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

ORIGINAL

In the Matter of **1-800 CONTACTS, INC.,** **a corporation**	**Docket No. 9372**

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO CALL SIX EXPERT WITNESSES AT TRIAL

Respondent's Motion to exceed the five-expert limit should be denied because no "extraordinary circumstances" necessitate a departure from the governing standard. *See* 16 C.F.R. § 3.31A(b). Rule 3.31A(b) was enacted to streamline Part 3 litigation and limit the number of experts a party may call. Respondent cannot satisfy the demanding requirement of "extraordinary circumstances" by arguing that each of its six experts are capable of offering relevant and non-cumulative testimony. Even if Respondent's contention were correct—and it is not—Respondent would not meet the Rule 3.31A(b)'s heightened burden. Respondent's desire to split into six parts the issues on which expert testimony may be relevant does not demonstrate that this case is "extraordinary."

Contrary to Respondent's suggestion, this case is straightforward. It has one defendant, charged with violating one statute by engaging in one type of conduct. Each instance of challenged conduct—*i.e.*, entering into bidding agreements with competitors—violates the statute in exactly the same way. Indeed, Respondent's own Motion demonstrates conclusively that six experts are not needed in this case. Respondent argues that this case is complicated because it involves both antitrust and trademark law. Respondent therefore proposes to call at

least four experts to explain trademark law to the Court. But this Court does not need a single expert to help it understand an area of law—much less four.

Respondent's Motion should be denied.

Argument

Rule 3.31A(b) provides that "[e]ach side will be limited to calling at the evidentiary hearing 5 expert witnesses" unless the party shows that "extraordinary circumstances" justify a greater number. 16 C.F.R. § 3.31A(b). When enacting this rule, the Commission explained that "five expert witnesses per side is sufficient for each party to present its case in the vast majority of cases." 74 Fed. Reg. 1804, 1813 (Jan. 13, 2009) (interim final rulemaking). Respondent's Motion provides no compelling reason why this case should be treated differently than the "vast majority" of cases.

I. To Show "Extraordinary Circumstances," Respondent Needs to Do More than Show that All its Experts Can Offer Relevant Testimony

Respondent asserts that all six of its experts will offer relevant testimony. Resp. Mot. at 4-7. But this entirely misses the point. *All* witnesses must present relevant and non-cumulative testimony. 16 C.F.R. § 3.43(b). If "extraordinary circumstances" required only that witnesses present relevant and non-cumulative testimony, Rule 3.31A(b) would have no meaning at all. The Commission added Rule 3.31A to the Part 3 Rules as part of its 2009 effort to "further *expedite* its adjudicative proceedings." 74 Fed. Reg. at 1804 (emphasis added). At the time the rule was added, there were already limits in place on cumulative and irrelevant evidence. *See, e.g.*, 61 Fed. Reg. 50640, 50644 (Sep. 26, 1996) (noting that as of 1996, "the ALJ is empowered to exclude unduly repetitious, cumulative, and marginally relevant materials," and modifying Rule 3.43(b) to make this power "clearer"). Unless the new 2009 rule was intended to have no

effect, it must operate as more than a requirement that expert testimony be relevant and non-cumulative.

The Commission's rules force parties to prioritize their presentation of evidence in an effort to expedite adjudicative proceedings. Thus, in addition to limiting parties to five experts, tthe 2009 Amendments set word limits on briefs and limit trial time. 74 Fed. Reg. at 1815. The Commission explained that the new rules represented an attempt to balance the public interest in a fulsome decision-making process with two other vital interests: (1) "the interests of justice in an expeditious resolution of litigated matters" and (2) "the interest of the parties in litigating matters without unnecessary expense." 74 Fed. Reg. at 1805. These rules reflect the Commission's judgment that specific limits will speed the resolution of litigated matters and help to eliminate unneeded expenses.

The fact that Respondent must prioritize which potentially relevant experts to call at trial–as must Complaint Counsel–does not establish extraordinary circumstances. Nor is it unfair to Respondent. Respondent claims to have identified six fatal flaws in Complaint Counsel's theory of the case. Proving five fatal flaws will be sufficient. And if Respondent's strongest five experts are not persuasive, then the sixth is also likely to be deficient. Thus, even assuming that each of Respondent's six experts could present relevant and non-cumulative testimony, Respondent should still be limited to five experts.

II. <u>This Case is Straightforward</u>

This case is not "extraordinary." Respondent is the only defendant. Complaint ¶ 4. It is charged with violating one statute. *Id.* ¶¶ 33-34. It did so by entering into fourteen almost identical bidding agreements: all prevented bidding on 1-800's trademarked terms, and thirteen of fourteen explicitly required the use of "negative keywords" to prevent competing ads from showing even in cases where the competitor was not affirmatively bidding on any 1-800

Contacts trademarks. *Id.* ¶¶ 17-24. The fact that similar agreements were entered into with fourteen different competitors does not make the agreements—or the case—complicated.

