UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

In the Matter of

1-800 CONTACTS, INC.,
a corporation

Docket No. 9372

COMPLAINT COUNSEL'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY DECISION

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threaten and file litigation against its rivals. As explained below, the First Amendment does not prevent the Commission from ordering relief necessary to address and prevent recurrences of an antitrust violation, and the propriety of such relief does not depend on whether the lawsuits that gave rise to the agreements challenged here were objectively or subjectively reasonable.

ARGUMENT

A. The Complaint Challenges Respondent's Agreements With its Rivals, Not Respondent's Litigation-Related Activity

Respondent mischaracterizes the Complaint. Respondent's Opposition incorrectly asserts that Complaint Counsel attempts to "establish liability on the basis of constitutionally-protected conduct." Opp. at 6. For example, Respondent's Opposition observes that the Complaint "alleges that Respondent 'aggressively policed' the settlement agreements, including by threatening further litigation and demanding compliance." Opp. at 4 (citing Complaint ¶ 25). But the Complaint simply describes Respondent's litigious behavior as part of the background or context in which the challenged agreements arose and were maintained, thus resulting in ongoing anticompetitive harm. Such allegations do not transform pre- or post-litigation conduct into a basis on which Complaint Counsel will "establish liability."[2] As the Complaint explicitly states, Respondent's liability is based on the terms of its *agreements* with competitors, and on the impact of these agreements on competition, not on the background allegations identified in Respondent's Opposition. *See* Compl. ¶¶ 1, 3, 25, 32, 33. Similarly, if the challenged agreements had an anticompetitive impact, this impact is not excused by the purported merits of Respondent's pre-agreement conduct toward its rivals. *See* Mem. at 6 (the question of whether

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[2] Respondent also takes issue with the Complaint's characterization of Respondent's pre-agreement behavior. Opp. at 4 (criticizing use of the word "purported" in Complaint ¶ 20); *id.* (objecting to description of Respondent's "inaccurate" legal theory in Complaint ¶¶ 17-18). But these are not acts or practices on which Complaint Counsel will "establish" Respondent's liability.

the underlying lawsuit was "bona fide" or filed in "good faith" is not determinative of whether the challenged agreement is procompetitive or anticompetitive).

B. Private Litigation Settlements – Like Other Private Agreements – Are Subject to Antitrust Scrutiny

Respondent is entirely incorrect in asserting that "Complaint Counsel do[es] not contend that antitrust scrutiny applies to *all* private settlements." Opp. at 6. (emphasis in original). To the contrary, Complaint Counsel **does** contend that all private settlements are subject to antitrust scrutiny, just as all commercial agreements between private actors are subject to antitrust scrutiny. Complaint Counsel's opening Memorandum was clear on this point: "the source of each anticompetitive restraint at issue is . . . an agreement among private parties resolving litigation, which is unquestionably subject to antitrust scrutiny." *See* Mem. at 5. Indeed, this proposition is not subject to serious dispute. It has been reaffirmed by the Supreme Court on a number of occasions, including most recently in *Actavis*,[3] as well as by the Commission.[4]

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[3] *See generally* Mem. 4 (quoting *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2232 (2013) for the proposition that "this Court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws"); Mem. at 5-6 (citing *Andrx Pharmaceuticals v. Elan Corp.*, 421 F.3d 1227, 1233 (11th Cir. 2005); *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995)).

