

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



ORIGINAL

In the Matter of)
)
)
1-800 CONTACTS, INC.,)
a corporation,)
)
Respondent)
_____)

DOCKET NO. 9372

**COMPLAINT COUNSEL’S MOTION AND MEMORANDUM IN SUPPORT
TO LIMIT RESPONDENTS TO FIVE (5) EXPERT WITNESSES**

Complaint Counsel respectfully moves the Court for an order limiting Respondent to *five* expert witnesses, and requiring Respondent to identify those five witnesses immediately. Respondent has identified *seven* expert witnesses it intends to call at the hearing. Rule 3.31A(b), however, limits Respondent to five expert witnesses. Thus, Respondent must either withdraw two of its experts from the list or obtain the Court’s approval for an exception to Rule 3.31A(b). Respondent acknowledges this, but thus far has refused to do either in a timely manner.

Timing is important here. Respondent’s expert reports are due February 23, 2017 and Complaint Counsel’s rebuttal expert reports are due March 8, 2017. Thus, if this issue is not resolved promptly, Complaint Counsel will be prejudiced by having to prepare for additional, and potentially unnecessary, rebuttal reports and expert depositions. Given the timing, Complaint Counsel hereby files this motion requesting that the Court order Respondent, by February 23, to limit its expert witness list to five experts, and to serve only five expert reports.¹

¹ Complaint Counsel sees no “extraordinary circumstances” that would warrant seven experts in this case. See Rule 3.31A(b). Indeed, Respondent’s current list appears to contain considerable duplication, identifying two trademark lawyers, two consumer survey experts, two researchers on Internet search engines, and one industrial organization

To facilitate prompt resolution of this issue, Complaint Counsel agreed to serve this motion on Respondent by Saturday, February 4, 2017, and has been authorized by Respondent to state that Respondent will file its response by February 15, 2017. The parties jointly request the Court to issue an order on this motion on or before February 22, 2017.

BACKGROUND

On December 26, 2016, Complaint Counsel provided its expert witness list, identifying three expert witnesses. On January 13, 2017, Respondent served its expert witness list, naming *seven* experts it intends to call as witnesses at the hearing.² On January 27, 2017 Complaint Counsel requested that Respondent “either (1) provide a date certain by which Respondent will amend its expert witness list to identify five (or fewer) experts that it intends to call at the hearing in accordance with Rule 3.31(A)(a): or (2) file a motion under Rule 3.31A(b) ‘seeking leave to call additional expert witnesses due to extraordinary circumstances[. . ..]’” Complaint Counsel requested that “any amendment of Respondent’s expert witness list, or any motion under Rule 3.31A(b), must be made promptly enough to ensure that Complaint Counsel does not occasion unnecessary burdens related to experts who will ultimately not testify.”³

On January 29, 2017, Respondent acknowledged that Rule 3.31A(b) requires that Respondent either trim its expert list or obtain Court approval to present more than five witnesses.⁴ Respondent proposed that it would either reduce its expert list or file a motion by

economist. Nonetheless, if Respondent intends to seek leave of Court for seven experts, Respondent should file any necessary briefing in time to allow the Court to rule on that issue by February 22.

² See Ex. A (Respondent’s Expert Witness List) at 1.

³ Ex. B at 3-4 (D. Matheson email to G. Stone, et. al. (January 27, 2017)).

⁴ Ex. B at 3 (“We acknowledge, as we did in our expert disclosure, that the rule limits the number of experts who can testify at trial, subject to a motion to expand that number.”). See also Ex. A (Resp. Expert Witness List) at 1-2 (Respondent expects to reduce its list or file a motion for leave to call additional expert witnesses after receiving Complaint Counsel’s expert reports).

February 17, 2017— less than a week before Respondent’s expert reports are due.⁵ That schedule would not provide enough time for this Court to decide any motion by Respondent before Respondent’s expert reports are due on February 23. In fact, such a motion might not be decided until the week that Complaint Counsel’s own rebuttal expert reports are due.

As a result, Respondent’s schedule would impose significant and unwarranted burdens on Complaint Counsel. Complaint Counsel would have to prepare rebuttals to all of Respondent’s expert reports—which could include retaining additional potential rebuttal experts—and prepare for additional expert depositions. That would increase Complaint Counsel’s costs, and cause additional burden and distraction for experts that may not testify. This is a result of Respondent unilaterally delaying its decision as to which five experts it will call to testify.

