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,** **Respondent**	**Docket No. 9372**

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S TRIAL BRIEF REGARDING OBJECTIONS TO THE TESTIMONY OF DR. DAVID EVANS

[redacted]

[redacted] In fact, Complaint Counsel did provide all proper discovery. Complaint Counsel disclosed Mr. Hamilton's use of the Google Adwords Keyword Planner in a sworn declaration provided to Respondent during discovery. [redacted]

[redacted] Respondent has not identified any discovery obligation that Complaint Counsel has violated. That is because there is none.

FACTS

The facts are these: Walgreens' employee, Mr. Glen Hamilton, put the 1-800 Contacts trademarked keywords prohibited by the Bidding Agreements into the Google Adwords Keyword Planner. In two declarations, (CX 8001 and CX 8002), Mr. Hamilton described, among other things, his use of the Google Adwords Keyword Planner, [redacted] The declarations were provided to Respondent in December 2016, well before the close of discovery. Respondent's counsel was free to ask Walgreens for more information about what Mr. Hamilton did. They were free to subpoena Walgreens for any specific results. They did none of those things.

In January 2017, Respondent's counsel took Mr. Hamilton's deposition. Respondent's counsel was free to ask Mr. Hamilton about his declaration, the Google Adwords Keyword Planner results, or anything else. And they did so. Among other things, Mr. Hamilton testified in response to a question from Respondent's counsel that he had printed out the results from his use of the Google Adwords Keyword Planner. That was the first time Complaint Counsel had heard there was a print-out of any results. Complaint Counsel had never received any such print-out, and still does not have one. But more to the point, despite learning of this print-out at Mr. Hamilton's deposition, Respondent's counsel apparently has never followed-up with Walgreens' counsel to request production of the print-out.[1]

[1] Nor did Respondent ask Complaint Counsel if we had the print-out. Of course, Complaint Counsel did not have the print-out—and still does not—and so could not have provided it to Respondent.

In addition, in a separate phone conversation between Complaint Counsel and Walgreen's counsel on December 14, 2016, Walgreens' counsel noted that he had some additional detail regarding the results Mr. Hamilton obtained from his use of Google Adwords Keyword Planner. He provided that information during the phone call. Complaint Counsel gave the information to the staff of its economic expert, Dr. David Evans, pursuant to Paragraph 19(g)(i) of the Scheduling Order in this case. [redacted], Complaint Counsel now files this response to Respondent's trial brief.

ARGUMENT

On April 19, 2017, the night before Dr. Evans took the stand to testify in this case, Respondent filed a "trial brief" objecting to [redacted]

[redacted] Respondent's brief did not identify any discovery rule or obligation that Complaint Counsel violated. Instead, Respondent's brief merely insinuates that there was some unspecified discovery violation, speculating that "perhaps" "*someone*" from Complaint Counsel did not want Respondent to get Mr. Hamilton's results. Resp's Trial Br. at 4. Respondent's reckless speculation is 100% false.

First, Complaint Counsel satisfied all its discovery obligations. We turned over all documents to Respondent that we had obtained from Walgreens. Thus, we complied with the requirements of Paragraph 14 of the Scheduling Order, which requires parties to provide each other with copies of any third party *documents* obtained pursuant to a subpoena *duces tecum*. Complaint Counsel never obtained any documents from Walgreens containing the results Mr. Hamilton obtained from his use of Google Adwords Keyword Planner. If Complaint Counsel had received such documents, we would have produced them, just as we did with all other third party documents — as Respondent concedes. Resp's Trial Br. at 4-5.

Second, Complaint Counsel satisfied our obligation to produce the materials we had obtained from Walgreens to the extent that Dr. Evans relied on these materials in forming his opinions. *See* Scheduling Order ¶ 19(b). [redacted]

[redacted] Respondent instead complains that it was not provided with *other* information from the Google Adwords Keyword Planner that Dr. Evans did *not* rely on. Respondent asserts that absent such information, it has "no means to test the accuracy or reliability of the estimates on which Dr. Evans is relying." *Id*. at 4. But that assertion is baseless. Respondent has had the same means to discover information from Walgreens and the Google Adwords Keyword Planner that Complaint Counsel has.

