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

01 10 2017
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In the Matter of **1-800 CONTACTS, INC.,** **a corporation**	**Docket No**

<u>COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE AN OPPOSITION TO RESPONDENT'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA</u>

Pursuant to Rule 3.22 of the Rules of Practice for Adjudicative Proceedings, Complaint Counsel respectfully moves for leave to file the attached brief opposing Respondent's Motion to Compel Compliance with Subpoena filed on January 3, 2017. In support of its motion for leave, Complaint Counsel states as follows:

1. Respondent's motion to compel requests an order compelling Google Inc. ("Google") to produce three settlement agreements responsive to Respondent's subpoena. Motion to Compel ("MTC") 1. Respondent's novel relevancy argument supporting its motion is that the sought-after documents relate to the issue of whether the challenged Bidding Agreements between Respondent and its competitors take "commonplace forms," *id.*, and are therefore immune from antitrust scrutiny. As explained in more detail in Complaint Counsel's Opposition, this argument is currently before the Commission as part of Complaint Counsel's Motion for Partial Summary Decision, which is fully briefed and pending resolution. This Opposition seeks to ensure that these motions are resolved in proper sequence in a way that is most efficient for the parties, the Court, and the Commission. Complaint Counsel does not believe that Google is aware of these issues, or it would otherwise raise them with the Court.

2. As explained in more detail in the Opposition, Respondent's sole relevancy argument relies on a misreading of the Supreme Court's decision in *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), the nature of vertical versus horizontal agreements, and the empirical meaning of the term "commonplace." Complaint Counsel respectfully submits that these arguments

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In the Matter of **1-800 CONTACTS, INC.,** **a corporation**	**Docket No. 9372**

<u>COMPLAINT COUNSEL'S OPPOSITION TO</u>
<u>RESPONDENT'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA</u>

INTRODUCTION

Respondent's motion seeks to compel a third party, Google Inc. ("Google"), to produce three litigation settlement agreements in order to prove that Respondent's Bidding Agreements are "commonplace." Respondent's Motion to Compel ("MTC") 1. Complaint Counsel understands that Google intends to oppose Respondent's motion, and it will brief the issues specific to Respondent's request. However, there are certain policy considerations that Complaint Counsel respectfully asks the Court to consider.

First, Complaint Counsel submits that the Court should hold Respondent's motion to compel in abeyance. The novel legal argument underlying Respondent's motion is currently before the Commission as part of Complaint Counsel's Motion for Partial Summary Decision. This motion has been fully briefed. Complaint Counsel respectfully submits that it would be most efficient for the parties, the Court, and the Commission for the Court to await the Commission's resolution of Complaint Counsel's pending motion, which, should it be granted, could render this instant motion moot.

Second, should the Court decide to rule on Respondent's motion to compel now, the motion should be denied. The only link between Google's agreements and the claims and defenses in this action is Respondent's erroneous contention that antitrust immunity exists for settlement agreements that are "commonplace." In other words, Respondent claims that if many people restrain competition in a particular fashion, then that restraint becomes legal. That argument is wrong as a matter of law. Respondent's entire argument turns on the misreading of a single clause in *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), a reading that no other adjudicative body has adopted. Respondent's assertion that Google's agreements are relevant to this case is furthermore erroneous as a matter of law because it conflates vertical agreements between an advertising platform and **{ }** with horizontal agreements among direct competitors. Finally, the fact that Google may have entered into trademark settlement agreements with three **{ }** tells us nothing about whether agreements that reciprocally prohibit bidding on certain keywords are "commonplace."

<u>ARGUMENT</u>

I. THE COURT SHOULD HOLD RESPONDENT'S MOTION TO COMPEL IN ABEYANCE PENDING THE COMMISSION'S DECISION ON COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

respectfully requests that the Court hold Respondent's motion to compel in abeyance pending the Commission's resolution of Complaint Counsel's Motion for Partial Summary Decision.

