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PUBLIC

ORIGINAL

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

In the Matter of

1-800 CONTACTS, INC.,

Respondent.

Docket No. 9372

RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE OPPOSITION TO RESPONDENT'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA

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Counsel for 1-800 Contacts, Inc.

January 12, 2017

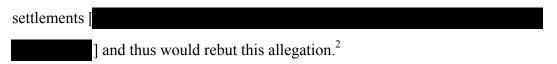
Respondent moved for an order compelling Google Inc. to produce three settlement agreements responsive to Respondent's subpoena. Complaint Counsel now seeks to intervene on Google's behalf, despite knowing "that Google intends to oppose Respondent's motion" and would "brief the issues specific to Respondent's request." (Complaint Counsel's Proposed Opposition at 1.)

Rather than responding to the "issues specific to Respondent's" motion, Complaint Counsel seeks to use this narrow discovery dispute to argue complex legal issues regarding the scope and effect of the Supreme Court's opinion in *Actavis*. Based on its (mis)reading of *Actavis*, Complaint Counsel contends that the Google settlement agreements are not relevant. (Motion for Leave at 2; Proposed Opposition at 3.) But the Court need not grapple with these issues to decide the Respondent's motion. Even if Complaint Counsel's reading of *Actavis* were correct—and it is not—the sought-after discovery would still be relevant.

Regardless of the debate about *Actavis*, the relevancy of the sought-after discovery is demonstrated by comparing the subpoena to the pleadings. *See In re Evanston Northwestern Healthcare Corp.*, 2004 FTC LEXIS 179, *3 (F.T.C. Sept. 28, 2004) ("Laying the subpoena along side the pleadings demonstrates that Respondents' subpoenas *duces tecum* seek documents that may be reasonably expected to yield relevant information."). A comparison of the Complaint's allegations with the requested discovery leaves no doubt regarding relevance. *FTC v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979) ("relevancy of an adjudicative subpoena is measured against the charges specified in the complaint").

• The Complaint alleges Respondent's contentions that a "rival's advertisement appear[ing] on the results page in response to a query containing a 1-800 Contacts trademark constituted infringement" were "inaccurat[e]." (Complaint ¶ 18.) The Google

¹ Complaint Counsel argue that these issues will be resolved by the Commission as part of the Motion for Partial Summary Decision, but Complaint Counsel told the Commission that the *Actavis* issues are "not relevant to the disposition of [that] Motion." (Complaint Counsel's Motion for Leave, Ex. C at 4.)



• The Complaint alleges that Respondent's agreements harmed search engines. (Complaint ¶ 31.) Google's settlement agreements, especially any that show Google [], will tend to show search engines are not harmed by [].

The relevance of Google's settlements is also demonstrated by the fact that Microsoft, which operates at a rival search engine (Bing), recently produced several settlement agreements

 $^{^2\,\}mathrm{Google}$'s and Respondent's settlements were entered into during the same time frame as Respondent's

in response to the identical subpoena request. (Declaration of Sean Gates \P 2-3.) In fact, one of these agreements was with the very same litigant with which Google settled (

]). (*Id.* at \P 3.)

The Court should deny Complaint Counsel's motion for leave to file an opposition.

Dated: January 12, 2017 Respectfully submitted,

/s/ Sean Gates

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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., Respondent.	Docket No. 9372	
DECLARATION OF SEAN GATES IN SUPPORT OF RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE OPPOSITION TO RESPONDENT'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA		
I, Sean Gates, declare as follows:		
1. I am an attorney and counsel for l	Respondent, 1-800 Contacts, Inc., in this matter.	
I have personal knowledge of the facts set forth	in this declaration, and if called as a witness I	
could and would testify competently to such fact	S.	
2. Respondent served on Microsoft	. Respondent served on Microsoft a subpoena that included a request for settlement	
agreements identical to that served on Google.		
3. On January 11, 2017, Microsoft p	produced several settlement agreements in	
response to Respondent's subpoena. Including a	among these agreements was a settlement with	
].		
I declare under the penalty of perjury tha	t the foregoing is true and correct. Executed this	
12th day of January, 2017 at Pasadena, Californi	a.	
	/s/ Sean Gates Sean Gates	

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2017, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark Secretary Federal Trade Commission 600 Pennsylvania Ave., NW, Rm. H-113 Washington, DC 20580

The Honorable D. Michael Chappell Administrative Law Judge Federal Trade Commission 600 Pennsylvania Ave., NW, Rm. H-110 Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing documents to:

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800 Contacts, Inc.

Dated: January 12, 2017

Respectfully submitted,

/s/ Sean Gates Sean Gates Charis Lex P.C. 16 N. Marengo Ave., Suite 300 Pasadena, CA 91101 (626) 508-1717 sgates@charislex.com

Counsel for 1-800 Contacts, Inc.

PUBLIC

CERTIFICATE OF 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.

Dated: January 12, 2017 Respectfully submitted,

/s/ Sean Gates

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Counsel for 1-800 Contacts, Inc.

Notice of Electronic Service

I hereby certify that on January 12, 2017, I filed an electronic copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion for Leave to File Opposition (PUBLIC), 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 January 12, 2017, I served via E-Service an electronic copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion for Leave to File Opposition (PUBLIC), upon:

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