PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	
	)	**PUBLIC**
1-800 CONTACTS, INC.	)	**DOCKET NO. 9372**

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S APPLICATION FOR A STAY PENDING REVIEW BY A U.S. COURT OF APPEALS

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I. INTRODUCTION

On November 7, 2018, the Commission affirmed the judgment entered against Respondent 1-800 Contacts, Inc. ("1-800") by the Administrative Law Judge ("ALJ"). It held that 1-800 unreasonably restrained competition and violated Section 5 of the FTC Act by agreeing with numerous competitors to restrict advertising. *See In re 1-800 Contacts, Inc.,* Dkt. No. 9372 (Nov. 7, 2018), slip. op. at 2-3 ("Opinion"). The Commission concluded that these agreements (i) harmed consumers by depriving them of relevant and valuable competitive advertising, thus leading to increased consumer search costs and higher prices for contact lenses; and (ii) harmed search engines by reducing the competition for advertising space on search engine results pages, thus leading to reduced revenues and lower quality search engine results pages. *Id*. at 19-22, 30-34, 42-47 (harm to consumers), 50-53 (harm to search engines).

The Commission entered an Order prohibiting 1-800 from enforcing its unlawful agreements and from entering into similar agreements in the future. *In re 1-800 Contacts, Inc.*, Dkt. No. 9372 (Nov. 7, 2018) ("Order"). 1-800 now asks the Commission to stay its Order in part. *See* Respondent's Application for a Stay Pending Review by a U.S. Court of Appeals at 1 (Dec. 10, 2018) ("Application").

While 1-800 characterizes its request as a partial stay, and acknowledges that it should "not enforce the challenged provisions in the fourteen [existing] agreements during the appeal and will notify the counterparties of the Commission's decision" (*id*. at 1), the boundaries of 1-800's willingness to end the challenged conduct are unclear.[1]

[1] 1-800 asserts that it does "not seek to stay" certain provisions of the Order, citing II and III.A (Application at 1), but appears to request a stay for some of the very same provisions (*e.g.*, *id*. at 12 (challenging Order, II.C)). 1-800's proposed stay order does not specify the provisions that would be stayed. *Id*. (Proposed Order).

Importantly, it appears that 1-800 would escape some of the most critical provisions of the Order. Specifically:

- 1-800 would not be prohibited from entering into new agreements containing anticompetitive terms similar to those in the unlawful agreements (Order, II.A, B, C);
- 1-800 would not be required to nullify the unlawful provisions of its existing agreements (Order, III.B);
- 1-800 would not be required to notify persons accused of infringement of the Commission's decision and Order (Order, IV.A); and
- 1-800 would not be required to notify Commission staff of communications with potential infringers (Order, IV.B).

Staying these provisions would allow 1-800 to continue the very conduct that the Commission—and the ALJ before it—found to be anticompetitive and unlawful.

1-800 fails to meet its burden for justifying a stay, which entails evaluation of the four factors identified in FTC Rule 3.56(c). First, 1-800 fails to demonstrate that it is likely to succeed on appeal. 1-800's arguments, a reprise of those made previously to the Commission and the ALJ, are unsupported by precedent, as the Commission discussed at length in its Opinion.

Second, 1-800 fails to demonstrate that it will suffer irreparable harm in the absence of a stay. In the place of a particularized showing of specific harm, 1-800 offers conclusory assertions that the Order makes it difficult to resolve trademark litigation (an assertion the Commission rejected); and that the notice requirements are burdensome and will be costly to implement.

Finally, the equities—including harm to third parties and the public interest—strongly weigh against granting a stay. While 1-800 suggests it is willing to stop enforcing anticompetitive agreements in effect with certain rivals, it wants to avoid critical portions of the Order that prohibit it from engaging in the very same conduct going forward, without having to notify targets of the Commission's Order or Commission staff of its activities. Further, 1-800 seeks to retain the offending provisions of its agreements, which contain reciprocal no-bid covenants. Thus, even if 1-800 chooses not to enforce its rivals' commitments for the pendency of its appeal, the anticompetitive provisions remain enforceable against 1-800 itself. Each day that 1-800's agreements remain in force and each day that 1-800 is free to engage in the same conduct with additional firms, consumers are harmed. These factors clearly weigh against granting a stay.

Because 1-800 fails to demonstrate that a stay is justified, the Commission should deny 1-800's Application.