Respondent’s refusal to fish or cut bait should not impose additional burden, including substantial additional litigation costs, on Complaint Counsel. Therefore, Complaint Counsel respectfully asks the Court to intervene and order Respondent to withdraw two of its experts from its expert witness list.

ARGUMENT

I. Five Experts Are Sufficient In All But The Most Extraordinary Cases.

One of the Commission’s primary goals in its development and promulgation of the 2009 Amendments was to cut the time and expense that was unnecessarily incurred in Part 3 litigation. The Commission identified undesirable consequences of protracted Part 3 proceedings, which included “substantially increased litigation costs for the Commission” 73 Fed. Reg. 58832 (Oct. 7, 2008) (proposed rules). And, the Commission expressed a serious concern that these

⁵ See Ex. C at 2 (discussing Respondent’s proposal to “inform [Complaint Counsel] of its decision no later than February 16, and to file a motion (if necessary) no later than February 17.”) The unnecessary delay proposed by Respondent is not necessary for them to digest Complaint Counsel’s expert reports, which will be provided on February 6. Instead, Respondent wants to delay its decision until three days after it deposes Complaint Counsel’s economic expert, Dr. Susan Athey, which is scheduled for February 14.

protracted, expensive proceedings “do not necessarily result in decisions that are more just or fair.” *Id.* The various steps the Commission took to eliminate this delay and expense included a presumptive limit on each side to calling five expert witnesses.

The Commission was explicit: “It has been the Commission’s experience that five expert witnesses per side *is sufficient for each party to present its case.*” *Id.* at 58838 (italics added). Five experts per side were sufficient “in the *vast* majority of cases.” 74 Fed. Reg. 1813 (January 13, 2009) (interim final rulemaking) (italics added). And, the Commission was equally explicit that a side would be entitled to have more than 5 witnesses in only “*extraordinary circumstances.*” Rule 3.31A(b) (italics added); 73 Fed. Reg. at 58838 (proposed rules); 74 Fed.Reg. at 1813 (interim final rulemaking).

The Commission’s evaluation of the need for expert witnesses has been borne out by the facts. In all but one of the Part 3 cases since 2009 – many of which were far more complex than this case -- both complaint counsel and the respondent have needed far fewer experts than the rules permit. *The North Carolina Board of Dental Examiners*, No. 9343, involved conduct that was subject to significant regulatory oversight by the state board of dental examiners; each party presented two experts.⁶ *McWane, Inc.*, No. 9351, involved industry standards of the American Water Works Association and the newly-enacted American Recovery and Reinvestment Act of 2009. Each side called one expert.⁷ And, in a case the Court recently completed, *LabMD, Inc.*, No. 9357, the parties combined presented a *total* of five experts.⁸ Two recent merger cases also

⁶ See North Carolina Federation of Dentists, 152 F.T.C. 640 (Dec. 2, 2011) (Commission opinion and order) available at <https://www.ftc.gov/sites/default/files/documents/cases/2011/12/111207ncdentalopinion.pdf>. Notably, neither the Court nor either party saw the need for an expert to advise the Court about the nuances of North Carolina state law. In its January 13, 2017, notice, in contrast, Respondent has identified *two* experts who will testify about trademark law.

⁷ See *McWane Inc.*, No. 9351, 2014 WL 556261, *4 (F.T.C. Jan. 30, 2014) (opinion of the Commission) available at https://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion_0.pdf.

⁸ See Opinion of the Commission (July 29, 2016) at 6-7, reproduced at <https://www.ftc.gov/system/files/documents/cases/160729labmd-opinion.pdf>.

involved fewer than five experts per side. *Sysco Corp.*, No. 9364, for example, involved an \$8.2 billion dollar merger, which allegedly would have had anticompetitive effects in two distinct product markets and more than thirty different geographic markets. Complaint counsel and the respondent needed two experts each. And, in *Staples Inc.*, No. 9367, a \$6.3 billion merger, complaint counsel had two experts and the respondent had three.⁹

To our knowledge, there has been only one case since the 2009 Amendments, *Pom Wonderful LLC*, No. 9344, a consumer protection case, in which a party has even sought leave to have more than five experts. But in *Pom*, the respondents were defending the scientific merit of a variety of health claims and required a medical expert versed in each medical issue, as well as multiple mechanisms by which respondents argued POM Wonderful pomegranate juice affected the body. Thus, the case involved three different products, twenty different advertisements, two distinct legal theories, and at least five distinct medical effects were at issue. In determining that *Pom* was an “extraordinary” case, the Court explained that “Complaint Counsel’s case challenges multiple products, multiple advertisements, and multiple areas of science.”¹⁰

Absent such extraordinary circumstances, however, each party is limited to five expert witnesses.

