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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Joseph J. Simons, Chairman
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

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

RESPONDENT 1-800 CONTACTS, INC.'S REPLY BRIEF IN SUPPORT OF ITS APPLICATION FOR A STAY PENDING REVIEW BY A UNITED STATES COURT OF APPEALS

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I. INTRODUCTION

This case centers on provisions pertaining to search advertising in fourteen of 1-800 Contacts' ("1-800") agreements with contact lens sellers. Consistent with the Order's core prohibition, 1-800 will not enforce those provisions pending appeal. Unsatisfied with obtaining the relief supposedly needed to restore competition, Complaint Counsel ("CC") opposes 1-800's partial stay request and demands enforcement of the Order in its entirety—regardless of its impact on 1-800. CC's opposition fails because it (1) applies a wrong likelihood of success standard—one no stay applicant could ever meet; (2) ignores most of what 1-800 actually argues as to irreparable harm, challenges arguments 1-800 never made, and disregards the Order's plain language to downplay its breadth; and (3) fails to identify consumer harm that has a realistic chance of occurring if a partial stay is granted.

II. ARGUMENT

A. CC misapprehends the likelihood of success standard.

CC's arguments boil down to a single proposition: the Commission was right. But the Commission need not confess error to find that 1-800 meets the likelihood of success factor. Indeed, "[p]rior recourse to the initial decision-maker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision." *In the Matter of Cal. Dental Ass'n*, 1996 FTC LEXIS 277, at *10 (May 22, 1996). All that 1-800 has to show is that the case "involves a difficult legal question" or is "based on a complex factual record." Appl. for Stay ("Appl.") 5. It strains credulity to suggest *that* standard is not met here, where there is an enormous record dealing with complex facts, the fundamental legal issues at the intersection of intellectual property and antitrust law are unsettled, the Commission majority (unlike the ALJ) applied two rarely used forms of antitrust analysis, and there is a 46-page dissent challenging point-by-point the majority's analysis.

CC says the Commission should ignore this backdrop because, in its view, the "weight of [the] evidence points in the same direction." Opp'n 4. But that is just another way of saying that CC believes the Commission got it right.[1] CC also casts off 1-800's arguments because the Commission already "explicitly rejected" them (Opp'n 6), and 1-800 does not provide "*new* insight as to why the Commission's analysis is vulnerable on appeal." Opp'n 5-7. In *every* case, the Commission has rejected the respondent's arguments—that is why there is a stay application. A respondent is not required to come up with new arguments after the Commission's decision (and years of litigation) to gain a stay. Indeed, if 1-800 presented "new" insights, CC no doubt would deem them waived.

B. CC ignores the irreparable harm to 1-800.

As 1-800 previously explained, the non-core provisions of the Order will cause irreparable harm by vitiating 1-800's right to appeal, imposing unrecoverable costs, and chilling its ability to enforce its trademarks and settle trademark disputes. CC does not challenge many of 1-800's arguments, and where it does, it misrepresents them.

CC does not dispute that if 1-800 is forced to nullify the Challenged Provisions now—as Section III.B requires—it will have no way to "revive" them later if successful on appeal. Appl. 10-11. That is irreparable harm. *See, e.g., In re N. Tex. Specialty Physicians*, 2006 WL 6679063, at *7 (Jan. 20, 2006) (staying provisions requiring immediate contract termination). Rather than responding to this reality, CC creates a straw man argument that 1-800 did not make.

[1] In fact, a former FTC Commissioner and two others recently published an article predicting reversal. Manne, Singer, & Wright, *Antitrust Out of Focus: The FTC Misses the Mark in Dogged Pursuit of 1-800's Trademark Settlements*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304769.

See Opp'n 10. ("1-800 asserts that, if it must nullify the challenged provisions in its agreements now, it will be vulnerable to trademark infringement by its rivals.").[2]

Moreover, as 1-800's application explained, and CC does not rebut, the Commission's authority is limited to regulating the conduct at issue in this case: horizontal search advertising agreements. Appl. 11-12 (explaining the conduct regulated must provide a "road to a prohibited goal"). Indeed, CC implicitly agrees, as it attempts to downplay the scope of the Order as "carefully tailored" to prevent 1-800 from "prohibit[ing] rivals from bidding on keywords in search advertising auctions . . . or enter[ing] into any agreements with rivals that place limits on search advertising . . . ." Opp'n 8. No fair reading supports this interpretation.

