

INTRODUCTION

Non-party Google Inc. (“Google”) submits this brief in opposition to Respondent’s Motion to Compel (“MTC”) the production of three confidential settlement agreements with {REDACTED}, resolving decade-old trademark infringement litigation between Google and {REDACTED} (“Agreements”). *See* Harkrider Decl. ¶8-10.

Respondent argues that the Agreements between Google and {REDACTED} are relevant because they demonstrate that Respondent’s settlement agreements with its competitors are “commonplace” and therefore lawful under the Supreme Court’s decision in *FTC v. Actavis*. MTC 1.

Actavis does not hold that agreements are lawful under the antitrust laws if they are “commonplace” in an industry. If that were true, then a firm suing rivals for predatory pricing would not violate the antitrust laws if it settled through an agreement that all firms price 20% above cost. Google understands that Respondent’s misreading of *Actavis* is fully briefed by Complaint Counsel and subject to a pending Motion for Partial Summary Decision. Google incorporates those arguments by reference.

Even if Respondent’s reading of *Actavis* were correct, the existence of the Agreements does not demonstrate that Respondent’s agreements are “commonplace” because (i) three *vertical* agreements between Google and {REDACTED} are irrelevant as to whether Respondent’s *horizontal* agreements are common; and (ii) Agreements settling decade-old cases under different law and (iii) different facts are irrelevant as to whether agreements are “commonplace” *today*.

Even if the Agreements were relevant, Respondent's Motion to Compel should be denied because (i) the Agreements are inadmissible, (ii) the Agreements are duplicative of testimony, and (iii) production may lead to abuse by Respondent or others.

GOVERNING STANDARDS

Commission Rule of Practice ("Rule") 3.31(c)(1) permits "discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. §3.31(c)(1). An Administrative Law Judge ("ALJ") "shall" limit discovery if "(i) . . . [it] is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) [t]he party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) [t]he burden and expense of the proposed discovery on a party or third party outweigh its likely benefit." §3.31(c)(2). The ALJ may "deny discovery . . . to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding." *In re Lab. Corp of Am.*, 2011 FTC LEXIS 31, *4-5 (Feb. 28, 2011).

ARGUMENT

The burden already imposed on Google is tremendous. Respondent's first subpoena *duces tecum* consisted of 124 requests and subparts and 98 pages of keywords and queries related to the requests ("Subpoena"), which it followed with another subpoena. Harkrider Decl.¶2-3. Google produced over 15 million lines of data and over 5,500 pages of documents to Respondent. *Id.*¶4.

Google made two witnesses available for full-day depositions in response to Complaint Counsel's subpoena *ad testificandum* under Rule 3.33(c)(1). *Id.*¶6-7. Google allowed

Respondent to ask Gavin Charlston, Google's in-house trademark counsel, questions about the terms of the Agreements. *Id.* ¶11; MTC, Ex.C.

Just before Christmas, Respondent threatened a motion to compel information about the Agreements already provided via Mr. Charlston's testimony. Google promptly answered Respondent's letter and Respondent filed the instant motion. Harkrider Decl. ¶5.

Because the Agreements are not relevant or admissible, the request suggests that Respondent is trying to harass and embarrass Google by demanding production. Respondent's Motion to Compel should be denied.

I. GOOGLE PRESERVED ITS OBJECTIONS TO RESPONDENT'S SUBPOENA

Google filed timely responses and objections to the Subpoena. MTC, Ex.B. Respondent claims, without any relevant authority, that Google waived its right to object to the Subpoena. Respondent is wrong. Nowhere does Rule 3.34(c) state that objections are waived unless a subpoenaed party moves to quash.¹ After receiving the Subpoena, Google retained its right to object under Rule 3.37.² This Court has not found waiver in past matters when a non-party raised written objections but did not move to quash. *See In re OSF Health Sys. & Rockford Health Sys.*, 2012 WL 588757 (F.T.C., Feb. 13, 2012) (No.9349) (resolving subpoena dispute where non-party raised written objections without moving to quash).