II. ARGUMENT

FTC Rule 3.56(c) authorizes Respondent to seek a stay of a Commission Order pending appeal by demonstrating: (1) the likelihood of Respondent's success on appeal; (2) irreparable harm if a stay is not granted; (3) the degree of injury (or lack thereof) to other parties if a stay is granted; and (4) that the stay is in the public interest. 16 C.F.R. § 3.56(c); *see also In re McWane, Inc.*, 2014 FTC LEXIS 83, at *3 (Apr. 11, 2014).

A. Respondent Fails to Establish Likelihood of Success on Appeal

1-800 makes several arguments that it is likely to succeed on appeal, all of which fail. First, 1-800 asserts that a "complex factual record" in this case counsels for the issuance of a stay. Application at 5-6. In support of this, 1-800 contends that: (i) the volume of evidence presented to the Commission was significant; and (ii) the Commission "refuse[d]" to follow the

ALJ's methodology. *Id*. at 6. That a case involves a large volume of evidence does not mean that the record is "complex"—particularly where the weight of that evidence points in the same direction. The Commission majority and the ALJ *both* concluded, based on two economic models, internal documents, and the testimony of multiple witnesses, that 1-800's agreements reduced advertising, raised consumer search costs, diverted sales from low-price retailers to high-price 1-800, and eased competitive pressure that would otherwise have impelled 1-800 to lower its prices. *See* Opinion at 30-33, 43-47; ID at 153-160.[2]

1-800's related claim that the Commission majority and ALJ disagreed with one another misstates the Commission's opinion, which adopted the ALJ's findings of fact *and* its conclusion that Complaint Counsel proved, through a direct showing of harm, that 1-800's agreements were anticompetitive. To the extent that the Commission departed from the ALJ's methodology (for example, in finding liability on additional grounds), the Commission has previously rejected the "unsupported position that [the Commission's] rejection of the conclusions of the Administrative Law Judge means that serious and substantial issues exist on appeal." *In re Realcomp II, Ltd.*, 2010 WL 145155, at *3 (F.T.C. Jan. 7, 2010).

Next, 1-800 claims that the Commission made multiple legal errors that render its decision vulnerable on appeal. Among other things, 1-800 asserts that the Commission's reliance on the "inherently suspect" and "direct effects" analyses is risky because these modes of analysis are "infrequently-used." *See* Application at 6-9. The Commission rejected this very argument in denying a request for stay in *Realcomp*. *See Realcomp*, 2010 WL 145155, at *3 ("Nor is there

[2] For the record, this case did not involve an unusually large record. *Compare* ID at 3 n.2 (1,250 exhibits, 43 witnesses, and 4,554 pages of trial transcript), *with In re McWane, Inc.*, 155 F.T.C. 903, 2013 WL 8364918, at *17 (May 1, 2013) (2,000 exhibits, 53 witnesses, and 6,045 pages of trial transcript).

any merit to Realcomp's argument that our decision relied on a disputed legal standard.") In reaching this conclusion, the Commission correctly reasoned that a legal principle is not "disputed" simply because litigants disagree that it should be applied in their case. *Id*.

In any event, 1-800 already made the same arguments to the Commission about Complaint Counsel's modes of analysis. 1-800's "renewal of its legal arguments, without more, is insufficient to justify granting a stay." *In re North Texas Specialty Physicians*, 141 F.T.C. 456, 2006 WL 6679063, at *2 (Jan. 20, 2006) ("*NTSP*"). *See also In re Toys "R" Us, Inc.*, 126 F.T.C. 695, 1998 WL 34300625, at *2 (Dec. 1, 1998). Although 1-800 now relies on Commissioner Phillips' dissent, "its repetition of the dissent's arguments neither changes the Commission's conclusion . . . nor establishes a likelihood of success on appeal." *See McWane*, 2014 FTC LEXIS 83, at *4.

In support of its argument that the Commission's inherently suspect analysis is erroneous, 1-800 repeats its analysis of *FTC v. Actavis*, 570 U.S. 136 (2013), asserting that *Actavis* affirmatively precludes the application of inherently suspect analysis to 1-800's settlement agreements. *See* Application at 7. But, as the Commission observed (Opinion at 35), 1-800's position is inconsistent with *Actavis* itself, which cites with approval a trio of decisions applying *per se* (truncated) analysis to facially overbroad or overly restrictive IP settlements. *See Actavis*, 570 U.S. at 147-150 (citing *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963); *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952); *United States v. Line Material Co.*, 333 U.S. 287, 310-12 (1948)). *See also* Opinion at 35-36 (summarizing *Actavis*); Complaint Counsel's Corrected Post-Trial Brief at 88-90 (same).

