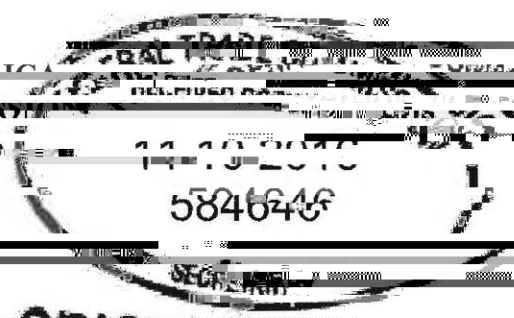


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



_____)
In the Matter of _____)
_____)
1-800-CONTACTS, INC.)
_____)
Respondent _____)
_____)

COMPLAINT COUNSEL'S MOTION FOR A SCHEDULING ORDER

This Motion asks the Court to grant the Complaint Counsel's request for a Scheduling Order for the deposition of Respondent, and that the Scheduling Order does not entitle Respondent to cut short Complaint Counsel's seven hours of deposition testimony.

Complaint Counsel seeks to depose Mr. Tim Roush, the current Chief Marketing Officer of Respondent's 1-800-Contacts, in a deposition. Complaint Counsel is entitled to take this seven hours of deposition testimony because Mr. Roush is a key witness in this matter. Complaint Counsel has the unilateral right to use at least 7 of Complaint Counsel's seven hours to depose Mr. Roush himself. Respondent's position is unreasonable. Nothing in the Scheduling Order entitles Respondent to any portion of the seven hours allocated to Complaint Counsel. The Court's Scheduling Order includes a provision that requires Complaint Counsel to depose Mr. Roush and to provide the information and testimony from the deposition, including Mr. Roush, and has no obligation to depose them.

Respondent, of course, need not undergo a discovery or an examination of [REDACTED] after Complainant Counsel has concluded its questioning if Respondent believes clarifications are necessary. And Complainant Counsel has stated that [REDACTED] Respondent's questioning. But there is no basis for [REDACTED] question its own party witnesses.

Complaint Counsel respectfully requests that the Court order that [REDACTED] entitled to serve subpoenas on [REDACTED] and any other named employees [REDACTED] during a deposition.

ARGUMENT

The Court's September 7, 2014, Controlling Order governing the duration and allocation of time for depositions, [REDACTED] deposition. In its Controlling Order, the Court stated that [REDACTED] the Administrative Law Judge." Paragraph 17 of the Controlling Order states that [REDACTED] party depositions, the time shall be divided evenly between the parties.

There is no such such type of party witness.

Mr. [REDACTED] ; Ex. B [REDACTED]

Mr. Rash is therefore a party witness in this case. See, e.g., *Feltmore Industries LLC v. Levand King, Gordon Mfg. Co.*, 2012-01-01-0235-TW [REDACTED] employment relationship with a party and should be considered party witnesses.

Foundation of State University of New York, Limited Corp., 07 Civ. 1260, 2008 WL 4922276,

at *4 (N.D.N.Y. 2/30/08) (citing *United States v. Rousey*, 2008 WL 1179774, *1 (N.D.

Arizona, 2008 WL 1179774, *1 (N.D. Ariz. 5/20/08); *United States v. Rousey*, 2008 WL 1179774, *1 (N.D.

2005) (same). Because Mr. Roush is a party witness, Paragraph 13 of the Scheduling Order,

which permits a party to depose its own witnesses, does not apply.