Moreover, moving to quash immediately upon receiving a subpoena is inefficient because it creates litigation that could be avoided with further negotiations. That is especially true where it might take weeks for a company receiving requests as wide-ranging as those in the Subpoena to determine how to comply. Indeed, Google and Respondent spent months negotiating the

¹ 3.34(c) simply lays out the requirements of a motion to quash; it does not suggest waiver.

² Rule 3.37(a) notes that non-parties "may be compelled to produce documents and things or to submit to an inspection as provided in §3.34."

scope of the Subpoena. While negotiations did not avoid this particular dispute, many other issues were resolved.

The only authority Respondent cites for its novel waiver argument pertains to a Civil Investigative Demand (“CID”) under Part 2 of the FTC Rules of Practice, not Part 3. *FTC v. O’Connell Assocs., Inc.*, 828 F. Supp. 165 (E.D.N.Y. 1993). Part 2 is a non-adversarial proceeding where the Commission’s only recourse in discovery disputes is to file a petition for relief in district court. There is no right to respond with objections in Part 2. Thus, district courts require the party receiving a CID to file a motion to quash with the Commission prior to filing objections in court. Here, the FTC’s administrative body is hearing Google’s objections in the first instance.³

Google objected to Respondent’s Subpoena in a timely manner. Respondent acknowledged this by negotiating with Google after receiving objections. This Court has “almost plenary” authority to resolve this discovery dispute in Google’s favor. FTC Operating Manual, 10.13.6.3.

II. THE AGREEMENTS ARE NOT RELEVANT TO RESPONDENT’S DEFENSE

Parties requesting settlement agreements must meet a heightened standard of relevance “[g]iven the strong public policy of favoring settlements and the congressional intent to further that policy.” *Bottaro v. Hatton Assocs.*, 96 F.R.D. 158, 160 (E.D.N.Y. 1982). This heightened standard “require[s] some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement.” *Id.* See also *In re Motions to Quash Subpoena filed by Craft Gallery, Ltd. (Craft Gallery)*, 2013 WL 8367788, at

³ Even in Part 2, courts have permitted objections to subpoenas without a motion to quash. See *FTC v. Ernstthal*, 1978 WL 1375 (D.D.C. May 30, 1978).

*2 (W.D. Tex. Apr. 5, 2013); *Big Baboon Corp. v. Dell, Inc.*, 2010 WL 3955831, at *4 (C.D. Cal. Oct. 8, 2010).

Respondent cannot meet this heightened standard by arguing that *three* vertical agreements to resolve decade-old litigation under different facts and law show that Respondent's horizontal agreements are "commonplace" today.

A. The Agreements are Vertical, Not Horizontal

Even if *vertical* agreements between search engines and { [REDACTED] } settling trademark infringement litigation were "commonplace," this does not mean that *horizontal* agreements like Respondent's agreements with competitors not to bid on trademarked keywords are "commonplace."

It is hornbook law that horizontal agreements form the basis of *per se* illegality, whereas courts review vertical agreements under the Rule of Reason.⁴ In *Generac Corp. v. Caterpillar Inc.*, the plaintiff sought to show that defendant's trademark licensing agreement constituted a *per se* violation. 172 F.3d 971 (7th Cir. 1999). The court affirmed dismissal of the claim because the agreement "was a vertical one" and therefore properly reviewed under the Rule of Reason. *Id.* at 977.

In contrast, courts have found horizontal agreements that allegedly protect trademarks constitute *per se* violations. *See, e.g., United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *Rowe Furniture Corp. v. Serta, Inc.*, 1982 WL 1899 (N.D. Ill. Sept. 30, 1982). Respondent's horizontal agreements not to bid on trademarked keywords fall squarely within the facts in these cases.

⁴ *Per se* Sherman Act violations definitionally violate §5 of the FTC Act. *See, e.g., F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

Respondent's argument is akin to suggesting that if it is lawful for manufacturers to grant exclusive geographic areas to distributors, it must also be lawful for distributors themselves to enter into geographic market division. That is not the law.

B. The Law Evolved Since the Agreements Were Entered

The law on the use of trademarks as keywords was undeveloped at the time the claims settled by the Agreements were brought. Since that time, the law has developed to make clear that Google does not infringe when its customers bid on competitors' trademarked keywords. As a result, the existence of *old* Agreements is irrelevant as to whether such agreements are "commonplace" *today*.