[4] Respondent's Opp. incorrectly implies that the Commission's brief to the Supreme Court in *Actavis* stated that private litigation settlement agreements are "ordinarily" immune from antitrust liability *See* Opp. at 6 (citing Petitioner's Brief, *FTC v. Watson Pharms., Inc.*). Contrary to the impression created by Respondent's selective quotation, Petitioner's brief in *Actavis* explicitly stated that "private agreements that settle patent litigation do not enjoy the antitrust immunity afforded to litigation itself," and confirmed that "the antitrust analysis [of such agreements] requires a nuanced examination of the specific terms of the parties' agreement." *See* Exhibit A (Petitioner's Brief, *FTC v. Watson Pharms., Inc.*) at 27. Likewise, since *Actavis* the Commission has made it clear that *Actavis* held that litigation settlements "are not immune from antitrust scrutiny and are to be evaluated under the traditional antitrust rule of reason." Exhibit B (Federal Trade Commission's Brief as Amicus Curiae, *In re: Wellbutrin XL Antitrust Litig.*, Case No. 2:08-cv-2431 (E.D. Pa. Sept. 26. 2013)) at 4; *id.* at 7 ("it is incorrect to suggest . . . that *Actavis* merely created a narrow exception to an otherwise blanket antitrust immunity," because the Court's "directive to consider traditional antitrust factors is not a special rule limited to "reverse payment" cases.").

Whether a settlement will result in antitrust liability is a different question. *Actavis* is clear that all private settlement agreements are subject to antitrust *scrutiny*; and it places the burden of proving ultimate *liability* on the plaintiff. Respondent's Opposition ignores this crucial distinction between "scrutiny" and "liability" when it invents an "*Actavis* burden" that, according to Respondent, must be satisfied before a private settlement agreement may even be evaluated to determine if it violates the antitrust laws. Indeed, in the portion of the *Actavis* opinion cited by Respondent, the Court expressly discussed whether certain settlements could be "subject to antitrust *liability*." *See FTC v. Actavis*, 133 S. Ct. 2223, 2233 (2013) (emphasis added). No portion of the Court's opinion supports the notion that private settlement agreements may be subject to antitrust *scrutiny* only after a plaintiff clears some special hurdle.

Moreover, Respondent's contrived "*Actavis* burden" is not relevant to the disposition of this Motion. The issue presented by Complaint Counsel's instant Motion for Partial Summary Judgment is whether Respondent's *Noerr*-related Defenses present a sufficient and legally cognizable defense for the restraints at issue.[5] Respondent's "*Actavis* burden" argument, which is not hinted at in its Answer, appears to concede that *Noerr* does not immunize the restraints

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[5] *Cf. Mass. Mutual Life Ins. Co. v. Residential Funding Co., LLC*, 55 F. Supp.3d 235, 237 (D. Mass. 2014) (granting plaintiff's motion for partial summary judgment regarding legally insufficient "loss causation" defense); *id.* at 246 (explaining that summary judgment on the defenses was appropriate in part because "judicial resources are not saved by ptodefpartlanti

from antitrust scrutiny and instead suggests an entirely different defense in which the "bona fides" of its claims against its competitors should be taken into account as one of a range of relevant factors. Opp. at 7-8 (suggesting that factors relevant to the analysis of a settlement include the litigation's "bona fides," whether the settlement is "commonplace" and "within the range of litigation outcomes," and whether a workable surrogate exists that allows a court to avoid grappling with the merits of the underlying litigation). Respondent's Opposition argues that this panoply of factors is relevant to the legality of the Bidding Agreements.[6] But no authority supports the contention that, if Respondent's underlying trademark claims were non-sham, then the Bidding Agreements are necessarily exempt from antitrust liability. Again, such a position is untenable as it would mean that parties could enter into *any* anticompetitive agreement as long as there was non-sham litigation pending between them.

C. Respondent's Defenses Are Not Relevant to the Propriety of the Relief Sought

Respondent takes issue with Items 2, 3, 4, and 5 of the Complaint's Notice of Contemplated Relief. *See* Opp. 1-2 (citing Notice of Contemplated Relief, Items 2-5). Items 2 and 3 prohibit Respondent from entering new agreements with terms similar to those challenged in the Complaint,[7] while Item 4 prohibits Respondent from enforcing the challenged provisions in its current agreements. *See* Compl. at 9 (Nos. 2, 3, 4). Item 5 would prohibit Respondent from threatening or filing ***future*** lawsuits premised on the notion that its trademarks are

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[6] To the extent Respondent's interpretation of *Actavis* (and the asserted exemption for "settlements within the range of litigation outcomes" (Opp. at 7-8)) constitutes "part of the issues being adjudicated" now that it has been raised for the first time in Respondent's Opposition, Complaint Counsel reserves the right to move separately for a summary decision on this issue. *See* 16 C.F.R. §3.24(a).