II. RESPONDENT'S MOTION TO COMPEL SHOULD BE DENIED BECAUSE THE DOCUMENTS IT SEEKS ARE IRRELEVANT AS A MATTER OF LAW

Discovery is appropriate "to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). The fatal flaw in Respondent's motion to compel is that the lone issue it identifies—"whether the challenged agreements are 'commonplace forms' of settlement agreements" (MTC 1)—is irrelevant as a matter of law to the allegations of the complaint, any proposed relief, or to Respondent's defenses. Thus, the Court should deny Respondent's motion to compel. *See United States v. Kellogg Brown & Root Servs., Inc.*, 284 F.R.D. 22, 33 (D.D.C. 2012) ("it is proper to deny discovery on matters only relevant to claims or defenses that have been stricken").

A.

the antitrust laws," no matter what "form" they take. 133 S. Ct. at 2232 (collecting authorities dating back to 1931).[2]

Respondent bases its relevancy argument on the misreading of half of a sentence from *Actavis*. Respondent claims that, in *Actavis*, "the Supreme Court … made clear that 'commonplace forms' of settlement agreements are not subject to antitrust scrutiny." MTC 4. *Actavis* did no such thing. Rather, in the context of explaining why "there is nothing novel about

Apple, Inc., 791 F.3d 290, 324 (2d Cir. 2015) (quoting *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000)).

Nor did the Third Circuit adopt Respondent's erroneous reading of *Actavis*, as Respondent suggests. *See* MTC 4-5 (citing *King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp.*, 791 F.3d 388, 402 (3d Cir. 2015), for the proposition that *Actavis* "explained that its holding should not be read to subject to antitrust scrutiny 'commonplace forms' of settlement"). Respondent once again omits critical context, namely, the rest of the quoted sentence, where *King Drug* made clear that it was discussing situations "such as tender by an infringer of less than the patentee's full demand." 791 F.3d at 402. *King Drug* never suggested that *Actavis* created a broad antitrust immunity, contrary to decades of established precedent, based on a brand new test of whether the settlement agreement was "commonplace." That is because no such immunity exists, or has ever existed.

To the contrary, *King Drug* highlighted the Supreme Court's *rejection* of arguments identical to that which Respondent makes here. As the Third Circuit observed, in *Palmer v. BRG of Ga., Inc.*, 874 F.2d 1417, parties to a market allocation agreement attempted to justify their scheme by claiming that it was "an ordinary copyright royalty arrangement which courts have routinely sustained." *King Drug*, 791 F.3d at 407 & n.28 (quoting *Palmer v. BRG of Ga., Inc.*, 874 F.2d 1417, 1434 (11th Cir. 1989), *rev'd*, *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 50 (1990) (per curiam)). The Supreme Court nonetheless found this "ordinary" agreement to be "unlawful on its face," that is, a *per se* violation of the antitrust laws. *Palmer*, 498 U.S. at 49-50. Far from supporting Respondent's novel argument, Respondent's own authority confirms that whether or not an agreement is "commonplace" has no bearing on whether it is "immune" from antitrust scrutiny.

In sum, the question of whether or not a settlement agreement is “commonplace” has no relevance to “the allegations of the complaint, … the proposed relief, or … the defenses of any respondent,” 16 C.F.R. § 3.31(c)(1), because no such defense exists as a matter of law. The Court should therefore deny Respondent’s motion to compel.

B. Respondent’s Motion Ignores The Distinction Between Horizontal And Vertical Agreements

Respondent’s motion should also be denied because Google’s agreements with **{**[redacted]**}** bear no relevance on the question of whether Respondent’s agreements with its *competitors* are “commonplace,” let alone lawful. Respondent’s assertion that “[t]he terms of the Google agreements … bear on whether the terms of relief in Respondent’s agreements are commonplace forms of settlements” (MTC 5-6 (footnote omitted)), glosses over the critical distinction that agreements between Google and **{**[redacted]**}** are *vertical* agreements, whereas agreements between Respondent and its competitors are *horizontal* ones.

It is bedrock antitrust law that horizontal agreements are analyzed under a significantly more stringent standard than vertical agreements. *See Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007) (explaining that “the [Supreme] Court [has] rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones,” and citing *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, n.18 (1982), for the proposition that “horizontal restraints are generally less defensible than vertical restraints”). *See also Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54 (1977) (explaining that, in contrast to horizontal restrictions, vertical restrictions have certain “redeeming virtues”). This is because agreements among competitors “pose the most significant dangers of competitive harm.” Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1902(a) (3d ed. 2016). Because Google’s agreements with **{**[redacted]**}** do not present the same “significant dangers of competitive harm" as Respondent's agreements with its direct competitors, any analogy between Google's and Respondent's agreements is inapposite.