Courts have uniformly found that Google did not commit infringement when its customers bid on competitors' trademarked keywords. *See Parts.com, LLC v. Google Inc.*, 3:13-cv-01074-JLS-JLB (S.D. Cal. June 25, 2014) (dismissal); *Home Decor Ctr., Inc. v. Google, Inc.*, 2013 WL 10858861 (C.D. Cal. May 9, 2013); *Jurin v. Google Inc.*, 2010 WL 3521955 (E.D. Cal. Sept. 8, 2010) (dismissal); Joined Cases C-236/08 to C-238/08, *Google France SARL v Louis Vuitton Malletier SA, et al.*, [2010] ECR 1-0000; *Gov't Employees Ins. Co. v. Google, Inc.*, 2005 WL 1903128 (E.D. Va. Aug. 8, 2005). Given the development of the law, the Agreements, {REDACTED}, Harkrider Decl.¶10, are unlikely to yield any relevant information.

Respondent fails to establish that the law is unsettled. *Rescuecom v. Google* involved an appeal of a dismissal related to the question of whether AdWords "used" a trademark. The Second Circuit held that it did, but stated, "We have no idea whether Rescuecom can prove that Google's use . . . causes likelihood of confusion or mistake." *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 130 (2d Cir. 2009). *See also Jurin*, 2010 WL 3521955, at *3 (finding *Rescuecom* "nonapplicable and nonpersuasive" as to confusion). Respondent's citation of *Binder v.*

Disability Grp. is also misguided. There the plaintiff alleged that defendant fraudulently used its trademarks in ad text appearing on the results page. Second Amended Complaint, *Binder v. Disability Grp., Inc.*, 2010 WL 1323240 (C.D. Cal. Jan. 6, 2010). Finally, in *LBF Travel v. Fareportal, Inc.* the plaintiff survived dismissal, but there was no disposition of the infringement claims. 2014 WL 5671853 (S.D.N.Y. Nov. 5, 2014). Even if the law was unclear, the Agreements arose in unique cases involving Google’s trademark policies and operation of AdWords [REDACTED].

C. The Agreements Were Reached in Different, Irrelevant Cases

The Agreements arose long ago from very different contexts than the one before this Court, including different judges, legal standards, trademarks, and types of parties. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

Respondent has not established why these cases have any bearing on whether Respondent’s agreements are “commonplace.”

Even in cases involving similar offenses (of which this case is not), courts have refused production of settlement agreements that involved different *facts* from the litigation before them. In *Craft Gallery*, the court quashed a subpoena for Coach’s settlement agreement in a case where it made similar claims, finding that it “references a separate and distinct factual scenario” that had no applicability to defendants’ case. 2013 WL 8367788. at *2. And *Craft Gallery* involved a settlement agreement signed by one of the *parties*; here, the Agreements are between a *non-party* and entities not involved with this matter.

Even settlements arising from a common incident are not necessarily discoverable. In *Rhines v. United States*, the court denied a request by plaintiff to review third-party settlements arising out of the same event, finding “settlements with other [plaintiffs and defendants] would need to take into account a host of legal and factual variables unique to each claimant . . . mak[ing] comparisons . . . not only irrelevant but potentially misleading.” 2014 WL 3829002, at *4 (M.D. Pa. Aug. 4, 2014).

Respondent's argument would be disastrous to the consent decree process. For example, in Part 3 merger litigation, respondents would be entitled to confidential documents related to settling prior merger allegations in the same industry. Such documents are irrelevant in that context, and Google's settlements are irrelevant here. This Court should decline Respondent's request to engage in discovery of “not only irrelevant, but potentially misleading[,]” *id.*, information.

III. EVEN IF RELEVANT, THE AGREEMENTS SHOULD NOT BE PRODUCED

A. The Agreements are Inadmissible under FRE 408

Respondent's motion seeks the Agreements for a purpose that is inadmissible under Federal Rule of Evidence (“FRE”) 408(a): “to prove or disprove the validity or amount of a disputed claim.”

Respondent intends to show that the settlement terms reflect that claims in the underlying actions were valid. For example, Respondent seeks to show that Google's settlements “impl[y], of course, [] that claims such as Respondent's presented a substantial risk of liability[.]” MTC 6. This use is exactly what 408(a) prohibits and contradicts the policy of “encourag[ing] settlements which would be discouraged if such evidence were admissible.” ACN, FRE 408.