In support of its argument that the Commission's direct effects analysis is erroneous, 1-800 asserts that Complaint Counsel was required, but failed, to show that the reduction in advertising caused a reduction in output or increase in prices in the market for contact lenses. *See* Application at 7. The Commission (and the ALJ) rejected this argument, observing—consistent with the Supreme Court's decisions in *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999) ("*CDA*") and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986)—that "[r]estricting the availability of truthful information that guides consumer decisions in the marketplace *is* a competitive harm" (Opinion at 43) (emphasis added); and finding, in any event, that Complaint Counsel *did* demonstrate price effects in the market for contact lenses. *Id*. at 46-47. *See also* ID at 155-56.

Finally, 1-800 contends that the Commission gave short shrift to 1-800's proffered justifications, namely its "trademark rights" and "the benefits of settling trademark litigation." Application at 9. But each of 1-800's asserted justifications was fully briefed, carefully considered, and explicitly rejected by the Commission. 1-800's trademark rights were not "discard[ed]"—indeed, the Commission's Opinion acknowledges that trademark protection is a cognizable justification. Opinion at 38. However, the Commission found that 1-800's trademark rights did not "*justify* the restraints challenged in this case." *Id*. (emphasis added).

Importantly, for purposes of 1-800's appeal, this is because *trademark* courts—including the only one to fully consider 1-800's theory of infringement—have consistently held that the simple act of bidding on a rival's keyword cannot, alone, constitute trademark infringement. *See, e.g., Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 937-39 (9th Cir. 2015); *1-800 Contacts v. Lens.com*, 755 F. Supp. 2d 1151, 1173-74 (D. Utah 2010), *aff'd*, 722 F.3d 1229 (10th

Cir. 2013). (For a detailed overview of trademark law, *see* Opinion at 38-41.) Indeed, as the District Court of Utah observed in a case brought by 1-800 seeking to enforce one of these agreements, a trademark right "does not grant its owner the right to stamp out every competitor advertisement." *Lens.com*, 755 F. Supp. 2d at 1181.

Similarly, the Commission considered the "avoidance of litigation costs through settlement" to be a cognizable justification, but dismissed its application in this case because 1-800 failed to connect its own cost savings to any procompetitive effect. The Commission rejected 1-800's misreading of a single sentence from *Actavis* on this point, and cited multiple cases in support of its own position. *See* Opinion at 37 (citing cases). 1-800 offers no *new* insight as to why the Commission's analysis is vulnerable on appeal. *See* Application at 9 (citing *Actavis*, 570 U.S. at 156, for proposition that litigation costs are a procompetitive justification, without requiring proof of pass-on to consumers).

To be sure, 1-800 disagrees with the Commission's decision. But "Respondent's mere disagreement with [the Commission's] decision does not establish serious and substantial questions going to the merits." *Realcomp*, 2010 WL 145155, at *2.

For these reasons, 1-800 fails to satisfy its burden of showing a likelihood of success on appeal.

B. Respondent Failed to Show that it Will Be Irreparably Harmed by the Order

Respondent will not be irreparably harmed by the Commission's Order. "[S]imple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. A party seeking stay must show, with particularity, that the alleged irreparable injury is substantial and likely to occur absent a stay." *Realcomp*, 2010 WL 145155, at *4 (quoting *In re Cal. Dental Ass'n*, 1996 FTC LEXIS 277, at *6-7 (May 22, 1996)).

Here, 1-800 makes three broad claims. First, 1-800 asserts that the Commission's Order is vague and overbroad, "effectively preclud[ing] it from resolving trademark litigation in any meaningful way." Application at 11. In fact, the Commission's Order is "carefully tailored to prohibit only conduct similar" to the conduct deemed unlawful by the Commission. *See McWane*, 2014 FTC LEXIS 83, at *10 (rejecting similar claim). Under the terms of the Order, 1-800 *may not* prohibit rivals from bidding on keywords in search advertising auctions (Order, II.A) or enter into any agreements with rivals that place limits on search advertising, with certain enumerated exceptions. Order, II.B. Specifically, 1-800 *may* enter into agreements that require clear identification of the seller, or that prohibit (i) false or deceptive claims; (ii) a representation that 1-800 is the source of the goods or services advertised; (iii) a representation that the seller is affiliated with or sponsored by 1-800; or (iv) the use of a name that is confusingly similar to a 1-800 trademark. Order, II.B.