II. The Issues Presented by This Matter Do Not Warrant More Than Five Experts.

This case is straightforward. The Complaint challenges fourteen instances of the same conduct by Respondent. Respondent entered fourteen Bidding Agreements that were essentially identical. Complaint ¶¶ 1-2, 20-23. Complaint Counsel alleges that all these agreements violate the same statute in the same way. *See* Complaint ¶¶ 33-34. Complaint Counsel has proffered

⁹ We have copies of the notices exchanged by the parties in these cases, and will provide them to the Court or Respondent on request.

¹⁰ *In the Matter of Pom Wonderful LLC*, Docket No. 9344, Order dated Feb. 23, 2011, at 6, reproduced at <https://www.ftc.gov/sites/default/files/documents/cases/2011/02/110223aljordoncrossmo.pdf>.

only three experts—two economists and one survey expert—well within the limits of the Part 3 regulations.

In response, Respondent has designated seven experts. While Respondent did not identify the substance of the witnesses' proposed testimony, the list appears to contain considerable duplication: Respondent lists two search engine researchers, two trademark attorneys, two survey experts, and an industrial organization economist.¹¹ Respondent has yet to explain to us why it needs seven experts.

This case is not extraordinary in a way that demands more than five experts, and it certainly does not replicate the situation in *Pom*. Therefore, Respondent should be required to withdraw two of the experts listed on its expert witness list.

¹¹ We suggest that enforcing the limitations of Rule 3.31A is the only prudent course here. We anticipate that if Respondent proceeds with seven experts, it is likely to necessitate *in limine* motions, which Complaint Counsel recognizes are disfavored by the Court, and will generate unavoidable objections during their trial testimony due to undue delay, wasting time, or the needless presentation of cumulative evidence. Fed. R. Evid. 403.

CONCLUSION

For the foregoing reasons, Respondent should be ordered to withdraw two of the expert witnesses by February 23, 2017.¹²

Dated: February 4, 2017

Respectfully submitted,

/s/ Daniel J. Matheson

Daniel J. Matheson
Geoffrey M. Green
Barbara Blank
Charles A. Loughlin
Thomas H. Brock
Kathleen M. Clair
Gustav P. Chiarello
Joshua B. Gray
Nathaniel M. Hopkin
Charlotte S. Slaiman
Mika Ikeda

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
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Email: dmatheson@ftc.gov

Counsel Supporting the Complaint

¹² If the Court is inclined to grant Respondent leave to call seven experts, we respectfully ask the Court to consider the significant disadvantages we would face if, after receiving Respondent's seven expert reports on February 23, 2017, we are required to serve our rebuttal reports by March 8, 2017. Therefore, while we do not believe this would be a satisfactory resolution of this dispute, we respectfully ask the Court, if it approves Respondent going forward with more than five experts, to extend the deadline for our rebuttal reports from March 8, 2017, to March 14, 2017, the deadline for our depositions of their experts from March 20, 2017, to March 24, 2017, and the time for filing *in limine* motions until March 30, 2017.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

**[Proposed] ORDER GRANTING COMPLAINT COUNSEL’S MOTION
TO LIMIT RESPONDENT TO FIVE (5) EXPERT WITNESSES**

On February 4, 2017, Complaint Counsel filed a *Motion and Memorandum In Support to Limit Respondent to Five (5) Expert Witnesses*. Finding good cause for the motion, Complaint Counsel’s Motion is GRANTED. Respondent is HEREBY ORDERED to withdraw two of the experts listed in their January 13, 2017 filing, and to provide their revised list of five experts to Complaint Counsel by February 23, 2017.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

I hereby certify that on FEBRUARY 4, 2017 I served COMPLAINT COUNSEL'S MOTION TO LIMIT RESPONDENTS TO FIVE (5) EXPERT WITNESSES via electronic mail on the following counsel for Respondents:

Steven Perry, Steven.Perry@mto.com
Justin Raphael, Justin.Raphael@mto.com
Stuart Senator, Stuart.Senator@mto.com
Gregoy Stone, Gregory.Stone@mto.com
Gregory Sergi, Gregory.Sergi@mto.com
Garth Vincent, Garth.Vincent@mto.com

Date: February 4, 2017

By: /s/Dan Matheson
Dan Matheson

STATEMENT OF CONFERENCE WITH OPPOSING COUNSEL

Pursuant to paragraph 4 of the Additional Provisions of the Scheduling Order, Complaint Counsel states that, as set forth in the motion, we have conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement.

