UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Maureen K. Ohlhausen, Acting Chairman**
Edith Ramirez
Terrell McSweeny

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

OPINION AND ORDER OF THE COMMISSION

By OHLHAUSEN, Acting Chairman:

I. Introduction

Internet search engines like Google and Bing sell advertising opportunities to firms across an array of different industries through computerized auctions. This matter involves agreements entered into between an online retailer of contact lenses, Respondent 1-800 Contacts, Inc., and certain of its rivals that allegedly limited competition in internet-search-advertising auctions and restricted truthful, non-misleading advertising.

The alleged background facts are straightforward. Between 2004 and 2013, 1-800 Contacts and various of its competitors agreed not to bid on each other's trademarks as keywords in internet-search-advertising auctions. They further agreed to take steps to prevent their advertisements from appearing in response to search queries that contain each other's trademarked keywords. Although 1-800 Contacts disputes the characterization of those arrangements, the Complaint refers to them as "bidding agreements." Those agreements followed trademark infringement challenges or threatened challenges by 1-800 Contacts to rivals' bidding on "1-800 Contacts" and other trademarks as keywords in online search advertising. Although it resolved most of its trademark-infringement disputes through these agreements, 1-800 Contacts lost the only one of these cases that proceeded to judgment. *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1234-35, 1243-49 (10th Cir. 2013) (finding that Lens.com's bidding on 1-800 Contacts' trademarked keyword created no likelihood of confusion).

On August 8, 2016, the Commission issued an administrative complaint, alleging that the "bidding agreements" between 1-800 Contacts and its rivals harmed competition in relevant markets that include the sale of search advertising by auction in response to user queries regarding contact lenses in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Complaint alleges that 1-800 Contacts restricted competition beyond "the scope of any property right that 1-800 Contacts may have in its trademarks" and that the bidding agreements "are not reasonably necessary to achieve any procompetitive benefit." Compl. ¶ 32.[1]

Subsequently, 1-800 Contacts filed its Answer, which includes the two affirmative defenses that are at issue here. In its Second Defense, 1-800 Contacts asserts that the Section 5 claim "is barred, in whole or in part, because the lawsuits that gave rise to the trademark settlement agreements described in the Complaint have not been alleged to be and have not been shown to be objectively and subjectively unreasonable." And in its Third Defense, Respondent asserts that the claim "is barred, in whole or in part, because 1-800 Contacts' conduct is protected under the *Noerr-Pennington* doctrine and the First Amendment of the United States Constitution."

Complaint Counsel has moved for partial summary decision as to these two defenses. For the reasons explained below, we grant the motion.

II. Legal Standard and Undisputed Facts

Under Rule 3.24 of the Commission's Rules of Practice, a party may move for summary decision in its favor "upon all or any part of the issues being adjudicated." 16 C.F.R. § 3.24(a)(1). The same legal standard applies to those motions as to motions for summary judgment under Federal Rule of Civil Procedure 56. *See In re N. Carolina Bd. of Dental Exam'rs*, 151 F.T.C. 607, 610-11 (2011), *aff'd N. Carolina Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 717 F.3d 359 (4th Cir. 2013), *aff'd* 135 S. Ct. 1101 (2015). Hence, if there is no genuine dispute as to any material fact "regarding liability or relief," a final decision and order properly issues. 16 C.F.R. § 3.24(a)(2).

Here, Complaint Counsel moves for partial summary decision on the issue whether 1-800 Contacts has properly stated its Second and Third Defenses. Although 1-800 Contacts challenges many of the facts that Complaint Counsel identifies as undisputed, Complaint Counsel's motion does not turn on any facts outside the pleadings. Rather, the parties' briefs show that the only real dispute concerns the scope of the claims in the Complaint. *Compare* Opp. at 1-9 (focusing on allegations in the Complaint, but not citing any disputed material facts that foreclose granting the motion) *with* Reply at 1 ("Respondent's Opposition . . . identifies no material factual disputes; rather, it contests the legal implications of Complaint Counsel's allegations."). In that

[1] This opinion uses the following abbreviations:

Compl.: Complaint
Mem. Supp.: Memorandum in Support of Complaint Counsel's Motion for Partial Summary Decision
Opp.: Memorandum of Law of Respondent 1-800 Contacts, Inc. in Opposition to Complaint Counsel's Motion for Partial Summary Decision
Reply: Complaint Counsel's Reply in Support of its Motion for Partial Summary Decision

respect, the present motion resembles a motion to strike 1-800 Contacts' second and third affirmative defenses because it turns on the Complaint's allegations rather than on identifying which material facts are undisputed. *Cf.* 16 C.F.R. § 3.22(a) (permitting motions to strike); Fed. R. Civ. P. 12(f) ("The court may strike from a pleading an insufficient defense[.]"). Hence, in considering the present motion, we need only look to the Complaint's allegations.

III. Analysis

A. Third Defense*: Noerr* is not a defense because the Complaint only challenges private agreements

The Third Defense asserts that "1-800 Contacts' conduct is protected by the *Noerr-Pennington* doctrine and the First Amendment."[2]

The *Noerr-Pennington* doctrine immunizes non-sham petitioning of the government from antitrust liability. *See Prof'l Real Estate Investors, Inc. v. Colum. Pictures Indus.*, 508 U.S. 49, 60-61 (1993). It does not, however, reach private agreements that harm competition independent of governmental action. *See, e.g.*, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424-25 (1990) (holding that a horizontal boycott that carried "anticompetitive consequences" even without the passage of legislation was illegal); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988) (noting that *Noerr* does not protect "every concerted effort that is genuinely intended to influence governmental action," including "horizontal price agreements[,] . . . [h]orizontal conspiracies or boycotts"); *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963) (horizontal conspiracy under rubric of a settlement was illegal) (as approved by *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2232 (2013)); *see also Andrx Pharm., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 819 (D.C. Cir. 2001) ("The Agreement is not unlike a final, private settlement agreement resolving the patent infringement litigation by substituting a market allocation agreement. Such a settlement agreement would not enjoy *Noerr-Pennington* immunity and neither does the Agreement here."); *Premier Elec. Const. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 376 (7th Cir. 1987) ("There is no such thing as the lawful enforcement of a private cartel."). *See generally* FTC STAFF REPORT, ENFORCEMENT PERSPECTIVES ON THE NOERR-PENNINGTON DOCTRINE (2006).

