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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,** **Respondent.**	**Docket No. 9372**

RESPONDENT 1-800 CONTACTS, INC.'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO DISREGARD AND STRIKE PORTIONS OF THE REPORT AND TESTIMONY OF DR. KENT VAN LIERE

Complaint Counsel's motion asks the Court to strike and disregard all of the testimony and written opinions provided by Dr. Kent Van Liere regarding consumer confusion. The sole ground for the proposed relief is that Dr. Van Liere supposedly violated paragraph 19(b) of the Scheduling Order by not printing and producing some search pages he had viewed when investigating the online marketplace.

Complaint Counsel's motion should be denied for three independent reasons. *First*, there was no violation of the Scheduling Order. Dr. Van Liere viewed various search pages for background purposes, just as any survey expert would investigate the marketplace generally when considering a survey. Those search pages were not required to be printed out, or produced, because Dr. Van Liere did not rely upon them in formulating his opinions in this case. Dr. Van Liere has testified, both in his deposition and at trial, that he did not rely on the search pages in question when formulating his survey but instead created a "but-for-world" search page that reflected a "future world." (CX9049, Van Liere, Dep. 188, 203; Van Liere, Tr. 3208.) There was

thus no requirement that Dr. Van Liere create or produce printouts of the search pages at issue. Scheduling Order, ¶ 19(b).

Second, even if the search pages at issue were somehow subject to disclosure, exclusion of Dr. Van Liere's opinions would not be appropriate, as shown by the conduct of Complaint Counsel's own survey expert, Dr. Jacob Jacoby. As discussed herein, Dr. Jacoby did not produce all of the search pages that he testified he reviewed when preparing his survey. It is understandable that both survey experts took the same approach, given that Complaint Counsel has pointed to *no* case holding that a survey expert must produce background materials relating to the marketplace at issue.

Third, Complaint Counsel suffered no harm, for they were neither surprised nor prejudiced at trial. Dr. Van Liere's opinions were fully disclosed in his report, and he answered truthfully in his deposition when asked about his review of search pages. Complaint Counsel's sole argument is that they could not test Dr. Van Liere's statement that he saw some search pages that did not contain sponsored ads by 1-800 Contacts. In fact, Complaint Counsel questioned Dr. Van Liere about that topic extensively at trial. Moreover, the question of whether search pages without such ads in fact appear could have been answered through publicly available search engines, and Complaint Counsel could have collected representative search pages and sought their introduction as trial exhibits.[1] For these reasons, as discussed in more detail below, Complaint Counsel's motion should be denied.

[1] Respondent 1-800 Contacts, Inc. ("1-800 Contacts") also notes that, consistent with the Court's post-trial orders, it will not rely on Dr. Van Liere's testimony to establish whether ads sponsored by 1-800 Contacts sometimes do not appear on search pages in response to queries using a 1-800 Contacts trademark as a search term. Such facts should be established by fact witnesses or trial exhibits.

I. THERE WAS NO VIOLATION OF THE SCHEDULING ORDER

Complaint Counsel's contention that Respondent violated the Scheduling Order by not printing and producing search pages viewed by Dr. Van Liere is unfounded. As Dr. Van Liere explained, he looked at search pages as background information and "just to look at things." (Van Liere, Tr. 3013-14). Complaint Counsel's contention that Dr. Van Liere relied on the search pages in deciding not to include a 1-800 Contacts' sponsored ad in the stimuli of his study is incorrect. (Mot. at 3-4.) Dr. Van Liere testified at his pre-trial deposition that his decision not to include a sponsored ad by 1-800 Contacts was based on his determination that the most appropriate survey would measure consumer confusion in a "but-for" world rather than the current environment. (CX9049, Van Liere, Dep. 203 ("[W]e want to test [the rival ads] in an environment where we'd get a clean read on, if you search on 1-800 Contacts and 1-800 Contacts hasn't been otherwise forced by business or other interests to buy an ad, is there confusion from the ads of the competitors."); *see also id*. 188 ("This is the right way to test, in a future world where the [settlement] agreements did not exist, whether the ads, absent affirmative actions taken by 1-800 . . ., would, in fact, cause confusion.").

At trial, Dr. Van Liere again testified that his decision not to include a 1-800 Contacts' sponsored ad was based on his conceptual determination of what the proper stimuli should be in the but-for world, *not* any conclusion he drew from viewing search pages:

> Q. And your intention in creating this test page was for it to mimic the real world as closely as possible; correct?
>
> A. On those -- on those things that matter, meaning it looks like a search results page and the sponsored links look like they typically would.
>
> I think, as I testified yesterday, ***the presence or absence of the 1-800 sponsored link has more to do conceptually with what's the proper test given the facts of this case***.
>
> . . . .