Dated : February 4, 2017

/s/ Daniel Matheson

Daniel Matheson
Federal Trade Commission
400 7th Street SW
Washington, DC 20024

Ex. A

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

In the Matter of

**1-800 CONTACTS, INC.,
a corporation**

Docket No. 9372

RESPONDENT'S EXPERT WITNESS LIST

Pursuant to Paragraph 19(a) of the Scheduling Order and Rule 3.31A(a), Respondent hereby provides a list of experts that it currently intends to call as witnesses at the hearing. Respondent reserves the following rights:

1. Not to call at the hearing some or all of the persons listed;
2. To call any of the persons identified by Complaint Counsel as expert witnesses, including any identified as rebuttal experts;
3. To add experts to this list and/or present supplemental or surrebuttal expert reports and opinions, if necessary or appropriate, following Complaint Counsel's service of opening expert reports and/or rebuttal expert reports; and
4. To call any of these individuals or any other person at the hearing in order to respond to testimony or other evidence presented by Complaint Counsel, including in surrebuttal.

Respondent acknowledges the provision of Rule 3.31A(b) that "[e]ach side will be limited to calling at the evidentiary hearing 5 expert witnesses, including rebuttal or

surrebuttal expert witnesses,” and expects to reduce its list after receiving Complaint Counsel’s expert reports and/or file a motion seeking leave to call additional expert witnesses.

Subject to the foregoing, including its reservations of rights, Respondent provides the following list of experts:

EXPERT WITNESSES

1. **Dr. Kevin Murphy.** Professor Murphy’s background, qualifications, and publications within the past ten years are described in his curriculum vitae, a copy of which is provided herewith as Exhibit A. Transcripts of Professor Murphy’s testimony in *US Airways, Inc. v. Sabre Holdings Corp.*, United States District Court, Southern District of New York, Case No. 1:11-cv-02725-MGC are provided as Exhibit B. Transcripts of Professor Murphy’s testimony in *Aspinall v. Philip Morris, USA, Inc.*, Superior Court for the Commonwealth of Massachusetts, Case No. 98-6002-BLSI, are provided as Exhibit C. Neither Professor Murphy nor Respondent have in their possession, custody, or control any transcripts of other trial or deposition testimony given within the past four years that are not under seal.
2. **Dr. Anindya Ghose.** Professor Ghose’s background, qualifications, and publications within the past ten years are described in his curriculum vitae, provided as Exhibit D. In addition, Professor Ghose testified at a deposition in *In re Facebook, Inc., IPO Securities and Derivative Litigation*, United States District Court, Southern District of New York, Case No. 1:12-md-02389. Neither Professor Ghose nor Respondent have in their possession, custody, or control any transcripts of trial or deposition testimony given within the past four years that are not under seal.
3. **Dr. Michael Ostrovsky.** Professor Ostrovsky’s background, qualifications, and publications within the past ten years are described in his curriculum vitae, provided as Exhibit E. Professor Ostrovsky has not given trial or deposition testimony within the past four years.
4. **Dr. William Landes.** Professor Landes’s background, qualifications, and publications within the past ten years are described in his curriculum vitae, provided as Exhibit F. Professor Landes has not given trial or deposition testimony within the past four years.
5. **Mr. Howard S. Hogan.** Mr. Hogan’s background, qualifications, and publications within the past ten years are described in his curriculum vitae, provided as Exhibit G. Mr. Hogan has not given trial or deposition testimony within the past four years.

