

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

11 08 2016

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In the Matter of

1-800 CONTACTS, INC.,
a corporation

Docket No. 9372



**OPPOSITION OF RESPONDENT 1-800 CONTACTS, INC. TO COMPLAINT
COUNSEL'S MOTION TO CLARIFY THE SCHEDULING ORDER**

Respondent 1-800 Contacts, Inc. hereby opposes Complaint Counsel's Motion To Clarify the Scheduling Order (filed Nov. 3, 2016).

ARGUMENT

For the benefit of the deponent and to conserve the resources of the parties, a deposition is presumptively limited to one day of seven hours. *See* Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 *Tul. J. Int'l & Comp. L.* 153, 173 (1999). One goal of the one-day, seven-hour limit is to ensure that counsel are efficient in their examinations. *See, e.g., In the Matter of Intel Corp.*, FTC Docket No. 9341, 2010 WL 2332726, at *3 (May 28, 2010) ("Intel will necessarily be mindful of the seven hour time limitation, which is likely to encourage Intel to be efficient in its questioning and discourage Intel from duplicating prior lines of questioning."). Few depositions, if any, need go any longer. *See Roberson v. Bair*, 242 F.R.D. 130, 138 (D.D.C. 2007) ("[T]he court should begin with the presumption that the seven-hour limit was carefully chosen and that extensions of that limit should be the exception, not the rule").

Complaint Counsel's suggestion that this language actually means that "Complaint Counsel is entitled to examine the witness for [all] seven hours." Complaint Counsel's [Proposed] Order.

Having refused a reasonable compromise regarding the allocation of the seven hours,¹ and now wanting all seven hours for themselves (*see* Complaint Counsel's [Proposed] Order),² Complaint Counsel, in effect, are asking the Court to extend the time for Mr. Roush's deposition or, alternatively, deny Respondent an opportunity to examine. Complaint Counsel, however, have made no showing of a need to extend Mr. Roush's deposition beyond seven hours. Rather than compelling the witness to stay longer, the Court should allocate the seven hours equitably between the parties and direct the parties to be efficient in their questioning.

In practice, courts expect the parties to work out an allocation that allows sufficient time for the party noticing the deposition to question the witness, while still allowing time for cross-examination. However, in some instances, the courts have found it necessary to make that allocation for the parties. The Scheduling Order, for example, establishes a 50/50 split for depositions of non-parties.³ For its current employees, Respondent proposes an allocation much more favorable to Complaint Counsel: 330 minutes, or more than 75% of the time (6 minutes

¹ As reflected in Ex. C to Complaint Counsel's motion, Complaint Counsel were willing to offer only 30 minutes of the 420 minutes allotted for Mr. Roush's deposition. Respondent asked for 90 minutes, as it asks for now, but ultimately offered to accept 60 minutes, or just one hour, in order to avoid the expense and effort necessitated by the motion. *See* Exhibit A hereto, October 27, 2016 email from Respondent's counsel to Complaint Counsel.

² In their [Proposed] Order, Complaint Counsel seek relief going far beyond the deposition of Mr. Roush, the only deponent at issue. They seek, even in those cases where they already have taken up to eight hours of an Investigational Hearing, to be allowed another seven hours solely for their use. No justification is provided for such a one-sided allocation of time. In any event, the issue before the Court relates only to the allocation of time for Mr. Roush's deposition.

³ Since Complaint Counsel already have taken Investigational Hearing testimony from some of the non-parties on their witness list, the ultimate allocation of time for these witnesses will give Complaint Counsel more than 50% of the total time.

EXHIBIT A

From: [Stone, Gregory](#)
To: [Matheson, Daniel](#)
Cc: [-800CON FTC ATTY;SBlank, Barbag](#); [Loughlin, Chuck](#); [Slaiman, Charlotte](#); [Green, Geoffrey](#); [Chiarello, Gustav](#); [Gray, Joshua](#); [Barton, Clair](#); [Kathleen](#); [Taylor, Mark](#); [Hopkin, Nathaniel](#); [BC-1040-1800-Search Ad Team-D](#); [Brock, Thomas H.](#)

Greg,

As we discussed during our meet and confer earlier today, Complaint Counsel is amenable to your proposal regarding confidentiality if you are willing to accept the clarifications below we have offered in red text. As discussed, we will undertake to obtain agreement from relevant third parties, but if we are not successful in doing so we reserve the right to revisit this issue to develop a workable solution. With that caveat, we understand that we have an agreement that Respondent will waive its claims that certain materials are “confidential material” to the following extent:

“If a communication produced by 1-800 Contacts in the course of discovery in this matter is a communication that was sent to or received from a person who was then a current employee of a company, that communication may be shown to any person during the course of a deposition if that person to whom it is shown is, at the time of his or her deposition, a current employee of that same company, but only so long as the company agrees in writing that ~~the Protective Order’s restrictions shall be relaxed so that any~~ **it will waive its claims that** documents it has produced to the FTC, Complaint Counsel, or 1-800 Contacts **in this matter are “confidential material” solely to the extent that such documents** (a) that constitute communications to or from any person at that company may be shown to any person during the course of a deposition if that person is, at the time of his or her deposition, a current employee of that same company, and/or (b) that constitute communications to or from any person who was at the time of the communication an employee of 1-800 Contacts may be shown **during the course of a deposition** to any current employee of 1-800 Contacts.”