The Order facially reaches beyond 1-800's "rivals" and purports to regulate 1-800's agreements with *anyone* that "sells" *or* "markets" contact lenses. Order § I.K. Recognizing that overreach, CC creatively interprets the Order so that it appears not to cover agreements with 1-800's suppliers or marketing affiliates, while leaving itself room to change its position later.[3] Opp'n 9 (calling it an "*unlikely possibility* that the Commission would attempt to enforce the Order against 1-800 and its suppliers"). But CC's hedging is little comfort to 1-800, which must live with the Order as written. CC's assurance that the prohibitions are "carefully tailored" to search advertising is even less plausible. The Order unambiguously prevents 1-800 from entering any agreement that restricts truthful, non-infringing advertising, regardless of whether it

[2] As to this hypothetical argument, CC announces that "[w]hat 1-800 *actually* wants is to be able suppress competitive advertisements *without* showing that the advertisements are infringing." Opp'n 10. That is hyperbole. If that is what 1-800 "actually" wanted, then why would it *agree* not to enforce the Challenged Provisions pending appeal?

[3] CC's stretched interpretation assumes that 1-800's marketing affiliates are "controlled" by 1-800. Order § I.A. But marketing affiliates are separate companies with which 1-800 contracts to "distribute coupons, build brand awareness, and drive traffic to 1-800's website." Roundy Decl. ¶ 3. Nor is 1-800 in a "joint venture" or "partnership" with its contact lens suppliers (Opp'n 9); it is in arms-length contracts with them. Costello Decl. ¶ 3.

has anything to do with search advertising. Order § II.C. And, the Order installs the Commission as the monitor for *all* of 1-800's trademark enforcement efforts, whether or not involving rivals or search advertising. Order § IV.

As the three declarations show, these provisions irreparably harm 1-800 by intruding into every aspect of 1-800's brand, imposing unrecoverable costs, and chilling 1-800's willingness and ability to enforce its trademarks. CC repeatedly calls 1-800's concerns "conclusory" and "unsupported" (Opp'n 2, 11), but that is not so. For example, CC ignores Mr. Montclair's explanation that "1-800 does not systematically track every person with whom it has communicated about potential infringement," and therefore it would be "costly"—if not impossible—to provide the requisite notice. Montclair Decl. ¶¶ 13-14. Moreover, Mr. Montclair explains how 1-800 would have to "incur additional outside counsel fees and expend internal resources" in providing the Commission *every* communication "regarding that Person's suspected trademark infringement," and how the additional costs will impact 1-800's incentive and ability to protect its brand. *Id.* ¶¶ 11, 16; Order § IV.B.1. 1-800 has shown irreparable harm.

C. There is no realistic harm to the public interest.

CC suggests that consumers will be harmed in two ways, neither of which has any basis in reality. *First*, CC speculates that 1-800's contract counterparties could continue to enforce reciprocal keyword bidding restrictions against 1-800. Opp'n 12-13. But, as the record shows, 1-800 has long had a policy not to bid on rivals' trademarks (Dissent 6), so counterparties will have no opportunity to enforce those provisions.

Second, CC speculates 1-800 will enter *new* agreements containing trademark bidding restrictions with its rivals. Opp'n 13. CC does not identify who the counterparties to these imagined agreements might be. That is not surprising, since, according to the Commission, the

fourteen agreements at issue here cover almost 80 percent of the online sales of contact lenses in the U.S. Comm'n Op. 33. Nor does the Commission explain why anyone would enter into an agreement that the Commission has announced is unlawful. CC's arguments have no basis in reality and should be rejected.

III. CONCLUSION

The Commission should partially stay the Order.

December 26, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2018, I filed the foregoing Application for a Stay Pending Appeal using the FTC's E-Filing System, which will send notification of such filing to all counsel of record as well as the following:

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Dated: December 26, 2018 /s/ Ryan A. Shores

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 26, 2018 /s/ Ryan A. Shores

Notice of Electronic Service

I hereby certify that on December 26, 2018, I filed an electronic copy of the foregoing Respondent 1-800 Contacts' Reply Brief in Support of Application for a Stay, with:

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