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

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

ORDER GRANTING RESPONDENT'S MOTION TO PERMIT RESPONDENT TO CALL SIX (6) EXPERT WITNESSES

I.

On February 21, 2017, Respondent 1-800 Contacts, Inc. ("Respondent") filed a Motion Pursuant to Rule 3.31A to Permit Respondent to Call Six (6) Expert Witnesses at Trial ("Motion"). On February 22, 2017, Federal Trade Commission ("FTC") Complaint Counsel filed an opposition to the Motion ("Opposition").[1] Respondent's Motion is GRANTED, as explained below.

II.

FTC Rule 3.31A(b) limits a party to calling five expert witnesses, absent "extraordinary circumstances." 16 C.F.R. § 3.31A(b).[2] Respondent seeks leave to exceed the five-expert limit by one additional witness, to permit it to call a total of six expert witnesses.

By way of background, the Commission's Complaint alleges that certain agreements that Respondent made with various competing online contact lens sellers constitute a restraint of trade and an unfair method of competition in the alleged markets for the auctioning of keyword search online advertising and the retail sale of contact lenses, in violation of Section 5 of the FTC

[1] By Order dated February 17, 2017, Complaint Counsel's Motion to Limit Respondent to Five Expert Witnesses was granted in part and denied in part. The February 17, 2017 Order required Respondent to either (1) serve Complaint Counsel with an amended expert witness list, limited to five of the expert witnesses already identified; or (2) file a motion for leave to call an additional expert witness in accordance with Rule 3.31A by February 21, 2017, and further ordered Complaint Counsel to file its opposition by February 22, 2017.

[2] Rule 3.31A(b) states in full: "No party may call an expert witness at the hearing unless he or she has been listed and has provided reports as required by this section. Each side will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal or surrebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances." 16 C.F.R. § 3.31A(b).

Act (the "Challenged Agreements"). Complaint ¶¶ 28-29, 31. Specifically, the Complaint asserts that under the Challenged Agreements, competitors agreed not to bid in any online search advertising auction for the use of the search term "1-800-Contacts" or variations thereof, and to employ negative keywords in paid search advertising to prevent competitors' advertising from appearing in response to a query for "1-800-Contacts." Complaint ¶¶ 22, 24. According to the Complaint, the Challenged Agreements are not justified by trademark protection. Complaint ¶ 21. Respondent's Answer asserts, among other things, that the Challenged Agreements were settlement agreements to resolve bona fide litigation over competitors' use of its trademark, and denies that such agreements are anticompetitive or unlawful. Answer ¶¶ 20-24, 31, 33-34.

Respondent asserts that extraordinary circumstances justify exceeding the five-expert limit to allow one additional expert. Respondent argues that six experts are necessary to respond to the allegations of the Complaint and to support Respondent's defenses. Respondent states that it seeks to show that "the circumstances and character of the agreements make antitrust scrutiny inappropriate, that in the alternative the procompetitive benefits of the agreements outweigh any anticompetitive effects, that the agreements are not likely to harm competition or consumers, that 1-800 Contacts does not have sufficient market power to harm competition, and that the complaint's alleged product markets fail." Motion at 2. Respondent also seeks to challenge the scope of the injunctive relief being sought in this case.

Complaint Counsel argues that no extraordinary circumstances exist in this case. Complaint Counsel asserts that the case is straightforward, involving one respondent and one statute, and that the Challenged Agreements involve only one type of conduct. Complaint Counsel further argues that it is not enough to show that the proposed expert testimony is relevant and non-cumulative. Moreover, Complaint Counsel asserts, the Commission has foreclosed Respondent from arguing that the circumstances and character of the Challenged Agreements make antitrust scrutiny inappropriate, or that the Challenged Agreements were reasonable, by striking Respondent's *Noerr-Pennington* defense and further stating that while "the nature of the trademark disputes may inform the antitrust analysis, the reasonableness of those disputes is not an affirmative defense." *See* Opinion and Order of the Commission Granting Complaint Counsel's Motion for Summary Decision, Feb. 1, 2017 ("Commission Order").

III.

A summary of Respondent's proffered expert witnesses follows.

1. **Mr. Howard Hogan**. Respondent seeks to call Mr. Hogan, a trademark lawyer who has litigated and settled trademark disputes, to testify that the Challenged Agreements were "reasonable and commonplace" in their form; that the relief provided by the Challenged Agreements is "narrowly and appropriately tailored to remedy" the trademark violations asserted; and that "more narrowly tailored provisions would prove to be impracticable." Motion at 4-5. Respondent argues this testimony is necessary to rebut Complaint Counsel's legal theory that the Challenged Agreements violate antitrust standards because they allegedly reach beyond the rights protected by trademark law, and to support Respondent's contention that the

Challenged Agreements settled reasonably disputed claims, through commonplace and reasonable settlement agreements.

2. **Dr. William Landes**. Respondent seeks to call Dr. Landes, a professor of law and economics, to "explain and apply economic principles of trademark protections." Motion at 5. Respondent argues that this testimony is required to dispute Complaint Counsel's application of antitrust laws to challenge settlements of trademark disputes.

3. **Dr. Anindya Ghose**. Respondent seeks to call Dr. Ghose, a professor with expertise in information systems and digital marketing, including search engine data. Respondent states that in response to Complaint Counsel's subpoenas issued in this case, Internet search engine companies "produced thousands of pages (and electronic equivalents) of data that they have collected on searches, the rates at which consumers click on various search results, the rates at which consumers who click complete a transaction, and other measures." Motion at 6. Respondent states that Dr. Ghose will use the data provided by search engines "to explain consumer Internet search behavior as relevant to the restrictions in the settlement agreements and also use such data and academic literature to analyze the potential effects of the settlement agreements." Motion at 6.