> Q. And just to confirm again, you removed the 1-800 Contacts sponsored ad from this page; correct?
>
> A. I don't know – it's not on this page. We created this page. This is a manufactured but-for world page. ***It wasn't that it was removed. It just—it's not there because conceptually I don't think it should be there.***

(Van Liere, Tr. 3207-08 (emphasis added); *see also id*. 3210 ("it shouldn't be there, so that's why we didn't put it in there"); *id.* 3238 (the proper design tests whether "the sponsored links in this case of the settlement parties [would] be confusing in a situation . . . in which the trademark holder is not required to purchase their own advertisement as a sponsored link").)

Complaint Counsel claim that Dr. Van Liere "testified that his test and control stimuli faithfully represent the real world because a non-trivial number of the [search engine pages] he relied on did not contain 1-800 Contacts[']sponsored ads." Mot. at 5 & n.11. But in the cited testimony (Van Liere, Tr. 3099), Dr. Van Liere merely stated that he and his team "did searches where 1-800's sponsored ad did not appear." (Van Liere, Tr. 3099.) He did *not* state that he relied upon that fact to justify any of his choices in designing the study; Complaint Counsel's assertion to the contrary is simply wrong. In fact, when asked by Complaint Counsel whether he would have changed any element of his study if there was evidence that a "de minimis number of such searches [searches for "1-800 Contacts"] did not contain 1-800 Contacts sponsored ads," Dr. Van Liere responded that he would not: "[W]hat you've just said wouldn't have changed the way I actually presented the allegedly confusing types of ads that are at issue here, nor what I would have used of the control in that matter." (Van Liere, Tr. 3218-19.)[2]

[2] The design of Dr. Van Liere's study is consistent with similar studies he conducted as an expert in past trademark litigation relating to the use of a trademark as a keyword. (Van Liere, Tr. 3237; Van Liere, Dep. 265-66 (studies conducted for Rosetta Stone and American Airlines were of a "similar character" and "followed a similar format" to his study for 1-800 Contacts.).) *See also Rosetta Stone Ltd. v. Google Inc.*, 676 F.3d 144, 159 (4th Cir. 2012) (describing the Van Liere survey results as providing "clear evidence of actual confusion for purposes of summary judgment").

In short, it is clear that Dr. Van Liere did not rely upon the search pages at issue when "formulating [his] opinion in this case," Scheduling Order, ¶ 19(b), which means that no preservation or disclosure obligation arose. *Id*. *See also id*., ¶ 19(g) (providing that the parties need not "preserve or disclose . . . data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in the opinions contained in his or her final report"). Because there was no violation of the Scheduling Order, Complaint Counsel's motion should be denied.

II. EXCLUSION IS NOT WARRANTED BECAUSE ANY NONDISCLOSURE WAS SUBSTANTIALLY JUSTIFIED AND HARMLESS

Although the Scheduling Order, not the Federal Rules of Civil Procedure, governs here, it is worth noting that under the Federal Rules, exclusion is not warranted where the alleged nondisclosure was "substantially justified or harmless." *See Bresler v. Wilmington Trust Co.*, 855 F.3d 178, 190 (4th Cir. 2017); Fed. R. Civ. P. 37(c)(1). Here, even assuming Dr. Van Liere relied on the search results that he viewed (which he did not), nondisclosure would have been substantially justified and would not have harmed Complaint Counsel.

Substantial justification is "justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure request. . . . The test is satisfied if there exists a genuine dispute concerning compliance." *United States v. Dentsply Int'l, Inc.*, No. 99-5 MMS, 2000 U.S. Dist. LEXIS 6994, at *24 (D. Del. May 10, 2000).

The test is satisfied here for the simple reason that Complaint Counsel themselves did not produce all the search pages that *their* expert, Dr. Jacoby, viewed in connection with his work in this matter. Dr. Jacoby testified that in creating the 2016 (or current) search results page for his survey, he looked at "quite a few pages": "[w]e looked at quite a few pages, some of which involved typing in 'contact lenses,' some of which involved typing in '1-800 Contacts.'" (Jacoby,

Tr. 2272; *id*. 2273-74 ("we used a variety of pages we looked at").) Yet Complaint Counsel did not produce all of those search pages. For example, the materials produced with Dr. Jacoby's expert report do not contain any search pages from 2016 for the term "1-800 Contacts," even though Dr. Jacoby testified that he did view 2016 search pages for the term "1-800 Contacts." (Jacoby, Tr. 2274.)[3]

The parties' mutual nondisclosure makes sense: survey experts routinely look at the marketplace to obtain a better understanding of the particular circumstances and context of the subject for the survey (for instance, an expert may visit a store to see how products are displayed). The disclosure requirement is not triggered by such background review where, as here, the experts do not "rely upon" that background in formulating his or her opinions. Scheduling Order, ¶ 19(b).