Indeed, Respondent fails to explain how Google's agreements with three **{** **}** are in any way comparable to Respondent's Bidding Agreements with numerous rivals, each of whom was afforded *reciprocal* rights under the Bidding Agreements at issue in this case. Nor does Respondent explain how Google's "assessment of the risks of potential liability" (MTC 6) from dealing with three **{** **}** are in any way relevant to Respondent's decision to enter into at least 14 separate bilateral agreements with its closest competitors. Simply put, Respondent's motion overlooks one of the most basic distinctions in antitrust law, and in doing so, fails as a matter of law to establish any relevancy between Google's settlement agreements and the Bidding Agreements at issue in this case.

C. Three Settlement Agreements of a Single Third Party Reveal Nothing About Whether Bidding Agreements Among Competitors Are "Commonplace"

Even if Google's agreements with **{** **}** were comparable to Respondent's Bidding Agreements—and, as explained in Part B, *supra*, they clearly are not—Respondent's assertion th Tc -0.0002 Tw 79D.h25sue in this case.

per year.[4] Among this sea of trademark litigation, showing that Respondent's bidding agreements may be "similar" to three other (non-analogous) settlement agreements of a third party is a far cry from showing that such agreements are "commonplace," and, thus, not relevant to this case.

CONCLUSION

For the reasons stated above, the Court should hold Respondent's motion to compel in abeyance pending the Commission's resolution of Complaint Counsel's motion for partial summary decision, or, in the alternative, deny Respondent's motion.

Dated: January 10, 2017

Respectfully submitted,

/s/ Daniel J. Matheson
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Ex. A

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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 MOTION FOR PARTIAL SUMMARY DECISION

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Counsel Supporting the Complaint

Dated: November 3, 2016

COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION AND [PROPOSED] ORDER

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that, pursuant to Federal Trade Commission Rule of Practice 3.24, Complaint Counsel hereby respectfully move for a partial summary decision in this action. For the reasons set forth in the accompanying Memorandum, this motion should be granted.

By this Motion, Complaint Counsel seek partial summary decision dismissing Respondent's Second Defense (the *Noerr-Pennington* doctrine and the First Amendment to the United States Constitution) and Third Defense (that the Bidding Agreements settled litigation that was not objectively or subjectively baseless). Both defenses fail as a matter of law.

Between 2004 and 2013, Respondent entered into fourteen Bidding Agreements with rival sellers of contact lenses. Thirteen of the Bidding Agreements ended threatened or actual trademark lawsuits. These private settlements do not constitute "petitioning" protected by the First Amendment and the *Noerr* doctrine. Rather, they are merely private agreements between Respondent and thirteen of its competitors. The Commission's Complaint alleges that the Bidding Agreements violate Section 5 of the FTC Act. The Second and Third Defenses alleged in Respondent's Answer and Defenses assert that the Bidding Agreements are immune from antitrust scrutiny under the *Noerr* doctrine, and argue that the underlying trademark litigations were not objectively baseless. For the reasons set forth in the accompanying Memorandum, these defenses fail as a matter of law. This Motion is supported by the accompanying Memorandum and the authorities cited therein.

Complaint Counsel does not seek summary decision as to the remaining defenses in Respondent's Answer and Defenses, or as to the allegations of the Complaint. Complaint

Counsel requests entry of an Order granting partial summary decision on Respondent's Second and Third defenses and directing Chief Administrative Law Judge Chappell to receive evidence and issue an initial decision on all of the remaining factual and legal allegations in the Complaint. A Proposed Order is attached.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of **1-800 CONTACTS, INC.,** **a corporation**	**PUBLIC** **Docket No. 9372**

[PROPOSED] ORDER

Having carefully considered Complaint Counsel's Motion for Partial Summary Decision, Respondent 1-800 Contacts, Inc.'s Opposition thereto, and Complaint Counsel's Reply, and all supporting and opposing declarations and other evidence, and the applicable law, it is hereby ORDERED AND ADJUDGED, that Respondent's Second Defense and Third Defense fail as a matter of law, and Complaint Counsel's Motion for Partial Summary Decision as to this issue is hereby GRANTED.