1-800 Contacts does not dispute that anticompetitive, private agreements lie beyond *Noerr*'s protection. Instead, it argues that the Complaint asserts liability based on conduct beyond the bidding agreements, including 1-800 Contacts' cease and desist letters, threats to sue, lawsuit filings, and threats of further litigation. Opp. at 1-2, 4-6. But, as Complaint Counsel emphasizes, that is not the basis of the Complaint's allegations of liability. Although the Complaint alleges conduct by 1-800 Contacts other than the bidding agreements, Complaint Counsel expressly represents that "the only acts or practices challenged by the Complaint are Respondent's *agreements* with its rivals." Reply at 1 (emphasis in original).[3] Consistent with Complaint

[2] 1-800 Contacts' Opposition memorandum, however, addresses this defense solely in terms of *Noerr-Pennington* and appears to conflate the Third Defense's First Amendment reference with *Noerr-Pennington* considerations.

[3] 1-800 Contacts also argues that the Complaint's "Notice of Contemplated Relief" seeks to enjoin conduct beyond "just entering into settlement agreements." Opp. at 1. But there is nothing in the relief sought to suggest it goes

Counsel's representation, the Complaint's only count states a claim under Section 5 based exclusively on the "series of bilateral agreements between 1-800 Contacts and numerous online sellers of contact lenses[.]" Compl. ¶ 1. It ties the challenged anticompetitive effects directly to the bidding agreements, *id.* ¶¶ 28-31, and avers that those agreements are overbroad, restrain price competition, and are not reasonably necessary. *Id.* ¶ 32.

Given that the Complaint alleges liability based only on private agreements that do not constitute government petitioning, 1-800 Contacts' Third Defense fails.

B. Second Defense: Although the nature of the trademark disputes may inform the antitrust analysis, the reasonableness of those disputes is not an affirmative defense

In its Second Defense, 1-800 Contacts asserts that the Complaint's claim is barred because "the lawsuits that gave rise to the trademark settlement agreements . . . have not been alleged to be and have not been shown to be objectively and subjectively unreasonable."[4] 1-800 Contacts argues that antitrust liability ordinarily does not attach to settlement agreements, Opp. at 6, and that such agreements are subject to "antitrust scrutiny" only in limited circumstances. *Id*. at 7. It reads the Supreme Court's opinion in *Actavis* to impose a greater burden on a plaintiff seeking to establish antitrust liability when the underlying conduct involves settlements because of the "general legal policy favoring the settlement of disputes." Opp. at 7-8 (quoting *Actavis*, 133 S. Ct. at 2234). According to 1-800 Contacts, Complaint Counsel has failed to meet this supposed *Actavis* burden. Opp. at 7-8. It argues that Complaint Counsel must show that the underlying infringement claims are "objectively and subjectively unreasonable," *i.e.*, that they are a "sham." *Id*. at 7-8 & n.6.

But that is not the holding in *Actavis*. The Supreme Court made clear in *Actavis* that neither the fact that the agreements in question were settlement agreements nor the fact that they concerned patent rights rendered them immune from antitrust scrutiny. *Actavis*, 133 S. Ct. at 2232 (citing cases and observing that "this Court's precedents make clear that patent-related settlements can sometimes violate the antitrust laws"). In short, 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. For example, if 1-800 Contacts restricted competition beyond "the scope of any property right that 1-800 Contacts may have in its trademarks," Compl. ¶ 32, then the *bona fide* nature of the underlying trademark dispute could not be a defense.

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beyond the authority of the Commission. *Rubbermaid, Inc. v. FTC*, 575 F.2d 1169, 1174 (6th Cir. 1978) (noting that the Commission "has wide latitude in forming an appropriate remedy"). Moreover, 1-800 Contacts will have the opportunity in this proceeding to present any arguments—including any related to the First Amendment—regarding the proper scope of relief that may attach upon a finding of liability at such time as that issue is being considered in the proceeding. Such arguments, however, do not save 1-800 Contacts' Third Defense.

[4] This defense can also be read as simply a restatement of the *Noerr-Pennington* doctrine, *i.e.*, as a restatement of the Third Defense. For the reasons explained above, *Noerr* does not immunize the private agreements that are the sole basis for liability in the Complaint. Consequently, if read this way, the defense also fails.

IV. Conclusion

Because the Complaint alleges that 1-800 Contacts violated Section 5 solely by entering into private bidding agreements, we hold that the *Noerr-Pennington* doctrine does not apply and 1-800 Contacts' Third Defense fails as a matter of law. Similarly, because Complaint Counsel need not prove 1-800 Contacts' lawsuits to be objectively and subjectively unreasonable to establish a Section 5 violation, 1-800 Contacts' Second Defense also fails. We therefore grant Complaint Counsel's motion.

Accordingly,

IT IS ORDERED THAT Complaint Counsel's Motion for Partial Summary Decision regarding Respondent's Second and Third Defenses is **GRANTED**.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: February 1, 2017