6. **Dr. Ronald Goodstein.** Professor Goodstein's background, qualifications, and publications within the past ten years are described in his curriculum vitae, provided as Exhibit H. Professor Goodstein has not given trial or deposition testimony within the past four years.
7. **Dr. Kent Van Liere.** Dr. Van Liere's background, qualifications, and publications within the past ten years are described in his curriculum vitae, provided as Exhibit I. The transcript of Dr. Van Liere's deposition in *In re: Lumber Liquidators Chinese-Manufactured Flooring Products Marketing, Sales Practice and Products Liability Litigation*, United States District for the Eastern District of Virginia, Case No. 1:15-md-02627, is provided as Exhibit J. The transcript of Dr. Van Liere's deposition in *Rock v. National College Athletic Association*, United States District Court for the Southern District of New York, Case No. 1:12-cv-01019, is provided as Exhibit K. The transcript of Dr. Van Liere's deposition in *Orix USA Corp. v. Preston Hollow Capital, LLC*, United States District Court for the Eastern District of Texas, Case No. 5:15-CV-00170, is provided as Exhibit L. The transcript of Dr. Van Liere's deposition in *Devi Khoday and Danise Townsend v. Symantec Corp., and Digital River, Inc.*, United States District Court for the District of Minnesota, Case No. 11-CV-00180, is provided as Exhibit M. The transcript of Dr. Van Liere's trial testimony in *Amev LG Ltd v. Cumbria County Council*, a matter in the United Kingdom, is provided as Exhibit N. The transcript of Dr. Van Liere's deposition in *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, United States District Court for the Eastern District of North Carolina, Case No. 5:14-cv-217, is provided as Exhibit O. Neither Dr. Van Liere nor Respondent have in their possession, custody, or control any transcripts of other trial or deposition testimony given within the past four years that are not under seal.

DATED: January 13, 2017

Respectfully submitted,

/s/ Gregory P. Stone

Gregory P. Stone (gregory.stone@mto.com)

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Garth T. Vincent (garth.vincent@mto.com)

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Fax: (626) 508-1730

Counsel for 1-800 Contacts, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2017, I served **RESPONDENT'S EXPERT WITNESS LIST** on the following Complaint Counsel:

Thomas H. Brock, ***tbrock@ftc.gov***
Barbara Blank, ***bblank@ftc.gov***
Gustav Chiarello, ***gchiarello@ftc.gov***
Kathleen Clair, ***kclair@ftc.gov***
Joshua B. Gray, ***jbgray@ftc.gov***
Geoffrey Green, ***ggreen@ftc.gov***
Nathaniel Hopkin, ***nhopkin@ftc.gov***
Charles A. Loughlin, ***cloughlin@ftc.gov***
Daniel Matheson, ***dmatheson@ftc.gov***
Charlotte Slaiman, ***cslaiman@ftc.gov***
Mark Taylor, ***mtaylor@ftc.gov***

DATED: January 13, 2017

By: */s/ Gregory P. Stone*
Gregory P. Stone

Ex. B

Matheson, Daniel

From: Matheson, Daniel
Sent: Tuesday, January 31, 2017 4:52 PM
To: 'Stone, Gregory'; Raphael, Justin; Blank, Barbara; Loughlin, Chuck; Slaiman, Charlotte; Green, Geoffrey; Chiarello, Gustav; Gray, Joshua Barton; Clair, Kathleen; Taylor, Mark; Hopkin, Nathaniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.
Cc: ~800CON_FTC_ATTYS; Sean Gates <sgates@charislex.com> (sgates@charislex.com)
Subject: RE: Dkt. 9372 - Complaint Counsel's Expert Witness List

Greg,

Thank you for your suggestion. However, we do not believe it will be productive to agree on a briefing schedule and a joint request to the Court for a ruling unless we request that the Court issue a ruling on or before February 22. It risks putting the Court in a difficult position if Respondent files its opposition shortly before the holiday weekend and we request a ruling coming soon after the holiday. To avoid this risk, it may be best if Complaint Counsel simply files its motion without an agreement regarding the briefing schedule, unless you are amenable a briefing schedule that would include an opposition from Respondent no later than February 15, and a joint request to the Court to issue a ruling no later than February 22.

Regards,

Dan

From: Stone, Gregory [mailto:Gregory.Stone@mto.com]
Sent: Tuesday, January 31, 2017 8:40 AM
To: Matheson, Daniel; Raphael, Justin; Blank, Barbara; Loughlin, Chuck; Slaiman, Charlotte; Green, Geoffrey; Chiarello, Gustav; Gray, Joshua Barton; Clair, Kathleen; Taylor, Mark; Hopkin, Nathaniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.
Cc: ~800CON_FTC_ATTYS; Sean Gates <sgates@charislex.com> (sgates@charislex.com)
Subject: RE: Dkt. 9372 - Complaint Counsel's Expert Witness List

Dan,

We appreciate the various issues you have raised and your creative approach to resolving the competing considerations. I think your second proposal will work depending on the specific dates. We suggest the following:

- You file a motion to limit Respondent to five or fewer experts no earlier than February 6.
- If you file on February 6, we will oppose on or before February 16.
- We will jointly request that the Court rule on or before February 24.