Chief Administrative Law Judge Chappell is hereby directed to receive and consider all of the parties' evidence on all other factual and legal allegations in the Administrative Complaint. *See* Section 3.24(a)(5) of the Commission's Rules of Practice, 16 C.F.R. § 3.24(a)(5).

ORDERED:

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED:

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

This case challenges fourteen agreements between Respondent and its competitors that restrict price competition and reduce the availability of truthful, non-confusing advertising (hereinafter the "Bidding Agreements"). Respondent asserts that the Bidding Agreements are keywords" to prevent search engines from displaying an ad even where the party did not purchase the keyword. Id. ¶¶ 29, 33-38. These restrictions on placing ads apply regardless of the content of the ad – regardless of whether an ad causes confusion and regardless of whether the ad is truthful. There is no dispute about the terms of the Bidding Agreements. And Respondent admits that it entered into these agreements. Id. ¶¶ 6, 20. The anticompetitive effects alleged in the Complaint all flow from these private agreements. Id. ¶ 40 (citing Compl. ¶ 31) (alleging nine examples of anticompetitive effects resulting from Respondent's Bidding Agreements).

Respondent's Second and Third Defenses to the Complaint in this case assert that the Bidding Agreements are immune from antitrust scrutiny under the Noerr doctrine, and argue that the underlying trademark litigations were not objectively baseless.

II. STANDARD FOR SUMMARY DECISION

A "party may move . . . for summary decision in the party's favor upon all or any part of the issues being adjudicated." 16 C.F.R. § 3.24(a)(1). If the party seeking summary decision meets its burden by identifying portions of the record that demonstrate the absence of a genuine issue of material fact, the opposing party must establish "specific facts showing that there is a genuine issue for trial." In re North Carolina State Board of Dental Examiners, 151 F.T.C. 607, 611 (2011) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)); see also 16 C.F.R. § 3.24(a)(3). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial,'" and summary decision should be granted in favor of the moving party. North Carolina State Board, 151 F.T.C. at 611 (quoting Matsushita, 475 U.S. at 587).

Motions for partial summary decision can be particularly helpful in expediting resolution when the legal sufficiency of a defense is at issue. For example, in North Carolina State Board, the Commission determined that there was no genuine issue of material fact regarding "the propriety of the [respondent's] invocation of the state action doctrine as an affirmative defense," id.

In this case, just as in *New Mexico Natural Gas* and *Biovail*, the source of each anticompetitive restraint at issue is not governmental action, but instead, an agreement among private parties resolving litigation, which is unquestionably subject to antitrust scrutiny.[4]

IV. Private Settlement Agreements Are Subject to Antitrust Scrutiny Even if the Underlying Litigation is Not Objectively or Subjectively Baseless

Respondent's Defenses (in particular, its Second Defense) appear to reference the rule that a lawsuit potentially covered by the *Noerr* doctrine will lose its antitrust immunity if the lawsuit is a sham, that is, if the lawsuit is24 Tm oj -0.int byT1 1 Tf -0.0026 Tw 17.6titrus25.07ally covS doctrine did not protect from antitrust scrutiny the defendant's settlement agreements resolving patent litigation. 421 F.3d at 1233-36. Similarly, in *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), the Seventh Circuit held that a litigation settlement agreement represented a *per se* unlawful agreement to restrict advertising, even though the underlying suit was clearly meritorious, as the trial court ruled in favor of the plaintiff and ordered an accounting of partnership assets. *Id.* at 826-28.

Respondent suggests that, somehow, filing "bona fide" or "good faith" trademark infringement lawsuits against rivals insulates the resulting settlement agreements from antitrust scrutiny. But the question of whether the underlying lawsuit was "bona fide" or filed in "good faith" is not determinative of whether the challenged agreement is procompetitive or anticompetitive. Because private agreements settling litigation are subject to antitrust scrutiny irrespective of the merits of the underlying lawsuit, Respondent's defenses are irrelevant to the allegations of the Complaint, and fail to provide Respondents with any legally cognizable defense.

CONCLUSION

For the reasons stated above, the Commission should find that the agreements challenged here are subject to antitrust scrutiny and are not immunized by the *Noerr* doctrine, regardless of whether the litigation that led to the agreements was filed in good faith, or was objectively or subjectively unreasonable. Complaint Counsel therefore respectfully asks the Commission to enter an Order granting summary decision in Complaint Counsel's favor regarding Respondent's Second Defense and Third Defense.

