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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

12 26 2018
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COMMISSIONERS: Joseph J. Simons, Chairman
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of: 1-800 Contacts, Inc., a corporation	DOCKET NO. 9372

RESPONDENT 1-800 CONTACTS, INC.'S REPLY BRIEF IN SUPPORT OF ITS APPLICATION FOR A STAY PENDING REVIEW BY A UNITED STATES COURT OF APPEALS

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CC says the Commission should ignore this backdrop because, in its view, the "weight of [the] evidence points in the same direction." Opp'n 4. But that is just another way of saying that CC believes the Commission got it right.[1] CC also casts off 1-800's arguments because the Commission already "explicitly rejected" them (Opp'n 6), and 1-800 does not provide "new insight as to why the Commission's analysis is vulnerable on appeal." Opp'n 5-7. In every case, the Commission has rejected the respondent's arguments—that is why there is a stay application. A respondent is not required to come up with new arguments after the Commission's decision (and years of litigation) to gain a stay. Indeed, if 1-800 presented "new" insights, CC no doubt would deem them waived.

B. CC ignores the irreparable harm to 1-800.

As 1-800 previously explained, the non-core provisions of the Order will cause irreparable harm by vitiating 1-800's right to appeal, imposing unrecoverable costs, and chilling its ability to enforce its trademarks and settle trademark disputes. CC does not challenge many of 1-800's arguments, and where it does, it misrepresents them.

CC does not dispute that if 1-800 is forced to nullify the Challenged Provisions now—as Section III.B requires—it will have no way to "revive" them later if successful on appeal. Appl. 10-11. That is irreparable harm. See, e.g., *In re N. Tex. Specialty Physicians*, 2006 WL 6679063, at *7 (Jan. 20, 2006) (staying provisions requiring immediate contract termination). Rather than responding to this reality, CC creates a straw man argument that 1-800 did not make.

[1] In fact, a former FTC Commissioner and two others recently published an article predicting reversal. Manne, Singer, & Wright, Antitrust O028 p004 v4 (y)2 (.6 (t)-26( )Tj -09f 0 Tc 09254 Tw

See Opp'n 10. ("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.").[2]

Moreover, as 1-800's application explained, and CC does not rebut, the Commission's authority is limited to regulating the conduct at issue in this case: horizontal search advertising agreements. Appl. 11-12 (explaining the conduct regulated must provide a "road to a prohibited goal"). Indeed, CC implicitly agrees, as it attempts to downplay the scope of the Order as "carefully tailored" to prevent 1-800 from "prohibit[ing] rivals from bidding on keywords in search advertising auctions . . . or enter[ing] into any agreements with rivals that place limits on search advertising . . . ." Opp'n 8. No fair reading supports this interpretation.

The Order facially reaches beyond 1-800's "rivals" and purports to regulate 1-800's agreements with *anyone* that "sells" or "markets" contact lenses. OrderTd ( )Tj EMC /P9 (s)-29 (7 Tc -0.0

has anything to do with search advertising. Order § II.C. And, the Order installs the Commission as the monitor for all of 1-800's trademark enforcement efforts, whether or not involving rivals or search advertising. Order § IV.

As the three declarations show, these provisions irreparably harm 1-800 by intruding into every aspect of 1-800's brand, imposing unrecoverable costs, and chilling 1-800's willingness and ability to enforce its trademarks. CC repeatedly calls 1-800's concerns "conclusory" and "unsupported" (Opp'n 2, 11), but that is not so. For example, CC ignores Mr. Montclair's explanation that "1-800 does not systematically track every person with whom it has communicated about potential infringement," and therefore it would be "costly"—if not impossible—to provide the reqan7td76-1reqo ess(d12 r)3 (c) M-16 (r)-27 (s)Tj 0.01c-11 (eq)-3(t)]TJ 40.0181

fourteen agreements at issue here cover almost 80 percent of the online sales of contact lenses in the U.S. Comm'n Op. 33. Nor does the Commission explain why anyone would enter into an agreement that the Commission has announced is unlawful. CC's arguments have no basis in reality and should be rejected.

III.

CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2018, I filed the foregoing Application for a Stay Pending Appeal 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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Notice of Electronic Service

I hereby certify that on December 26, 2018, I filed an electronic copy of the foregoing Respondent 1-800 Contacts' Reply Brief in Support of Application for a Stay, with:

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I hereby certify that on December 26, 2018, I served via E-Service an electronic copy of the foregoing Respondent 1-800 Contacts' Reply Brief in Support of Application for a Stay, upon:

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