Respondent does not argue that Mr. Roush is a party witness of that a deposition

deposition is appropriate. Nor does Respondent rely on the time-splitting proviso in paragraph

13 of the Scheduling Order. Instead, Respondent relies on FRC Rule 3.5(b), which states that

“any party shall have the right to question the deponent for any purpose, including to

assert that this language gives it the right to use any portion of the seven-hour deposition that it

sees fit to question its own witness in this case.”¹

Respondent has cited no authority supporting its claim because the Federal Rules

not allow a witness to depose its own witness.² Examination is not a deposition and a party

examine its own witnesses in a deposition. The Federal Rules do not give a party the right to

question a deponent merely reflects the fact that deponents are subject to direct and cross

examination. 16 C.F.R. § 3.33(d); see also 16 C.F.R. § 3.33(e) (“any party may see and cross

questions.”); Fed. R. Civ. P. 302. The examination and cross-examination of a deponent

proceed as they would at trial.”³ Complaint Counsel does not state a particular day may

question its own witness on re-direct after Complaint Counsel has concluded its questioning.

Alabama Aircraft Indus. Inc. v. The Boeing Co., 2002 WL 121121 (Ala. 5/27/02) (“[I]n a deposition,

at *2 (N.D. Ala. Dec. 22, 2002) (Special Master Report and Recommendations).

defending a deposition will always be afforded the opportunity to re-direct cross-examine and

¹ Respondent also cites *FRC Rule 3.5(b)*, and *Fed. R. Civ. P. 302*.

dependent...
hour maximum...
examination and re-direct...
WL 557253 (N.D. Ala. Feb. 11, 2015)...
and...

Instead, if Respondent wishes to...
Counsel has...
seven hours if necessary. See, e.g., Fed. R. Civ. P. 20(d) advisory committee notes...
amendment ("Should the lawyer...
additional time...
wants Mr. Roush to stay longer to answer Respondent's own questions...

Indeed, Complaint Counsel has already made...
deposition for as long as necessary to allow Respondent to complete its...
Roush...
Counsel's deposition...
of plain logic, the...
because it has unlimited access to its own witnesses. See *In re Nat'l W. Life Ins. Policy*

² "[S]ince many...
latter may...
authority exists." *In re LabMD, Inc.*, ETC No. 0257, 2017 WL 2156216 (Jan. 16, 2017) (Commission order) (citing *ITC v. Ingersoll Rand*, 750 F.3d 1011 (10th Cir. 2014)).

³ See Ex. C (Email from DuMatia...
Paragraph 12 of the Scheduling Order, we are willing to agree...
current employees...
questioning...
current employees, subject to our right to conduct reasonable cross-examination...

Annuities Litig., No. 05-CV-1018 JLS (WV-55), 2011 WL 1611 (D.D.C. Jan. 19, 2011) (parties did not object to the proposed deposition because plaintiffs' counsel have unrestricted access to Plaintiffs' and can obtain declarations from Plaintiffs at any time.

The Scheduling Order provides for a time split deposition. A party has a right to a deposition. Any additional to direct examination does not count against those seven hours.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court grant Plaintiffs' Counsel's motion. Respectedly submitted,

Dated: November 16, 2010

Respectfully submitted,

/s/ Daniel J. Matheson
Geoffrey M. Green
Barbara Blank
Charles A. Lough
Kathleen M. Chan
Thomas H. Brock
Gustav P. Chiarello
Nadine M. ...
Mika Ikeda
Charlotte S. ...

Federal Trade Commission
Bureau of Consumer Protection
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
Telephone: (202) 326-3400
Facsimile: (202) 326-3400
Electronic Mail: ftc@ftc.gov
Counsel Supporting the Plaintiff

CERTIFICATE OF COMPLIANCE

Pursuant to Paragraph 4 of the Scheduling Order in the captioned matter on September 7, 2016, I hereby certify that Complaint Counsel, the moving party, has conferred by email and by telephone with counsel for Respondent F-000 Contacts, Inc. on October 20, 2016; October 21, 2016; October 25, 2016; and October 27, 2016, in an effort to resolve the issues raised in Complaint Counsel's Motion to Clarify the Scheduling Order. Complaint Counsel and Respondent were unable to resolve the issues.

Dated: November 10, 2016.