4. **Dr. Kent Van Liere**. Respondent seeks to call Dr. Van Liere as an expert in consumer surveys. Respondent states that Dr. Van Liere's testimony is intended to respond to Complaint Counsel's designated expert, Dr. Jacoby, who will testify regarding a consumer survey allegedly showing a minimal level of consumer confusion when trademarks are used in paid search advertising. Respondent states that Dr. Van Liere will testify about "the proper use of surveys in trademark lawsuits of the type that were settled" in this case and "will respond to the work of Dr. Jacoby with a consumer survey that he designed." Motion at 6.

5. **Dr. Ronald Goodstein**. Respondent seeks to call Dr. Goodstein, a professor of marketing, to "analyze the potential for consumer confusion and the potential for trademark dilution from the type of advertisements restricted by" the Challenged Agreements. Motion at 7. Respondent argues that the Complaint alleges that Respondent challenged its competitors activities, including by filing trademark litigation, "without regard to whether the advertisements were likely to cause consumer confusion or infringed" Respondent's trademarks. Complaint ¶ 27. Respondent argues that it should be permitted to rebut this assertion with an expert "who can explain, from a theoretical and academic marketing point of view, the factors that explain why and how consumers would be confused by such advertisements." Motion at 7.

6. **Dr. Kevin Murphy**. Respondent seeks to call Dr. Murphy, an economics professor, to present an economic analysis of the competitive effects of the Challenged Agreements. Respondent argues that the Complaint alleges that the procompetitive justifications for the Challenged Agreements do not outweigh the purported anticompetitive effects. Respondent asserts that Dr. Murphy's analysis will demonstrate, based on economic principles and his analysis of evidence in this case, that the Challenged Agreements "did not harm competition, are not inherently anticompetitive bid-rigging agreements, and that 1-800 Contacts does not have monopoly power either individually or jointly with the settling retailers in a properly defined antitrust market." Motion at 7.

IV.

Rule 3.31A(b) was added as part of the 2009 amendments to the Commission's Rules of Practice. The Rule does not define the phrase, "extraordinary circumstances." In enacting Rule 3.31A(b), the Commission stated that "[i]t has been the Commission's experience . . . that five expert witnesses per side is sufficient for each party to present its case in the vast majority of cases. The Rule also has a safety valve that allows a party to seek leave to call additional expert witnesses in extraordinary circumstances." 74 Fed. Reg. 1804, 1813 (Jan. 13, 2009).

It was held appropriate to employ the "safety valve" to allow additional expert witnesses in *In re POM Wonderful, LLC*, 2011 FTC LEXIS 25 (Feb. 23, 2011). In *POM*, the respondents were permitted to exceed the five-expert limit by three additional expert witnesses, for a total of eight expert witnesses. Among the factors cited were the number of advertisements challenged in the case, the complexity of the scientific issues presented, and the "broad and comprehensive defense" necessitated by the charges in the complaint. *Id.*, 2011 FTC LEXIS 25, at *11-12. Employing the safety valve is no less justified in the instant case, where the Complaint involves 14 Challenged Agreements that are broadly challenged as both unjustified under trademark law and anticompetitive. Resolution of these issues involves technical areas of both antitrust law and trademark law. Moreover, the case also presents technical issues regarding Internet search advertising, keyword usage, and extensive related data. Furthermore, unlike *POM*, Respondent seeks to exceed the five-expert limit by only one additional expert.

The fact that the fewer than five experts were used in other adjudicative proceedings, as argued by Complaint Counsel, is not material to whether Respondent should be allowed to use more than five experts in this case. *See POM*, 2011 FTC LEXIS 25, at *12. In addition, Complaint Counsel fails to demonstrate how or why the Commission's Order striking two of Respondent's affirmative defenses forecloses Respondent from calling the six expert witnesses referenced herein. The Commission's Order held that: (1) the *Noerr-Pennington* doctrine does not apply to private agreements such as the Challenged Agreements; and (2) to establish liability, "Complaint Counsel need not show that the underlying lawsuits giving rise to the settlement agreements that are the subject of the Complaint are sham." In this regard, the Commission further stated that the "reasonableness" of the Challenged Agreements is not an "affirmative defense." Commission's Order at 4. These holdings do not foreclose Respondent from attempting to disprove Complaint Counsel's allegations that the Challenged Agreements were unjustified and anticompetitive, or from defending the Challenged Agreements as procompetitive.

V.

Having considered the arguments of the parties and applicable law, and for all the foregoing reasons, Respondent's Motion is GRANTED. This Order is limited to permitting Respondent to designate and serve expert reports for the six expert witnesses addressed herein, which will thereby preserve Respondent's right to call such experts at trial. *See* Rule 3.31A(b) ("No party may call an expert witness at the hearing unless he or she has been listed . . ."). This Order does not constitute a ruling that any particular expert, or particular testimony, will be

admissible at the hearing on this matter. *See POM*, 2011 FTC LEXIS 25, *14-15 (allowing designation of excess expert witnesses, but holding there was insufficient basis to rule on admissibility of expert testimony at trial). *See also* Rule 3.43(b) (allowing exclusion of "needless presentation of cumulative evidence"); Rule 3.41(b) (stating hearing should be limited to no more than 210 hours); Scheduling Order, Additional Provision 9 (providing for motions *in limine* to preclude or limit testimony at the hearing).

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: February 22, 2017

Notice of Electronic Service

I hereby certify that on February 22, 2017, I filed an electronic copy of the foregoing Order Granting Respondent's Motion to Permit Respondent to Call Six (6) Expert Witnesses, with:

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I hereby certify that on February 22, 2017, I served via E-Service an electronic copy of the foregoing Order Granting Respondent's Motion to Permit Respondent to Call Six (6) Expert Witnesses, upon:

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