celanese Corp.*, Docket No. 9216, 1990 WL 1037361 (1990), which granted review of an order "requir[ing] respondents to provide English language translations of foreign language documents produced under subpoena," *id.* at *1, has no bearing here.

C. There is No Substantial Ground for Difference of Opinion

Complaint Counsel have not demonstrated that "there is a substantial ground or difference of opinion" as to any issue they seek to appeal. They have not met their burden to "show that a controlling legal question involves novel or unsettled authority" and "a likelihood of success on the merits." *In re Daniel Chapter One*, 2009 WL 1353465, at *4. The mere fact that Complaint Counsel's strained readings of the discovery Rules have never before been rejected does not warrant interlocutory review. *Id.* ("allegations of a 'highly controversial' or 'open' question of 'where to draw the line'" are "insufficient to show a substantial ground for difference of opinion").

1. Discovery from OPP and BCP Under Rule 3.36

There is no "substantial ground for difference of opinion" about whether Rule 3.36 requires a "special showing of need" or "strong justification" for discovery from "any Bureau or Office not involved in the matter." Mot. at 7. As the Order holds, Order at 3 n.3, Rule 3.36's text is clear: it authorizes a subpoena *duces tecum* to the Commission upon a showing that the requested discovery is (1) reasonable in scope; (2) "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent"; (3) cannot reasonably be obtained by other means; and (4) has been specified with "reasonable particularity." 16 C.F.R. § 3.36(b); *id.* §§ 3.31(c), 3.37(a). The Rule does not refer at all to a "special showing of need" for a document subpoena. That silence is telling given that the Rule does require a "compelling need" for a subpoena compelling testimony at an evidentiary hearing. 16 C.F.R. § 3.36(b)(3). If the Commission had intended to require the same showing for a document subpoena, it would have said so.

The legislative history does not support adding a requirement that the Commission left out of the text. The 2009 amendment to Rule 3.36 made no change to any of the prerequisites that the Order found Respondent satisfied. Instead, the amendment simply added the phrase "any Bureau or Office [of the Commission] not involved in the matter, the office of Administrative Law Judges, or the Secretary" to the list of entities that cannot be subject to discovery absent a motion under the Rule. Prior to the amendment, the Rule required a motion only for discovery from "a governmental agency other than the Commission."

This puts the legislative history in its proper context: the Commission referred in its commentary to a "special showing of need" and a "strong justification" to explain why the Rule's existing requirements were being made applicable also to discovery from the Commission, not to require more than the Rule does on its face. 74 Fed. Reg. 1804, 1814 (Jan.

13, 2009). Indeed, the Commission disavowed any intent to raise the bar for Rule 3.36 discovery: "In the rare event that material excluded by the proposed rule is not duplicative, privileged or work product, *it should not be difficult* for respondent to satisfy a good cause standard or the requirements of Rule 3.36." *Id.* at 1812 (emphasis added).

Complaint Counsel's remaining arguments lack merit. Shoehorning a "special showing of need" into the Rule's reference to "reasonable particularity," Mot. at 8, bends the text out of shape. If Complaint Counsel's interpretation of "reasonable particularity" were correct, Rule 3.37(a) would require parties to make a "special showing of need" to obtain document discovery from each other. *See* 16 C.F.R. § 3.37(a). *Cf. Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2004–05 (2012) ("identical words used in different parts of the same act are intended to have the same meaning") (quotation marks omitted). And changes to the Federal Rules of Civil Procedure made in 2016, Mot. at 8, cannot shed light on the Commission's intent in amending its Rules in 2009.

2. Discovery from BC and BE Under Rule 3.31(c)(2)

The Order held that Respondent demonstrated good cause for discovery from BC and BE by demonstrating that the requested discovery was relevant, "reasonable in scope and stated with reasonable particularity," and "not obtainable through other means." Order at 4. There is no "substantial ground for difference of opinion as to whether a showing of good cause under Rule 3.31(c)(2) requires the satisfaction of different or additional factors not specified in Rule 3.36." Mot. at 5.

Complaint Counsel's motion must be denied because they do not articulate any "good cause" standard that the Commission should adopt on appeal or explain why the Order's application of "good cause" was legally erroneous. In order to obtain interlocutory review to "clarify what 'good cause' means under Rule 3.31(c)(2)," Mot. at 5, Complaint Counsel must

clarify what they contend good cause means.

Complaint Counsel say that the Order could make Rule 3.36 and 3.31(c)(2) "perilously indistinguishable." Mot. at 6. But Complaint Counsel do not distinguish the two Rules or explain why a respondent that has shown that discovery is relevant, reasonable in scope, reasonably particularized, and unavailable through other means has not demonstrated "good cause" to obtain such discovery. Complaint Counsel's argument that the two Rules address "very different discovery needs," Mot. at 6, undercuts their position. Because "Bureaus or Offices of the Commission that investigated the matter, including the Bureau of Economics," 16 C.F.R. § 3.31(c)(2), are more likely to have discoverable information than "any Bureau or Office not involved in the matter," 16 C.F.R. § 3.36(a), Rule 3.31's requirement of "good cause" for discovery from investigating Bureaus and Offices should be less stringent than Rule 3.36's prerequisites for discovery from Bureaus and Offices "not involved in the matter."

Finally, Complaint Counsel's argument that the Order will open the door to "large, tangentially-related productions of documents" and "burdensome, marginal discovery requests," Mot. at 6, ignores the limited scope of the discovery that the Order permits, Respondent's extensive efforts to minimize any burden on the Commission, and the fact that the Rules give an Administrative Law Judge a gatekeeping role over discovery. The Order properly rejected Complaint Counsel's blanket objections of a "fishing expedition" and supposed burden. Order at 4-5. And Complaint Counsel's suggestion that authorizing discovery would contravene "the Commission's stated intention," Mot. at 6, again contradicts the Commission's statement that "it should not be difficult for respondent to satisfy a good cause standard . . . ." 74 Fed. Reg. at 1812.

III. CONCLUSION

Complaint Counsel's motion for interlocutory appeal should be denied.

DATED: December 30, 2016

Respectfully submitted,

/s/ Justin P. Raphael

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2016, 2016, I filed **RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR INTERLOCUTORY APPEAL OF THE COURT'S DECEMBER 20, 2016 ORDER** using the FTC's E-Filing System, which will send notification of such filing to all counsel of record as well as the following:

Donald S. Clark
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The Honorable D. Michael Chappell
Administrative Law Judge
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DATED: December 30, 2016

By: */s/ Justin P. Raphael*
Justin P. Raphael

CERTIFICATE FOR ELECTRONIC FILING

I hereby 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.

DATED: December 30, 2016

By: */s/ Justin P. Raphael*
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Notice of Electronic Service

I hereby certify that on December 30, 2016, I filed an electronic copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion for Interlocutory Appeal of the Court's December 20, 2016 Order, with:

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I hereby certify that on December 30, 2016, I served via E-Service an electronic copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion for Interlocutory Appeal of the Court's December 20, 2016 Order, upon:

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