Daniel J. Matheson

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., N.W.
Washington, D.C. 20500
Telephone: (202) 326-2075
Facsimile: (202) 326-3482
Electronic Mail: dmatheson@ftc.gov

Counsel Supporting the Government

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LITIGATION

In the Matter of

1-800 CONTACTS, INC.,
a corporation,

Respondent

PUBLIC

PROPOSED ORDER

Having carefully considered Complaint Counsel's Motion for Clarification of the Substantive

Order and Respondent's Opposition thereto, it is hereby

ORDERED that

consequently,

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

Ex. A

REDACTED IN FULL

Ex. B

REDACTED IN ENTIRETY

Ex. C

From: Matheson, Daniel
Sent: Tuesday, October 25, 2016 3:38 PM
To: 'Vincent, Garth';
Cc: ~800UCON-FIC-ATTYS, LLC; 1141618@USSEARCH.AG; Team...
Subject: RE: Deposition scheduling

Garth,

Please let us know the earliest favorable for Mr. Shabanov's deposition.

Regarding the time split for Mr. Shabanov's deposition, we do not intend that the 2.5 hours will be devoted to our questioning. Our question period is for the 1000 contacts made in 2008-2015. We anticipate that 5.5 hours may be enough time if you would agree to a 5.5 hour deposition, if you are unable to agree to a longer deposition, as provided for by Paragraph 12 of the Scheduling Order, while we will obviously do our best to be efficient in our questioning. Mr. Shabanov, who has a reasonable right to conduct his deposition, has stated we are unable to complete our questioning in the time allotted. We are in a predicament in that we must get a deposition started in the initial examination to 3.5 hours.

Regarding depositions of current employees of Respondent, we would like to request that some of the 7 hour examination period be reserved for Respondent's current employees. We are willing to agree that depositions of Respondent's current employees can be reserved for seven hours. After conclusion of the deposition, we are prepared to stay for any further questions. Respondent's current employees are subject to cross-examination after the deposition and in response to your questioning. As you stated that you will request a 7 hour deposition, we are prepared to reserve seven hours longer than deposition hours we understand it, your position is that the day must be reserved for seven hours in each case, including any direct examination. Complaint Court considers your request for a deposition of Respondent's current employees to be less than seven hours in order to facilitate Respondent's direct examination of its own witnesses. We are prepared to reserve seven hours for your deposition but as a general rule we do not agree to reserve seven hours for your deposition. We are prepared to reserve seven hours for your deposition to accommodate your efforts to conduct reasonable investigation of your claim and you can rely on the fact that we are prepared to reserve seven hours for your deposition. Counsel's questioning will be limited to 7 hours for Respondent's current employees for 5 years, reducing the time for questioning from Respondent's current employees to 7 hours, if you lengthen the time after 7 hours while you continue to question your witnesses, subject to a reasonable opportunity for cross-examination.

Please let us know if you agree. If you do not agree we will move to compel a 7-hour deposition for Mr. Shabanov. We can satisfy any remaining direct and cross-examination obligations on the issue of time splits for 1000 contacts witnesses, for the avoidance of doubt, to do such a motion we will ask the Court to clarify that Complaint Court's stipulation to all 7 hours.

Respectfully,

Paul

From: Vincent, Garth [mailto:Garth.Vincent@mtc.com]
Sent: Thursday, October 27, 2016 6:21:47 AM
To: Matheson, Daniel; Blank, Barbara; Clair, Kathleen; C. S. Simon; C. L. Hatten
Cc: ~800CON_FTC_ATTYS
Subject: RE: Deposition Scheduling

Dan,

I am writing to follow up on our discussion last Friday about the deposition of individuals who are not currently employed by 1-800 Contacts and the Scheduling Order provisions. I am writing to you as a "non-party" deposition. None of the individuals you have referenced are parties to this action. I am not aware of any provisions, or any other case, that would require the use of these former employees' depositions. We agree with your assessment that there is unlikely to be a time issue with most of the former employee depositions and are happy to try to work with you on a schedule that works for you. We can also have a deposition with a former employee who is not currently employed by 1-800 Contacts in advance of a deposition with a current employee. I have never spoken directly with Ms. Blackwood (rather my discussions have been through her legal counsel) but I do not know enough about her particular situation in order to advise in advance of a deposition with a former employee. I am happy to take "the time" and pay for a non-party deposition to schedule a deposition with a former employee. I am happy to cede to you any additional time that we do not use from our portion of the 7 hour period.