Third, to the extent Respondent is complaining that Complaint Counsel did not disclose oral communications with Mr. Hamilton or Walgreens' counsel, there is no discovery mechanism that would require such production. Respondent never served a discovery request seeking this information, and if they had, such a request would be improper. Complaint Counsel's communications with potential third party witnesses are protected by the work-product doctrine. *Hickman v. Taylor*, 329 U.S. 495 (1947).

Hickman is controlling here. In that case, the U.S. Supreme Court rejected a party's efforts to obtain factual information from opposing counsel's interviews with potential witnesses. *Hickman*, 329 U.S. at 498-99. The information was protected work product, and that protection could not be overcome by the party's need for discovery; indeed, the party's counsel could simply go out and seek the same factual information from the witnesses himself. *Id*. at 511-13. The same is true here. Respondent's counsel was free to seek additional discovery from Walgreens after they obtained Mr. Hamilton's declarations disclosing the use of the Google Adwords Keyword Planner. They could have asked Walgreens for Mr. Hamilton's printed results after they learned of them at Mr. Hamilton's deposition in January. But they did none of those things. Respondent's counsel appears to place remarkable importance on the information in this document, *see* Resp's Trial Br. at 4, yet they have never even bothered to try to get it.[2]

[2] On this score, we respectfully note the Court's March 30, 2017, ruling denying our motion *in limine* to exclude the testimony of one of Respondent's fact witnesses, Dr. Neil Wieloch. There, the Court reasoned:

> Complaint Counsel does not persuasively explain why, in the two months since the deposition, Complaint Counsel did not seek an extension or reopening of discovery to request a further search and production.
>
> https://www.ftc.gov/system/files/documents/cases/586171_delay_order.pdf

Fourth, the withholding of such protected information does not raise any "sword and shield" issue. The "sword and shield" concern arises when a litigant uses privileged information to support a point, but then invokes privilege to prevent its opponent from using that same information to challenge the point.[3] But Complaint Counsel is not using any privileged information as a sword and a shield. It is not using any privileged information at all. Dr. Evans is not using any information that was not disclosed. The information Dr. Evans is using—

[redacted]—was fully disclosed in Dr. Evans' expert report.

Finally, Respondent complains that Complaint Counsel was not obligated to disclose information provided from Complaint Counsel to its expert. Resp's Trial Br. at 4. But Paragraph 19(g)(i) of the Scheduling Order states explicitly that neither side needs to disclose communications between counsel and its experts. If compliance with Paragraph 19(g)(i) of the Scheduling Order means that Complaint Counsel has not provided proper discovery, then the provisions of that Paragraph make no sense.

Moreover, *Respondent* has been litigating under the same provisions of the Scheduling Order. For example, Respondent had the staff of its economic expert, Dr. Kevin Murphy, talk to some of Respondent's other experts to discuss their opinions. Murphy Dep. at 245-46. Dr. Murphy relied on those oral discussions, but Respondent's counsel has never provided Complaint Counsel with a recitation or description of the information the experts discussed. In

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Respondent's counsel had the same opportunity here. Respondent has known of Walgreen's use of Google Adwords Keyword Planner since December, and it has not offered any reason why it did not seek this discovery from Walgreens or Mr. Hamilton.

[3] April 3, 2017 Order Denying Motion *in Limine* to Preclude Testimony of Bryan Pratt and Mark Miller, at 3.

fact, unlike Dr. Evans, Dr. Murphy did not even disclose those discussions in his expert report. As a result, Complaint Counsel has no means to test the accuracy or reliability of the information discussed.[4] Similarly, Respondent's counsel interviewed third parties in the course of this case. Respondent provided declarations from third parties. But Respondent's counsel have not disclosed whether they had conversations with *other* third parties from whom they chose not to get declarations, or whether their declarants—including Microsoft—told them anything that did *not* go into the declarations. Again, Complaint Counsel does not know what information was not disclosed that might allow it to test the accuracy or reliability of the information that was disclosed.

CONCLUSION

Complaint Counsel has provided all of the discovery it is required to provide. There has been no discovery violation. Dr. Evans' testimony regarding [redacted] should be allowed.

Dated: May 1, 2017

Respectfully submitted,

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[4] The fact that Dr. Murphy's staff had oral discussions with Respondents' other experts, rather than getting information about those experts' opinions from Respondent's counsel is a distinction without a difference.

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2017, 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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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.

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