This allows us time to review your experts' reports and depose Dr. Athey before deciding whether we need to oppose your motion or can reduce the number of experts. It will ensure that the motion is decided before you have to do any work on additional rebuttal reports that

you would not otherwise be working on, which reports would be due in accordance with the Scheduling Order on March 8.

Please let us know if this proposal is acceptable.

Best regards,

Greg

From: Matheson, Daniel [<mailto:dmatheson@ftc.gov>]

Sent: Monday, January 30, 2017 1:01 PM

To: Stone, Gregory; Raphael, Justin; Blank, Barbara; Loughlin, Chuck; Slaiman, Charlotte; Green, Geoffrey; Chiarello, Gustav; Gray, Joshua Barton; Clair, Kathleen; Taylor, Mark; Hopkin, Nathaniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.

Cc: ~800CON_FTC_ATTYS; Sean Gates <sgates@charislex.com> (sgates@charislex.com)

Subject: RE: Dkt. 9372 - Complaint Counsel's Expert Witness List

Greg,

We discussed this afternoon the schedule on which Respondent anticipates making a decision on whether to narrow its list of experts, or in the alternative to file a motion seeking leave to call additional experts at the hearing due to extraordinary circumstances. We understand that Respondent anticipates that it will be able to make a final decision no later than shortly after Professor Athey's deposition on February 14. Specifically, you suggested that Respondent could be in a position to inform us of its decision no later than February 16, and to file a motion (if necessary) no later than February 17.

We appreciate the offer of a date certain, but we are concerned that in the event a motion is filed on February 17, the parties will not have enough time to brief the issue and obtain a decision from Judge Chappell before February 23, when Complaint Counsel will receive Respondent's expert reports and prepare rebuttal reports. (Our concern is acute because Monday, February 20 is a public holiday.) Thus, we suggest the following alternatives:

1. We can proceed as you suggested this afternoon (i.e., Respondent files a motion seeking additional experts no later than February 17) on the condition that if such a motion is filed, Complaint Counsel's date for rebuttal reports is extended by 2.5 business days. (That is, our rebuttal reports would be provided no later than noon Eastern time on Monday, March 13). For the avoidance of doubt, if Respondent reduces its list to five or fewer expert witnesses and thus does not file such a motion, no extension for Complaint Counsel's rebuttal reports would apply.
2. If we can't reach agreement on a date certain that ensures resolution of any motion practice before February 23, Complaint Counsel can file a motion seeking to limit Respondent to five expert witnesses. We would time the motion to allow Respondent to review Complaint Counsel's expert reports before Respondent will need to decide whether to oppose the motion. Hopefully Respondent will determine that it need not oppose Complaint Counsel's motion, but even if Respondent decides to oppose Complaint Counsel's motion, the parties will have presented the issue to the Court in sufficient time to allow the Court to resolve it before February 23.

Please let us know if Option 1 above is acceptable, or if instead we should proceed with Option 2. Obviously, we are happy to consider any alternative proposals you might provide, but we would appreciate a response tomorrow so we can determine promptly if we need to proceed with our motion.

Thanks,

Dan

From: Stone, Gregory [<mailto:Gregory.Stone@mto.com>]

Sent: Sunday, January 29, 2017 6:01 PM

To: Matheson, Daniel; Raphael, Justin; Blank, Barbara; Loughlin, Chuck; Slaiman, Charlotte; Green, Geoffrey; Chiarello, Gustav; Gray, Joshua Barton; Clair, Kathleen; Taylor, Mark; Hopkin, Nathaniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.

Cc: ~800CON_FTC_ATTYS; Sean Gates <sgates@charislex.com> (sgates@charislex.com)

Subject: RE: Dkt. 9372 - Complaint Counsel's Expert Witness List

Dan,

We can discuss this topic during our meet and confer tomorrow. We acknowledge, as we did in our expert disclosure, that the rule limits the number of experts who can testify at trial, subject to a motion to expand that number. I do not believe that the rule limits the number of experts who can be designated by a party prior to the time that trial testimony is elicited, however. At the same time, I recognize that your familiarity with the rules is much greater than ours, so if there are other provisions we should also consider, please let us know. It would be fine if you point those out to us during tomorrow's meet and confer.