Given Complaint Counsel's nondisclosure of search results viewed by Dr. Jacoby, as well as their failure to cite *any* case law that a survey expert's marketplace background information must be produced, any nondisclosure by Respondent was substantially justified. *See Dentsply*, 2000 U.S. Dist. LEXIS 6994, at *24 (denying motion to exclude government expert in light of dearth of case law); *Fitz, Inc. v. Ralph Wilson Plastics Co*., 174 F.R.D. 587, 591 (D.N.J. 1997) (denying motion where there was "relatively little case law in existence" on point and it was "reasonable that the plaintiffs differed in their understanding of what the Federal Rules of Civil Procedure required them to disclose and supplement").

In addition, any nondisclosure was harmless, for there was no surprise or prejudice. *See, e.g.*, *Neiberger v. FedEx Ground Package Sys*., 566 F.3d 1184, 1192 (10th Cir. 2009) (affirming refusal to exclude expert opinion because of lack of prejudice). Complaint Counsel were fully

[3] The documents produced to Respondent contain some pre-2016 search pages from various materials. However, those documents contain only two search pages from 2016—one for the term "contact lenses" and one for the term "lens discounters." (CX8008-006 (Expert Report of Jacob Jacoby, Materials Considered, 2016 Google Search Results Page Screenshots).)

aware of Dr. Van Liere's opinions, which were set out in his report (RX0735 & RX0728-31) and which did not rely on his review of search pages. Nor were Complaint Counsel prevented from effectively examining Dr. Van Liere. Complaint Counsel assert that they were "unable to question Dr. Van Liere on the contention that he observed a non-trivial number of searches that did not return 1-800 Contacts sponsored ads." (Mot. at 2 & 5-7.) But whether 1-800 Contacts' ads sometimes appear, and sometimes do not, can be determined by conducting searches on publicly available engines. Complaint Counsel and their experts could have printed their own search pages if they so desired. Moreover, the trial record has many examples of search results for the term "1-800 Contacts" and its variants. (RX0352 (Decl. of Lisa A. Clark); RX0310, RX0311, RX0312, RX0313, RX0314 (search results pages)), which Complaint Counsel could point to if the question of whether or not 1-800 Contacts' ads sometimes appear, and sometimes do not, were relevant.[4] The Court should therefore deny the motion. *See, e.g.*, *Feld v. Primus Techs. Corp.*, No. 4:12-CV-01492, 2015 U.S. Dist. LEXIS 63653, at *6 (M.D. Pa. May 15, 2015) ("Given the 'extremely minimal' prejudice . . ., exclusion of the expert testimony . . . is not warranted.").

III. COMPLAINT COUNSEL'S REQUESTED RELIEF IS DISPROPORTIONATE TO THE SUPPOSED NONDISCLOSURE

The Court should also deny the motion because Complaint Counsel's requested relief is excessive. Many courts have refused to exclude substantive expert testimony in the absence of finding bad faith or other extreme conduct. *See, e.g.*, *Bean Meridian, L.L.C. v. Suzuki Motor Corp*. (*In re C.F. Bean L.L.C.*), 841 F.3d 365, 373 (5th Cir. 2016). *See also In re Paoli R.R. Yard Pcb Litig.*, 35 F.3d 717, 791-92 (3d Cir. 1994) ("exclusion of critical evidence is an 'extreme' sanction, not normally to be imposed absent a showing of willful deception or 'flagrant disregard'

[4] Examples of searches in which a 1-800 Contacts ad did not appear include: RX0310-0318, RX0310-0634-35, RX0310-0636-37, RX0310-0640-41, RX0311-0007-08, RX0311-0009-10, RX0311-0034-35, RX0311-0426-27, and RX0311-0579-80.

of a court order"); *United States v. Sarracino*, 340 F.3d 1148, 1171 (10th Cir. 2003) ("district judge erred by imposing the extreme sanction of excluding an expert witness' testimony"). There is no suggestion of bad faith or similar conduct here. Moreover, both Dr. Van Liere and 1-800 Contacts have made it clear that they are not relying on the search pages that Dr. Van Liere reviewed. There is thus no factual or legal basis for the relief that Complaint Counsel seek.

IV. CONCLUSION

For the reasons stated above, 1-800 Contacts respectfully requests that the Court deny Complaint Counsel's motion.

DATED: May 26, 2017

Respectfully submitted,

/s/ Steven M. Perry

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2017, I filed **RESPONDENT 1-800 CONTACTS, INC.'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO DISREGARD AND STRIKE PORTIONS OF THE REPORT AND TESTIMONY OF DR. KENT VAN LIERE** 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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The Honorable D. Michael Chappell
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DATED: May 26, 2017

By: */s/ Eunice Ikemoto*
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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: May 26, 2017

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35018742.1

Notice of Electronic Service

I hereby certify that on May 26, 2017, I filed an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s Opposition to Complaint Counsel's Motion to Disregard and Strike Portions of the Report and Testimony of Dr. Kent Van Liere, with:

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I hereby certify that on May 26, 2017, I served via E-Service an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s Opposition to Complaint Counsel's Motion to Disregard and Strike Portions of the Report and Testimony of Dr. Kent Van Liere, upon:

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