Regarding ~~in~~ **ing** ~~ing~~ **ing** employee
a an 1-800

a but ~~discussed~~ **discussed** meet but but but (b) but but but but **421u/**Span</ -1./Actua

Obviously, this examination must occur within the time limits established by the Scheduling Order. If you have any contrary authority that you would like us to consider, please send it in advance of our call.

I look forward to speaking with you at 4 p.m.

Best,

Greg

Gregory P. Stone | Munger, Tolles & Olson LLP
355 South Grand Avenue

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: NATIONAL HOCKEY LEAGUE)
PLAYERS' CONCUSSION INJURY) MDL No. 14-2551 (SRN/JSM)
LITIGATION)
)
This Document Relates to: ALL ACTIONS) Pretrial Order No. 6
) Deposition Protocol
)
_____)

The Court hereby adopts this Pretrial Order, which shall govern deposition protocols and procedures in all cases in this MDL proceeding.

1. Depositions – Generally. The procedures governing and limiting depositions, including resolution of any disputes arising during depositions, shall be in accordance with the Federal Rules of Civil Procedure. Counsel are expected to cooperate .53

3. Notices. The Court expects that the use of formal notices of depositions or subpoenas with respect to party witnesses will be unnecessary in this ~~case~~ ^{basis}-party

information cannot be obtained from any persons available for future depositions. If permitted, a supplemental deposition shall be treated as the resumption of the deposition originally noticed. Examination in any supplemental deposition shall not be repetitive of any prior interrogation.

7. Attendance. Unless otherwise agreed to by the parties, depositions may be attended only by the parties, the parties' counsel (including ~~house~~ counsel), the deponent, the deponent's attorney, the parties' expert witnesses, court reporters, videographers, and members and/or employees of the law firms of counsel of record. Upon application to the Court, and for good cause shown, attendance by a person who does not fall within any of the categories set forth in the previous sentence may be permitted. Unnecessary attendance by counsel is discouraged and may not be compensated in any fee application to the Court. While a deponent is being examined about any stamped confidential document or the confidential information contained therein, persons to whom disclosure is not authorized under the Confidentiality Order shall be excluded.

8. Videotaping. Videotaping of depositions shall be permitted upon request by the noticing party. Even when a deposition is videotaped, the stenographic record shall be the official record of the deposition. The party requesting the videotape shall bear the cost of the videotaping.

9. Conduct of Depositions. In any deposition, each side should endeavor to limit the number of attorneys questioning each witness by conferring in advance of the deposition to allow one attorney to be the primary questioner. Attorneys who may wish

to question a deponent should confer in advance to allocate among themselves the time permitted for the deposition.

10. Objections. Counsel shall comply with Fed. R. Civ. P. 30(d)(1). Directions to the deponent not to answer are improper except on the ground of privilege or to enable a party or deponent to present a motion to the Court for termination of the deposition on the ground that it is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the party or deponent. The only objections that may be raised at the deposition are those involving a privilege against disclosure or some matter that may be remedied if presented at the time, such as to the form of the question or the responsiveness of the answer. Objections o

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allotted period and that the particular information being sought cannot be elicited from a witness that is (or could be) scheduled to appear at another ~~time~~ event that the deposition involves a translator, ~~the~~ maximum length of the deposition shall be increased as is reasonably necessary ~~by~~ up to 75%.

16. Depositions of Treating Healthcare Providers. Depositions of treating healthcare providers shall be subject to the time limitations applicable to fact witnesses.

17. Use. Depositions may, under the conditions prescribed in Fed. R. Civ. P. 32(a)(1)-(4) or as otherwise permitted by the Federal Rules of Evidence, be used against any party (including parties later added and parties in cases subsequently filed in, or transferred to this Court as part of this litigation): (1) who was present or represented at the deposition; (2) who had reasonable notice thereof; or (3) who, within thirty (30) days after the filing of the deposition (or, if later, within sixty (60) days after becoming a party in this court in any action that is a part of this litigation), fails to show just cause why such deposition should not be usable against such party. However, ~~Order~~ does not address the admissibility for trial purposes of any testimony taken by deposition. Determinations on the admissibility of any such testimony shall be made in each coordinated proceeding or at trial.

18. Deposition Disputes. During depositions, disputes that arise that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require a rescheduling of the deposition, may be presented to the Court by telephone. The presentation of the issue and the Court's ruling will be recorded as part of the deposition. The undersigned will exercise by telephone the authority

granted under 28 U.S.C. § 1407(b) to act as district judge in the district in which the deposition is taken. The Court will provide the parties with a telephone number to reach the undersigned for any deposition disputes.

IT IS SO ORDERED.

ST. PAUL, MINNESOTA, this 19th day of December 2014.

s/Susan Richard Nelson

SUSAN RICHARD NELSON
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2016, I filed the **OPPOSITION OF RESPONDENT 1-800 CONTACTS, INC. TO COMPLAINT COUNSEL'S MOTION TO CLARIFY THE SCHEDULING ORDER** using the FTC's E-Filing System, which will send notification of such filing to all counsel of record as well as the following:

Donald S. Clark
Secretary

Notice of Electronic Service

I hereby certify that on November 08, 2016, I filed an electronic copy of the foregoing Opposition of Respondent to Complaint Counsel's Motion to Clarify the Scheduling Order, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on November 08, 2016, I served via E-Service an electronic copy of the foregoing Opposition of Respondent to Complaint Counsel's Motion to Clarify the Scheduling Order, upon:

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