Dated: November 3, 2016

Respectfully Submitted,

/s/ Dan Matheson

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Counsel Supporting the Complaint

UNITED STATES OF AMERICA
BEFORE THE 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 STATEMENT OF UNDISPUTED FACTS

Pursuant to Rule 3.24, Complaint Counsel submits, in support of its motion for partial summary decision, the following statement material f

4. Those cease-and-desist letters stated that the conduct of the recipient may constitute trademark infringement. Matheson Decl. Tab 2, Answer ¶ 17.

5. 1-800 Contacts filed complaints in federal court against certain of those online contact lens retailers for trademark infringement. Matheson Decl. Tab 2, Answer ¶ 18.

6. 1-800 Contacts entered into agreements resolving trademark disputes with thirteen online contact lens retailers. Matheson Decl. Tab 2, Answer ¶ 20.

7. 1-800 Contacts entered into an agreement w[redacted]}. Matheson Decl. Tab 3[redacted]}.

8. 1-800 Contacts entered into an agreement w[redacted]}. Matheson Decl. Tab 4{[redacted]}. 1-800 Contacts later entered into another agreement with { } which provided that the earlier agreement would remain in full force. Matheson Decl. Tab 5,{[redacted]}. The later agreement was incorporated in a consent decree entered by a court. Matheson Decl. Tab 6, CX0316 (Order of Permanent Injunction).

9. 1-800 Contacts entered into an agreement w[redacted]}. Matheson Decl. Tab 7{[redacted]}.

10. 1-800 Contacts entered into an agreement w[redacted]}. Matheson Decl. Tab 8[redacted]}.

11. 1-800 Contacts entered into an agreement w[redacted]}. Matheson Decl. Tab 9[redacted]}.

12. 1-800 Contacts entered into an agreement [redacted]}. Matheson Decl. Tab 10[redacted]}.

13. 1-800 Contacts entered into an agreement [redacted]}. Matheson Decl. Tab 1[redacted]}.

14. 1-800 Contacts entered into an agreement [redacted]}. Matheson Decl. Tab 1[redacted]}.

15. 1-800 Contacts entered into an agreement [redacted]}. Matheson Decl. Tab 1[redacted]}.

16. 1-800 Contacts entered into an agreement [redacted]}. Matheson Decl. Tab 14[redacted]}.

17. 1-800 Contacts entered into an agreement [redacted]}. Matheson Decl. Tab 15[redacted]}.

18. 1-800 Contacts entered into an agreement [redacted]}. Matheson Decl. Tab 1[redacted]}.

19. 1-800 Contacts entered into an agreement [redacted]}. Matheson Decl. Tab 17[redacted]}.

20. 1-800 Contacts also entered into a sourcing and services agreement with a contact lens retailer. Matheson Decl. Tab 2, Answer ¶ 20; Tab {[redacted]}. 1-800 Contacts has never sued {[redacted]} for infringement of 1-800 Contacts' trademark rights. 1-800 Contacts did not enter into the sourcing and services agreement to settle litigation. Matheson Decl. Tab 2, Answer ¶ 20.

21. In total, 1-800 Contacts has entered into at least fourteen agreements with rival contact lens retailers ("Bidding Agreements").

B. Search Engine Advertising

22. An internet search engine is a website that uses software to locate information on other internet websites based on a search engine user's "query," which is a word or phrase entered by user. Search engines such as Google and Bing are available to the general public, and do not charge end users for entering queries. Matheson Decl. Tab 1, Compl. ¶ 7; Tab 2, Answer ¶ 7.

23. A search engine results page is the list of results produced by an internet search engine. A search engine results page includes "organic" or "natural" search results that are identified by the search engine's software as relevant to the user's query. A search engine results page may also include advertisements.

24. Search engines use an auction process to sell advertising space on the search engine results page. Matheson Decl. Tab 1, Compl. ¶ 10; Tab 2, Answer ¶ 10. Advertisers seeking to place advertisements on a search engine results page submit bids to the search engine. A bid denotes the maximum amount the advertiser is willing to pay to the search engine each time a user clicks on a displayed advertisement.