With regard to the deposition of current employees of 1-800 Contacts, it appears that we are entitled to use some of the 7 hour examination period in the record. We would propose the following hours for Complaint Counsel: 1.5 hours for Respondent. Please let us know how you are going forward.

Garth

Garth Vincent
355 South Grand Avenue | Los Angeles, CA 90017
Tel: 213.683.9170 | Cell: 916.948.0700 | garth.vincent@mtc.com | www.mtc.com

From: Vincent, Garth
Sent: Thursday, October 20, 2016 5:55:20 PM
To: Matheson, Daniel (dmatheson@ftc.gov); Blank, Barbara (bblank@ftc.gov); Clair, Kathleen (kclair@ftc.gov); C. S. Simon (csidm@ftc.gov)
Subject: FW: Deposition Scheduling

Dan,

I am in receipt of your October 11 letter regarding scheduling of depositions of individuals who are not currently employed by 1-800 Contacts. We are happy to help facilitate scheduling of depositions of former employees to the extent we are able.

I do not know Ms. Judd but will proceed. As you know, Mr. Craver was already deposed in this litigation and was represented by a law firm related to Luxottica. I have a number that is no longer employed by Luxottica and contact him as well to see how he would like to proceed. As previously discussed, we have been able to locate and make contact with Mr. Judd. Mr. Judd has indicated that he would like to be deposed in the state of California and we have proposed to get back to you as soon as I have heard back from him.

We obviously do not agree with the suggestion that individual witnesses not subject to the provisions of Paragraph 3 of the Scheduling Order, or the similar provision of the orders, to take two separate depositions for any one witness. We intend to adhere to the clearly stated provisions of Paragraph 3 to individuals no less than those provided by 1,800 contacts and use one-half of the total allotted time for each deposition. We will continue to have the deposition on the next day if necessary in order to complete our examination of the witnesses on the same day.

I will endeavor to get back to you promptly regarding dates and accommodations for the depositions of each of the former employees as you have requested to the extent we are able to do so.

Garth

Garth Vincent, Attorney at Law, P.C.
355 South Grand Avenue, Los Angeles, CA 90071
Tel: 213.683.9170 | Cell: 310.948.0788 | garth.vincent@mta.com | www.mtn.com

CERTIFICATE OF SERVICE

I hereby certify that the following documents were served on the undersigned by electronic filing on the date indicated below:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room 11113
Washington, DC 20580

The Honorable D. Michael Channen
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room 11113
Washington, DC 20580

I also certify that the undersigned has provided a copy of the foregoing documents to:

Gregory P. Stone
Steven M. Feinberg
Garth T. Vincent
Stuart N. Senator
Gregory M. Sergi
Munger, Toffles & Olson LLP
355 South Grand Avenue
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Los Angeles, CA 90071
gregory.stone@mto.com
stevcf@mto.com
garth.vincent@mto.com
stuart.senator@mto.com
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justin.raaphael@mto.com

Charis Lex
16 N. Marengo Ave.
Pasadena, CA 91101
charislex@charislex.com

Counsel for Respondent, *Shutterstock, Inc.*

Dated: November 10, 2010

D. S. Auorffey
Auorffey

CERTIFICATE FOR

I certify that the electronic
and correct copy of the paper original and
document that is

November 10, 2016 November 10, 2016

By: /s/ Dan Manesky
Attorney