

PUBLIC

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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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*.¹ 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.)

settlements [REDACTED]
[REDACTED] and thus would rebut this allegation.²

- The Complaint alleges that companies settled with Respondent “to avoid prolonged and costly litigation” and that the agreements “go well beyond prohibiting trademark infringing conduct.” (Complaint ¶¶ 19, 21.) The sought-after settlements would rebut this allegation, showing that even a well-financed defendant chose to [REDACTED]
[REDACTED]. In addition, the Google settlements [REDACTED], showing that the Complaint’s allegation that Respondent’s settlements are overly restrictive is not well-founded.
- The Complaint alleges that Respondent’s agreements harmed search engines. (Complaint ¶ 31.) Google’s settlement agreements, especially any that show Google [REDACTED]
[REDACTED], will tend to show search engines are not harmed by [REDACTED]
[REDACTED].

Relevancy is also demonstrated by Respondent’s Answer. *In re Kaiser Alum. & Chem. Corp.*, 1976 FTC LEXIS 68, *5 (F.T.C. Nov. 12, 1976) (“The relevancy of the information sought is determined by laying the subpoena along side the defenses raised by [Respondent’s] answer to the complaint.”) Respondent contends that its agreements “are legitimate, reasonable, and commonplace settlements of *bona fide* trademark litigation based on other contact lens retailers’ unauthorized use of 1-800 Contacts’ trademarks as keywords to trigger Internet search advertising.” (Respondent’s Answer and Defenses to Administrative Complaint at 1.) Google’s settlements, which [REDACTED], would support this contention.

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 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 ¶¶ 2-3.) In fact, one of these agreements was with the very same litigant with which Google settled ([REDACTED]). (*Id.* at ¶ 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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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 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 facts.

2. 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 produced several settlement agreements in response to Respondent's subpoena. Including among these agreements was a settlement with [REDACTED].

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 12th day of January, 2017 at Pasadena, California.

/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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Dated: January 12, 2017

Respectfully submitted,

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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,

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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
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600 Pennsylvania Ave., NW
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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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