

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



In the Matter of)
)
1-800 Contacts, Inc.,)
a corporation,)
)
Respondent.)

DOCKET NO. 9372

**ORDER ON COMPLAINT COUNSEL'S MOTION
TO LIMIT RESPONDENT TO FIVE EXPERT WITNESSES**

I.

On February 4, 2017, Federal Trade Commission ("FTC") Complaint Counsel filed a Motion to Limit Respondent to Five (5) Expert Witnesses ("Motion"). Respondent filed an opposition to the Motion on February 15, 2017 ("Opposition"). As set forth below, the Motion is GRANTED IN PART AND DENIED IN PART.

Complaint Counsel states that Respondent has identified seven (7) expert witnesses that Respondent intends to call at the hearing. Complaint Counsel argues that FTC Rule 3.31A(b) limits Respondent to five (5) expert witnesses absent a motion demonstrating extraordinary circumstances. Complaint Counsel further argues that Respondent has not filed such a motion and that extraordinary circumstances are not present in this case. Respondent states that it has notified Complaint Counsel that it was withdrawing one of its designated experts, and argues that extraordinary circumstances are present in this case that warrant allowing Respondent to call six expert witnesses, instead of five, as limited by Rule 3.31A(b).

II.

FTC Rule 3.31A(b) states:

No party may call an expert witness at the hearing unless he or she has been listed and has provided reports as required by this section. 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.

16 C.F.R. § 3.31A(b).

Pursuant to Rule 3.31A(b), a party is limited to five expert witnesses unless the party obtains leave to allow additional expert witnesses, based upon a motion demonstrating extraordinary circumstances. *See In re POM Wonderful LLC*, 2011 FTC LEXIS 25, *10-11 (Feb. 23, 2011) (allowing respondents to designate three additional experts, based upon motion and showing of extraordinary circumstances). It is undisputed that Respondent has not filed a motion for leave to call additional expert witnesses. Respondent does not explain its failure to seek leave prior to designating excess expert witnesses.

Based on the foregoing, Complaint Counsel's Motion is GRANTED IN PART AND DENIED IN PART. It is hereby ORDERED that Respondent shall no later than 11:00 a.m. EST on February 21, 2017 either (1) serve Complaint Counsel with an amended expert witness list, limited to five of the expert witnesses already identified; or (2) file a motion for leave to call an additional expert witness in accordance with Rule 3.31A. In the event that Respondent files a motion for leave to call an additional expert witness, Complaint Counsel's opposition, if any, shall be filed no later than 11:00 a.m. EST February 22, 2017.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 17, 2017