For example, another case recently litigated before this Court, *In re North Carolina Board of Dental Examiners*, required only two experts for each party. *See* 2011 FTC LEXIS 137, at *41-47 (Jul. 14, 2011) (initial decision). In *NC Dental*, as in this case, Complaint Counsel charged an agreement among competitors in violation of Section 5 of the FTC Act, which encompasses violations of Section 1 of the Sherman Act. And there, as in this case, the defendant argued that its actions were in fact procompetitive and promoted "legal competition." *Id.* at *238. But this case is even simpler. *NC Dental* required an analysis of whether the dental board was capable of concerted action. *Id.* at *162. In this case, it is clear the parties to the agreements (independent, direct competitors) are capable of concerted action. Moreover, *NC Dental* involved the exploration of health and safety considerations, in addition to issues of state law. *In re N.C. Bd. of Dental Examiners*, 152 F.T.C. 640, 677 (2011) (noting respondent defended on the basis that its actions were "promoting the public health and enforcing state law") (citation omitted). And yet two experts per side were sufficient in *NC Dental*. 2011 FTC LEXIS 137 at *41-47.[1]

Indeed, this case has recently been made simpler by the Commission's grant of partial summary decision eliminating two of Respondent's defenses. Opinion and Order of the Commission, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017) ("Commission Order"). First, the

[1] Similarly, in other recent cases the parties have been able to put on their case with fewer than five experts. In *McWane, Inc.*, No. 9351, the parties called one expert each. In *LabMD, Inc.*, No. 9357, the parties called five experts total. In *Sysco Corp.*, No. 9364, complaint counsel and respondent needed two experts each. And in *Staples Inc.*, No. 9367, complaint counsel had two experts and the respondent had three. We have copies of the notices exchanged by the parties in these cases, and will provide them to the Court or Respondent upon request.

Commission ruled that the *Noerr-Pennington* doctrine does not immunize Respondent's conduct, because "anticompetitive, private agreements lie beyond Noerr's protection." *Id.* at 3. Respondent's instant Motion suggests that it intends to persist in raising before this Court its already-rejected argument that "the circumstances and character of the agreements make antitrust scrutiny inappropriate." Resp. Mot. at 2. But Respondent should not be permitted to present any expert testimony in support of this notion. The Commission has already answered this question as a matter of law. Moreover, even if the Commission's decision did not foreclose this defense, this Court does not need the assistance of any experts to interpret legal precedent.

Second, the Commission held that Respondent may not offer the purported reasonableness of its trademark lawsuits as an affirmative defense to antitrust scrutiny, because while "the nature of the trademark disputes may inform the antitrust analysis, the reasonableness of those disputes is not an affirmative defense." Commission Order at 4. Respondent suggests that expert testimony will assist it in presenting evidence related to the reasonableness of its lawsuits, including evidence that its employees "believed" that the Bidding Agreements were appropriate because they believed that competitors' advertisements being displayed in response to searches for "1-800 Contacts" was confusing to consumers. Resp. Mot. at 6-7. But the Commission has already held that such a "belief" does not present a defense to an antitrust claim, consistent with decades of precedent establishing that a civil antitrust violation does not require proof of specific intent. *See U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 436 n.13 (while "a defendant's state of mind or intent is an element of a criminal antitrust offense" that is not generally true of civil antitrust offenses). In short, a defendant's subjective belief that an agreement makes the world a better place presents no defense to the antitrust laws. *See, e.g., National Society of Prof'l Engineers v. United States*, 425 U.S. 679, 693-94 (1978) (bidding

restraint could not be defended because it "ultimately inures to the public benefit by preventing the production of inferior work and by insuring ethical behavior . . . this Court has never accepted such an argument.").

III. Respondent's Rationale for Exceeding the Five Expert Limit is Not Persuasive

Respondent suggests that this case is extraordinary and requires testimony from six experts because it "arises at the intersection of two areas of law" and "requires analysis of massive troves of data." Resp. Mot. at 8. Neither argument holds water.

First, the claim that an assessment of the Bidding Agreements requires an understanding of both antitrust and trademark law does not justify additional experts. Indeed, the fact that Respondent offers one such defense here, based in trademark law, does not make this case extraordinary. If anything, the fact that Respondent's defense is based on trademark law suggests *fewer* experts are needed in this case than in others. Expert testimony on an "area of law" is unnecessary. This Court can interpret federal law without reliance on expert testimony. The Court does not require four experts[2] (or even one) to explain the procompetitive benefits of trademark protection, the fact that confusing uses of a trademark can violate a trademark holder's rights, or the proper use of surveys in trademark lawsuits. Resp. Mot. at 4-7.