25. Advertisers choose the auctions they enter by placing bids on particular terms, called "keywords." A keyword instructs the search engine to display an advertisement if the user enters that keyword as a search engine query and certain other conditions are met. Alternatively, the advertiser may allow the search engine to choose the auctions the advertiser enters by instructing the search engine to match its bids to queries that the search engine deems relevant to the advertiser.

26. Advertisers may also ensure that their ads are not displayed in response to certain searches by submitting "negative keywords" to the search engine. A "negative keyword" instructs a search engine not to display an advertisement in response to a search query that contains that particular term or terms. Matheson Decl. Tab 1, Compl. ¶ 13; Tab 2, Answer ¶¶ 13, 24.

27. When a user enters a query, the search engine evaluates relevant bids. Whether an advertisement is displayed depends upon the amount of the bid, the quality of the advertisement as determined by the search engine, and negative keywords, if any. Quality refers to the search engine's assessment of whether the advertisement will be relevant and useful to the user.

C. The Terms of the Bidding Agreements Challenged in the Administrative Complaint

28. While the Bidding Agreements were phrased in various ways, each required a rival of 1-800 Contacts to refrain from bidding on 1-800 Contacts' specified trademark terms as keywords.

29. Four of the Bidding Agreements prohibit a rival of 1-800 Contacts from causing its website or advertisements to appear in response to any internet search for 1-800 Contacts' brand name, trademarks, or URLs and from causing its brand name, internet link or websites to

appear as a listing in a search engine results page when a user specifically searches for 1-800 Contacts' brand name, trademarks or URLs. These agreements were reached between 1-800 Contacts and { }. Matheson Decl. Tab 3,

{

}; Tab 4, {

}; Tab 7, {

[redacted]}; Tab 12,{[redacted]}; Tab 13,{[redacted]}; Tab 15,{[redacted]}; Tab 16,{[redacted]}.

31. Two of the Bidding Agreements prohibit a rival of 1-800 Contacts from purchasing or using any of 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, or 1-800 Contacts' URLs, as listed in an exhibit to the agreement, as triggering keywords in any internet search advertising campaign. Matheson Decl. T{[redacted]}; Tab 17,{[redacted]}.

32. One of the Bidding Agreements prohibits a rival of 1-800 Contacts from purchasing or using any of 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, or 1-800 Contacts' URLs, as listed in a schedule to the agreement, as triggering keywords in any internet search advertising campaign. Matheson Decl. T{[redacted]}.

33. Thirteen of the Bidding Agreements explicitly require a rival of 1-800 Contacts implement negative keywords.

34. Seven Bidding Agreements explicitly require a rival of 1-800 Contacts to

links triggered by those keywords. The list includes 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, and 1-800 Contacts' URLs. These Bidding Agreements were reached between 1-800 Contacts {[redacted]}. Matheson Decl. Tab 7, {[redacted]}; Tab 8,{[redacted]}.

36. Two Bidding Agreements require a rival of 1-800 Contacts to implement terms listed in an exhibit to the agreement as negative keywords in all search engine advertising campaigns. The list includes 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, and 1-800 Contacts' URLs. These Bidding Agreements were reached between 1-800 Contacts and {[redacted]}. Matheson Decl. Tab 1{[redacted]}; Tab 17,{[redacted]}.

37. One Bidding Agreement required a rival of 1-800 Contacts to agree to entry of a stipulated permanent injunction. Matheson Decl. Ta{[redacted]}. The injunction requires the rival, for the purpose of preventing the rival's internet advertising from appearing in response to a search for 1-800 Contacts' intellectual property rights, to implement as negative keywords 1-800 Contacts'

trademarks, variations on 1-800 Contacts' trademarks, and 1-800 Contacts' URLs, as listed in an exhibit to the permanent injunction. This Bidding Agreement was reached between 1-800 Contacts and {[redacted]}. Id. {[redacted]}; Tab 6, CX0316 at -004 (Order of Permanent Injunction, Exhibit A) (listing trademark terms and variations).

38. One Bidding Agreement requires a rival of 1-800 Contacts to implement as negative keywords in all internet search engine advertising campaigns 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, and 1-800 Contacts' URLs, as listed in a schedule to the agreement. This agreement was reached between 1-800 Contacts and {[redacted]}. Matheson Decl. Tab 1{[redacted]}.