1-800 submits a declaration from its general counsel, asserting that the Commission's Order will hamper its dealings with potential infringers. *See* Declaration of Roy Montclair ¶¶ 8-11. The declaration points to a screen shot of a Facebook page that appears in response to a search for "1-800 Contacts." *Id.* at ¶ 9, Appendix A. The screen shot displays 1-800's trademark in the *text* of certain advertisements; the Commission's Order already allows 1-800 to prohibit such uses of its trademark. *See* Order, II.B.

Second, 1-800 argues that the Order's definition of "Seller" (Order, I.K) is overinclusive. Application at 13. The Order defines "seller" as "any Person that markets or sells any contact lens product and includes its employees, agents, and representatives." Order, I.K. 1-800 asserts that—read broadly—the Order may preclude 1-800 from entering into agreements with downstream "affiliates" (resellers/ agents) with whom it may have legitimate reasons to enter into agreements restricting the use of its trademarks. *See* Application at 13; Declaration of Brady Roundy at ¶¶ 5-8. But the Order expressly defines "1-800 Contacts" to *include* its own "affiliates." Order, I.A ("'1-800 Contacts' means . . . *affiliates* in each case controlled by 1-800 Contacts. . . .") (emphasis added). Thus, on a plain reading of the terms of the Order, 1-800 is not prohibited from restricting its downstream affiliates' use of 1-800's trademark terms.

1-800 also argues that the term "Seller" could include upstream suppliers (contact lens manufacturers) and thereby preclude 1-800 from entering into agreements to restrict suppliers' uses of 1-800's trademarks. Application at 13. But 1-800 does not identify (even hypothetically) any situation in which it would legitimately need to restrict a supplier's use of 1-800's trademarks that would not already be permitted under the Order. *See* Declaration of Chad Costello ¶¶ 5-8 (agreements with manufacturers often "contain provisions governing how the retailer may use the *manufacturers'* trademarks") (emphasis added). 1-800's speculative concerns are insufficient to warrant a stay.

Further, the definition of "1-800 Contacts" (which includes "joint ventures" and "partnerships") appears to be broad enough to encompass upstream suppliers as well. *See* Order, I.A. Nevertheless, to the extent that 1-800 would like clarification of the Order on this narrow question, 1-800 should seek such clarification; it should not seek a stay of the Order on the unlikely possibility that the Commission would attempt to enforce the Order against 1-800 and its suppliers. *E.g.*, *NTSP*, 141 F.T.C. 469, 2006 WL 6679064 (Jan. 20, 2006) (granting respondent's petition for clarification of final opinion); *In the Matter of Chicago Bridge & Iron Co.*, 139 F.T.C. 540, 2005 WL 6300814 (Mar. 15, 2005) (granting respondent's petition for clarification of order).

Finally, 1-800 claims that the costs and burdens associated with the Order's nullification and notice provisions are significant. *See* Application at 10, 12, 14; *see also* Declaration of Roy Montclair ¶¶ 14, 16. 1-800 asserts that, if it must nullify the challenged provisions in its agreements now, it will be vulnerable to trademark infringement by its rivals. *See* Application at 10-11. But this is untrue. Pending appeal, 1-800 will have the same recourse as any other trademark owner. What 1-800 actually wants is to be able suppress competitive advertisements *without* showing that the advertisements are infringing—which goes to the very heart of this antitrust case.

1-800 also claims that it will be quite costly and difficult to notify all of the persons it has previously threatened with trademark infringement actions. *See* Application at 12, 14; *see also* Declaration of Roy Montclair ¶¶ 12-14. 1-800 relies on the Commission's decision in *In re North Carolina Bd. of Dental Examiners*, 2012 WL 588756 (F.T.C. Feb. 10, 2012) ("*NCBDE*"), for the proposition that the notification of affected persons may be costly or confusing. But *NCBDE* is distinguishable. There, the Commission was concerned by the potential legal confusion (to dentists, non-dentist teeth whiteners, and consumers) stemming from a "repeated change in policy" effected by a *state board*. *See id.* at *3. This is not at issue here. The Commission's Order in this case simply requires 1-800 to notify potentially less sophisticated rivals of information relevant to their dissemination of "truthful, non-deceptive advertising." *See* Order, IV.A.2 & Appendix A.

1-800 also raises concerns regarding notifications to Commission staff. 1-800 asserts that forcing 1-800 to communicate possible trademark infringement actions to staff will be a "massive burden," will raise unspecified confidentiality issues, and will "decrease 1-800's incentive to protect its trademark." *See* Application at 12, 14; *see also* Declaration of Roy Montclair ¶¶ 15-16. These assertions are conclusory and unsupported. Notifying staff should be no more "burdensome" than notifying the alleged infringers. If 1-800 has already undertaken the "massive burden" of "aggressively" policing its trademark (Application at 15), it is of minimal additional burden to keep staff apprised of such policing.