Second, Respondent's suggestion that the case requires analysis of large and complicated data sets does not make this case extraordinary. Antitrust cases frequently require analysis of large and complicated data sets, and the need for an expert to analyze and draw conclusions from such data is commonplace. *See, e.g.*, *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 34-36 (D.D.C. 2015) (describing expert analysis of multiple datasets). Respondent appears to have split its economic analysis into two pieces—one expert will work with data, while another will largely

[2] Respondent's Motion suggests that Mr. Hogan and Profs. Landes, Goodstein, and Murphy will all testify regarding such topics. Resp. Mot. at 4-7.

testify about the theoretical procompetitive benefits the agreements may offer. Resp. Mot. at 5-7 (describing Dr. Ghose as an expert in data and Dr. Murphy as an expert who will testify in part "[b]ased on economic principles"). Respondent's tactical choice to divide its expert analysis in this fashion provides no reason to grant Respondent leave to exceed the five expert limit.

In short, Respondent's desire to use numerous experts for ground which could be covered by significantly fewer experts, and for issues which do not require expert testimony in the first place, does not create an extraordinary circumstance justifying an exception to the five-expert limit.[3]

IV. Respondent's Reliance on *Pom Wonderful* is Misplaced

Respondent cites *In re POM Wonderful LLC & Roll Global LLC*, 2011 FTC LEXIS 25 (Feb. 23, 2011) to support its argument that this litigation presents extraordinary circumstances. But *Pom Wonderful* is entirely unlike this case. *Pom Wonderful* was a case of "extraordinary breadth." *In re POM Wonderful LLC & Roll Global LLC*, 2011 FTC LEXIS 266 (Nov. 18, 2011) (noting that "managing the number of claims, advertisements, and alleged misrepresentations in this case has become 'somewhat unwieldy'"). In *Pom Wonderful*, Complaint Counsel brought a consumer protection case alleging that Respondents had engaged in false advertising by running multiple false and misleading advertisements making deceptive claims about three different products (juice, pills, and liquid concentrate) in at least three distinct medical fields: heart disease, prostate cancer, and erectile dysfunction. *POM Wonderful*, 2011 FTC LEXIS 25 at *11. Complaint Counsel further alleged two legal theories of violation: falsity and absence of reasonable basis substantiation. *Id.* at *11-12.

[3] Respondent's tardiness in moving for leave to call six experts should not weigh in Respondent's favor and should not provide any basis to allow Respondent to continue to keep six experts designated or to call six experts at trial.

Under those circumstances, the court allowed the respondents to offer eight experts. Five were medical field experts who could testify to whether medical science supported the claims made in the advertisements. *Id.* at *13. The court also allowed testimony by an expert on materiality, which is an element of a deceptive advertising claim. *See Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992) (citation omitted). It further allowed testimony by a linguistics expert because whether or not the advertisements made the alleged claims implicitly was at issue in the matter. *POM Wonderful*, 2011 FTC LEXIS 25 at *12 (Respondents may "defend[] themselves against allegations of implied claims by introducing extrinsic evidence of consumer perceptions, through expert testimony"). Finally, it allowed the testimony of a substantiation expert because the required level of substantiation in a deceptive advertising case is dependent in part on expert testimony. *Id.* at *14 ("[I]n defending against Complaint Counsel's theory that competent and reliable scientific evidence is necessary to substantiate Respondents' claims, Respondents should not be precluded from proffering expert opinion that an alternative substantiation level is appropriate, including an analysis of the Pfizer factors.").[4]

An antitrust case does not require experts on substantiation, materiality, or linguistics. It also does not require multiple experts who can testify to the state of medical science in a variety of specific fields. It may be possible to imagine an antitrust case which would need as much expert testimony as *POM Wonderful*, but this is not such a case.

V. Conclusion

For the reasons stated above, Complaint Counsel respectfully requests that the Court deny Respondent's Motion.

[4] The initial decision in *POM Wonderful* cites these experts extensively throughout and analyzes their testimony at length, further demonstrating how crucial expert opinion is to consumer protection cases and to *POM Wonderful* specifically. *See generally In re POM Wonderful LLC & Roll Global LLC*, 2012 FTC Lexis 106 (May 17, 2012).

Dated: February 22, 2017

Respectfully submitted,

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[PROPOSED] ORDER

Upon consideration of Respondent's Motion to Call Six (6) Expert Witnesses at Trial, and Complaint Counsel's Opposition to Respondent's Motion and Cross-Motion to Limit Respondents to Five Designated Experts, it is hereby ORDERED that Respondent's Motion is DENIED. It is further ordered that Respondent shall serve its amended expert designation on Complaint Counsel no later than one business day following the date of this order.

ORDERED:

_____
D. Michael Chappell
Chief Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2017, 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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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.

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