39. The agreements are bilateral, meaning that 1-800 Contacts must also refrain from using each party's trademark terms as keywords for internet search advertising and must use each party's trademarks terms as negative keywords. Matheson Decl. Tab 2, Answer ¶ 23.

40. The Administrative Complaint alleges that the fourteen agreements unreasonably restrain competition and injure consumers. Matheson Decl. Tab 1, Compl. ¶ 31.

Respectfully submitted,

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Counsel Supporting the Complaint

Dated: November 3, 2016

UNITED STATES OF AMERICA
BEFORE THE 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

DECLARATION OF DANIEL J. MATHESON

1. I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could and would testify competently under oath to such facts.

2. I am an attorney at the Federal Trade Commission and Complaint Counsel in this proceeding. Attached to this declaration are the exhibits submitted in support of Complaint Counsel's Motion for Partial Summary Decision.

3. Tab 1 is a true and correct copy of the Administrative Complaint issued by the Federal Trade Commission in the above-captioned matter dated August 8, 2016.

4. Tab 2 is a true and correct copy of the Answer and Defenses of Respondent 1-800 Contacts, Inc. dated August 29, 2016.

5. Tab 3 is a true and correct copy {[redacted]}.

6. Tab 4 is a true and correct copy {[redacted]}.

7. Tab 5 is a true and correct copy of {

}.

8. Tab 6 is a true and correct copy of CX0316, an Order of Permanent Injunction issued in 1-800 Contacts, Inc. v. Vision Direct, Inc., No. 08-cx-01949 (S.D.N.Y. May 15, 2009).

9. Tab 7 is a true and correct copy of { }.

10. Tab 8 is a true and correct copy of { }.

11. Tab 9 is a true and correct copy of {}.

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2016, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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November 3, 2016 By: /s/ Dan Matheson

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

11 16 2016

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

In the Matter of 1-800 CONTACTS, INC., a corporation	Docket No. 9372

MEMORANDUM OF LAW OF RESPONDENT 1-800 CONTACTS, INC. IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

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TABLE OF AUTHORITIES
(continued)

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I. INTRODUCTION

Complaint Counsel's Motion for Partial Summary Decision should be denied for two

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the same litigation and pre-litigation activity alleged throughout their Complaint. See Compl. at 9 (Nos. 2-5).[1]

The Complaint's allegations thus plainly include petitioning activity protected by the First Amendment. It has been settled for decades that the Noerr-Pennington doctrine shields the filing of lawsuits and pre-litigation communications from antitrust scrutiny, unless it is shown that those actions are not objectively and subjectively reasonable. As a consequence, Respondent's Second and Third Affirmative Defenses, taken together, properly assert that Complaint Counsel's claim is barred "in whole or in part" by the Noerr-Pennington doctrine. Accordingly, Complaint Counsel's motion for partial summary decision should be denied.

Second, Complaint Counsel do not dispute, nor could they, that it is their burden under FTC v. Actavis, 133 S. Ct. 2223 (2013), to prove that Respondent's settlement agreements are subject to antitrust scrutiny. As the Complaint suggests, Complaint Counsel may try to avoid their Actavis burden by challenging the bona fides of the underlying litigation. Such a challenge would require Complaint Counsel to show that the lawsuits described in the Complaint were objectively and subjectively unreasonable and that Respondent's conduct is not protected by Noerr and the First Amendment. Should Complaint Counsel attempt to do that, they first must overcome Respondent's Second and Third Affirmative Defenses, which are properly asserted in anticipation of such an effort by Complaint Counsel to sidestep their burden under Actavis

[1] Such relief would be a prior restraint in violation of the First Amendment. See Simon Prop. Grp., Inc. v. Taubman Cts., Inc., 262 F. Supp. 2d. 794 (E.D. Mich. 2003).

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II. RESPONDENT'S SECOND AND THIRD AFFIRMATIVE DEFENSES SHOULD NOT BE STRICKEN

A. The Noerr-PenningtonDoctrine Protects Litigation and Pre-Litigation Activity

Because "[t]he right of access to the courts is … but one aspect of th(t)-23 Td [50 Td [(RE(t)TJ

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policy." Hovenkamp, et al., IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law § 11.3 (2d. ed., 2015 Supp.).