Further, it is unclear what "confidentiality" issues are triggered by such disclosure. 1-800 is not required to apprise Commission staff of internal deliberations as to whether or not to launch trademark infringement actions; only communications made to third parties regarding any such actions need be reported. *See* Order, IV.B. These communications are not protected by any privilege, and 1-800 has identified no other confidentiality concern. *See In re Pacific Pictures Corp.*, 679 F.3d 1121, 1126-27 (9th Cir. 2012) ("[V]oluntarily disclosing privileged documents to third parties will generally destroy the privilege." (citation omitted)). In any event, communications required by the Order would be subject to all of the Commission's statutory confidentiality protections. *E.g.*, 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10 (protection for non-public information).

Finally, 1-800 makes the unsupported claim that notice provisions generally "chill" its ability to enforce its trademarks. *See* Application at 14. But 1-800 has offered no reason to conclude that the notification provisions should "chill" legitimate trademark enforcement. 1-800 remains free to sue potential infringers; it also remains free to enter into settlement agreements with potential infringers that provide robust protection for 1-800's trademarks, while not violating the antitrust laws. Thus, there is no reason to believe that 1-800 will be irreparably harmed by the implementation of the Commission's Order during the pendency of 1-800's appeal.

C. Public Interest, Including Substantial Harm to Consumers, Supports Denial of Stay

The third and fourth factors—the impact on third parties if a stay is granted and whether a stay is in the public interest—also strongly counsel against a stay in this case.[3] While 1-800 will suffer no "irreparable" harm, consumers will continue to suffer if the Order is stayed.

1-800 asserts that, because it does not seek a stay against the "core" provisions of the Order, there will be no harm to third parties. 1-800 relies on the Commission's grant of a partial stay in *CDA* for this proposition. *See* Application at 14-15 (citing *Cal. Dental Ass'n*, 1996 FTC LEXIS 277, at *8). But 1-800 *does* seek a stay against "core" provisions of the Order, and on this critical point, *CDA* is distinguishable. In *CDA*, the Commission concluded that the respondent's request for stay left "intact the order's core provisions, which prohibit CDA's interference with its members' truthful, nondeceptive promotional activities." *Cal. Dental Ass'n*, 1996 FTC LEXIS 277, at *5.

By contrast, through a stay, 1-800 seeks the discretion to continue that very "interference." First, 1-800 seeks to retain (but not enforce) the offending provisions of its agreements, which contain reciprocal commitments not to advertise in response to searches for the parties' respective trademarks. Thus, even if 1-800 chooses not to enforce its rivals'

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[3] These factors are typically considered together. *E.g., McWane*, 2014 LEXIS 83, at *11; *Realcomp*, 2010 WL 145155, at *5.

commitments for the pendency of its appeal, the anticompetitive provisions remain enforceable *against* 1-800 itself. Second, 1-800 seeks to retain its ability to enter into *new* agreements on the very same terms found unlawful by the Commission. Third, while 1-800 continues to engage in the anticompetitive conduct described above, 1-800 would like to avoid alerting Commission staff to such conduct, and also avoid notifying persons whom it has previously accused of infringement (and may accuse again) about their rights under the Commission's Order.

This would be a harmful outcome for consumers, and for the public interest generally. As the Commission found, advertising against 1-800's trademark is competitively significant to 1-800's lower-price competitors (Opinion at 31-32); consumers respond to such ads; and they pay less money for contact lenses when they see such ads—either because they purchase from the lower-price competitor, or because they seek (and receive) a price-match from 1-800. *Id*. at 46-47. Each day these agreements remain in effect (and 1-800 has the freedom to enter into similar agreements), 1-800's prices remain higher because consumers are in the dark about lower-price options. *See id*.; *see also* ID at 155-56.

The Order restores competition between 1-800 and its lower-price rivals, removing restraints that suppressed valuable information. Granting a stay here would mean allowing 1-800 to continue to thwart competition. This is good for no one other than 1-800 itself. Thus, granting a stay in this case would certainly be against the public interest.

III. CONCLUSION

Because 1-800 has failed to show that it will succeed on appeal, and because the balance of equities strongly weigh against a stay, Complaint Counsel respectfully requests that the Commission deny 1-800's Application for Stay.

Dated: December 18, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2018, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

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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 FOR 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.

December 18, 2018

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