[7] Item 2 would prohibit Respondent from forming an agreement "that restrains competition in any search advertising auction." *Id.* (No. 2). Item 3 would prohibit Respondent from forming an agreement with a competitor "to forbear from disseminating truthful and non-misleading advertising." *Id.* (No. 3).

automatically infringed every time a competitor's advertisement is displayed in response to an internet search that includes one of Respondent's trademarked terms.[8] Respondent asserts that these forms of relief "confirm" that the Complaint's allegations encompass conduct protected by the *Noerr-Pennington* doctrine. Opp. at 1. This argument fails, because injunctive relief need not be narrowly cabined by the violations proven. Instead, once the Commission finds a violation of antitrust law, it "has wide latitude in forming an appropriate remedy." *Rubbermaid, Inc. v. FTC*, 575 F.2d 1169, 1174 (6th Cir. 1978). Indeed, the Commission should draw upon its expertise and exercise "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" at issue. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). "Whether the case involves consumer protection or competition violations, the "wide discretion" described in *Ruberoid* is subject only to two constraints: the order must bear a "reasonable relation" to the unlawful practices, and it must be sufficiently clear and precise that its requirements can be understood." *In re POM Wonderful LLC*, 2012 FTC LEXIS 18, 93-95 (F.T.C. Jan. 11, 2012) (internal citations omitted). Relief that anticipates and addresses future conduct is entirely appropriate "so long as [it] bears a reasonable relationship to the act or practice found unlawful." Opinion of the Commission, *In re McWane, Inc.*, FTC Docket No. 9351, at *39, (Jan. 30, 2014) [hereinafter "*In re McWane*"], *available at*

Here, each of the remedies sought by Complaint Counsel bears a reasonable relationship to the Bidding Agreements challenged in the Complaint. Compl. 9 (Notice of Contemplated Relief). But the nexus between the relief sought and the violations found is a question for another day. The propriety of the relief sought is not at issue in Complaint Counsel's instant Motion, because none of relief sought is foreclosed by the *Noerr-Pennington* defenses Respondent advances.

Specifically, Items 2, 3, and 4 would prevent Respondent from entering identical agreements in the future, and require Respondent to abandon enforcement of the current provisions in order to "cease and desist from the violation of law" charged in the Complaint. 15 U.S.C. § 45(b).[9] Because *Noerr-Pennington* does not apply to private agreements, *see supra* at 3-4, Respondent's Second and Third Defenses would not bar this relief.

Respondent's Defenses likewise fail with respect to Item 5. As explained above, the Commission may exercise its discretion to fashion reasonable prospective relief even if Respondent were to establish that the ***past*** lawsuits that gave rise to the agreements at issue were "bona fide" or filed in "good faith." Nor can Respondent defeat Complaint Counsel's Motion for

Moreover, the Commission may appropriately hold that that Respondent's restraints are anticompetitive; by doing so, it will necessarily find that the restraints "exceed the scope of any property right that 1-800 Contacts may have in its trademarks," Compl. ¶ 32, by preventing the display of ***all*** search advertising in response to internet searches containing trademarked terms, regardless of the content of the ad.[11] *See* Compl. ¶¶ 18, 21, 24. In reaching this conclusion, the Commission would not need to determine, or even consider, the bona fides of the litigations that resulted in the challenged settlement agreements.

D. Respondent Identifies No Disputed Material Facts

Respondent has identified no genuine disputes as to material facts that defeat summary judgment. Instead, it only quibbles with allegations in ways that unnecessary will not be counted.”); *Mass. Mutual Life*, 55 F. Supp.3d 235, 239 (“a fact is “material” when it might affect the outcome of the suit under the applicable law.”). For example, Respondent “disputes” thirteen facts asserted by Complaint Counsel as “incomplete and misleading” solely on the basis that Complaint Counsel’s Separate Statement described Respondent’s challenged restraints as “agreements” rather than “settlement agreements.”