From: Matheson, Daniel [<mailto:dmatheson@ftc.gov>]

Sent: Friday, January 27, 2017 1:35 PM

To: Stone, Gregory; Raphael, Justin; Blank, Barbara; Loughlin, Chuck; Slaiman, Charlotte; Green, Geoffrey; Chiarello, Gustav; Gray, Joshua Barton; Clair, Kathleen; Taylor, Mark; Hopkin, Nathaniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.

Cc: ~800CON_FTC_ATTYS; Sean Gates <sgates@charislex.com> (sgates@charislex.com)

Subject: RE: Dkt. 9372 - Complaint Counsel's Expert Witness List

Greg,

Thanks for providing these dates. We would like to meet and confer early next week regarding the identity of the experts Respondent intends to call at the hearing. If convenient, we can address the issue during our meet and confer scheduled for January 20 at 2:00 Eastern.

As you are aware, absent an Order authorizing additional experts due to "extraordinary circumstances," Respondent is limited to five expert witnesses at the hearing under Rule 3.31A(b). ("Each side will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal or surrebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances.")

Our position is that after receiving Complaint Counsel's experts' reports, Respondent should promptly amend its expert witness list identify which experts it will call at the hearing to conform with Rule 3.31A(a). ("The parties shall serve each other with a list of experts they intend to call as witnesses at the hearing not later than 1 day after the close of fact discovery..."). The Scheduling Order specified the dates on which each party was to provide its list of experts, but it did not alter Rule 3.31A's requirement that each party's list should identify only experts the party intends "to call as witnesses at the hearing."

It would impose an unnecessary burden on Complaint Counsel to analyze reports from, or to prepare for and conduct depositions of, experts who will not ultimately testify at the hearing. Thus, we suggest that Respondent either (1) provide a date certain by which Respondent will amend its expert witness list to identify five (or fewer) experts that it intends to call at the hearing in accordance with Rule 3.31A(a), or (2) file a motion under Rule 3.31A(b) "seeking leave to call additional expert witnesses due to extraordinary circumstances." Our position is that any amendment of

Respondent's expert witness list, or any motion under Rule 3.31A(b), must be made promptly enough to ensure that Complaint Counsel does not occasion unnecessary burdens related to experts who will ultimately not testify.

Please let us know when you are available next week to discuss this issue.

Regards,

Dan

From: Stone, Gregory [<mailto:Gregory.Stone@mto.com>]

Sent: Friday, January 27, 2017 2:18 PM

To: Matheson, Daniel; Raphael, Justin; Blank, Barbara; Loughlin, Chuck; Slaiman, Charlotte; Green, Geoffrey; Chiarello, Gustav; Gray, Joshua Barton; Clair, Kathleen; Taylor, Mark; Hopkin, Nathaniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.

Cc: ~800CON_FTC_ATTYS; Sean Gates <sgates@charislex.com> (sgates@charislex.com)

Subject: RE: Dkt. 9372 - Complaint Counsel's Expert Witness List

Dan,

Professor Landes can be available in Chicago for his deposition on March 7 or 8. Once we finalize the date we will select a location. Professor Goodstein can be available on March 10 for his deposition; we will hold that one at our office in DC. Mr. Hogan can be available on March 14 for his deposition, which also will be in our office in DC. Professor Ghose can be available on March 14 in New York City for his deposition; we have not yet finalized the location. Professor Ostrovsky can be available for his deposition on March 17; we expect to hold that deposition in our SF office. Dr. Van Liere can be available for his deposition on March 17 in Denver; we have not yet finalized the specific location there. We are still working on finding a date for Professor Murphy's deposition.

Best regards,

Greg

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Notice of Electronic Service

I hereby certify that on February 04, 2017, I filed an electronic copy of the foregoing Complaint Counsel's Motion and Memorandum to Limit Respondent o Five Expert Witnesses, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on February 04, 2017, I served via E-Service an electronic copy of the foregoing Complaint Counsel's Motion and Memorandum to Limit Respondent o Five Expert Witnesses, upon:

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