B. The Agreements are Duplicative of Deposition Testimony

Respondent has already deposed Gavin Charlston about the Agreements. To the extent there is any admissible evidence related to the Agreements relevant to Respondent's defenses, Mr. Charlston's testimony is sufficient. Mr. Charlston identified the [REDACTED], and the duration and geographic scope of the settlements. *See* MTC, Ex.C. Respondent only argues that it lacks information on [REDACTED], associated with the settlements. That information is not only inadmissible, but also has absolutely no bearing on the validity of claims in this case or the cases that Google settled. Respondent therefore has all the information that it is entitled to under the FRE. Requiring Google to produce duplicative information is inherently burdensome and should be rejected under Rule 3.31(c)(1).

C. The Protective Order May Not Protect Google from Abuse

Respondent has a history of harassing firms with vexatious infringement litigation. *See* Complaint. Given the irrelevance of Google's settlements, Respondent's purpose could be to threaten Google rather than discover admissible evidence.

Despite the Protective Order, Respondent may well use the Agreements offensively in future litigation. As the Supreme Court noted in *Oppenheimer Fund, Inc. v. Sanders*, "a court is not required to blind itself to the purpose for which a party seeks information. Thus, when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied." 437 U.S. 340, 353 n.17 (1978).

Moreover, any disclosure could subject Google to harassment by litigious parties. In *Litton Industries, Inc. v. Chesapeake & Ohio Ry. Co.*, the court acknowledged:

[The] constant danger inherent in disclosure of confidential information pursuant to a protective order. . . . [requires] a strong showing of need, especially when confidential information from a non-party is sought.

129 F.R.D. 528, 531 (E.D. Wis. 1990). Respondent failed to make such a showing.

CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court deny Respondent's Motion to Compel.

Dated: January 12, 2017

Respectfully submitted,

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

_____)	
In the Matter of)	
)	
1-800 CONTACTS, INC.,)	
a corporation,)	DOCKET NO. 9372
)	
Respondent)	
_____)	

**[PROPOSED] ORDER DENYING RESPONDENT’S
MOTION TO COMPEL COMPLIANCE WITH SUBPOENA**

Upon due consideration of the Motion to Compel Compliance with Subpoena filed by Respondent 1-800 Contacts, Inc. (“Respondent”) on January 3, 2017 and the answer of non-party Google Inc. in opposition to that motion,

IT IS HEREBY ORDERED that Respondent’s motion is DENIED.

DATED: _____

D. Michael Chappell
Chief Administrative Law Judge

5. 1-800 Contacts' counsel, Sean Gates, sent a letter to me on December 22, 2016 threatening a motion to compel. The letter requested a response by December 28, 2016. I responded to Mr. Gates's letter on December 28, 2016.
6. The FTC issued a subpoena *ad testificandum* on October 27, 2016.
7. Google made two witnesses available to testify in response to the FTC's subpoena *ad testificandum*. One of the witnesses was Gavin Charlston, in-house trademark counsel at Google.
8. [REDACTED]
9. [REDACTED]
10. [REDACTED]
11. Google allowed 1-800 Contacts' counsel to ask Gavin Charlston about the terms of the Settlement Agreements during Mr. Charlston's deposition.
12. The facts contained in paragraphs 8 to 10 of this declaration meet the standards for "confidential material" as defined in the Protective Order dated August 8, 2016.

PUBLIC

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 10th day of January, 2017 in New York, NY.

/s/ John D. Harkrider
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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2017, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filings to:

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The Honorable D. Michael Chappell
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I also certify that I delivered via electronic mail a copy of the foregoing documents to:

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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 17, 2017

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Notice of Electronic Service

I hereby certify that on January 17, 2017, I filed an electronic copy of the foregoing Non-Party Google's Opposition to Respondent's Motion to Compel - PUBLIC, with:

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I hereby certify that on January 17, 2017, I served via E-Service an electronic copy of the foregoing Non-Party Google's Opposition to Respondent's Motion to Compel - PUBLIC, upon:

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