B. The Complaint Challenges Plainly Protected Conduct

Complaint Counsel do not dispute that Noerr-Pennington protects the filing of non-

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basis"—and that the Tenth Circuit affirmed that decision. See *Lens.com, Inc. v. 1-800 Contacts, Inc.*, No. 2:12-cv-352, Order, Docket Item 91, at 2 (D. Utah Mar. 2, 2014) (Ex. Z to Perry Decl.) Complaint Counsel make no argument that the situation was any different with respect to the other infringers. And for good reason: numerous courts have found that trademark claims may lie for uses of trademarks in internet keyword advertising similar to those that Respondent challenged.[4]

Given these holdings, the trademark infringement claims that Respondent asserted in its lawsuits and pre-litigation communications cannot be considered "sham." Complaint Counsel do not contend otherwise in their motion. Instead, they argue that "the issue of sham litigation is inapposite here, because the Complaint in this matter challenges agreements among private parties that resolved lawsuits, not the filing of the lawsuits themselves." Mem. of Law at 5. But that argument ignores the many other allegations of the Complaint, summarized above, that seek to establish liability on the basis of constitutionally-protected conduct. Respondent's Second and Third Affirmative Defenses are properly raised in response to these allegations.

C. Complaint Counsel Has Not Clearly Ruled Out An Effort To Evade Their *Actavis* Burden By Challenging The Bona Fides Of The Underlying Litigation

Complaint Counsel do not contend that antitrust scrutiny applies to all private settlements such that it necessarily applies to the trademark settlement agreements at issue here. Even before *Actavis*, the Commission recognized that antitrust liability "ordinarily" does not "attach" to traditional settlement agreements, and that it is "well-established that [voluntary settlement] agreements do not generally violate the antitrust laws." Brief for Petitioner at 26, *FTC v. Watson*

4 *E.g.*, *Edible Arrangements, LLC v. Provide Commerce, Inc.*, 2016 WL 4074121 (D. Conn. 2016); *Glob. Tel-Link Corp. v. Jail Call Servs., LLC*, 2015 WL 1936502 (E.D. Va. Apr. 28, 2015); *LBF Travel v. Fareportal, Inc.*, 2014 U.S. Dist. LEXIS 156583 (S.D.N.Y. Nov. 5, 2014).

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Pharms., Inc., (2013) (No. 12-416), 2013 WL 267027; see also id. at 25 (acknowledging that a patent holder's "good faith effort to enforce its patent through litigation cannot subject it to liability under the antitrust laws, even though the purpose of such litigation is to forestall competition").

Actavis reaffirmed that settlement agreements are subject to antitrust scrutiny in only limited situations. As the Court explained, "[i]nsofar as the dissent urges that settlements taking these commonplace forms have not been thought for that reason alone subject to antitrust liability, we agree, and do not intend to alter that understanding." 133 S. Ct. at 2233. For antitrust scrutiny to apply after Actavis, Complaint Counsel must at a minimum prove that the challenged settlements: (1) are not a "commonplace" form of agreement traditionally used to settle trademark disputes, and (2) that the "general legal policy favoring the settlement of disputes" is outweighed by the considerations that the Court set forth when considering "reverse payment" patent settlements. Id. at 2234. Complaint Counsel make no attempt in their motion to meet this burden.

Moreover, Complaint Counsel could not meet their burden if they tried. The settlements involved commonplace non-use trademark agreements.[5] They grew out of bona fide trademark infringement disputes. See infra at 5-6.[6] The agreements were within the range of litigation

[5] See McCarthy on Trademarks and Unfair Competition § 18:82 (4th ed. 2016 update) ("An agreement not to use or register a mark, usually entered into to settle an infringement dispute, is not against public policy and is an enforceable promise.");

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outcomes.[7] The resolution of trademark disputes is to be encouraged.[8] Unlike reverse payments, there is no risk that parties settling trademark disputes will seek to divide monopoly profits because trademarks do not confer monopoly rights.[9] And there is no “workable surrogate” like the size of a reverse payment that a court could use to avoid a “detailed exploration” of the underlying trademark dispute. *Actavis*, 133 S.Ct. at 2236-37.

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DATED: November 16, 2016

Respectfully submitted,

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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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Dated: November 25, 2016

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 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

[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]

[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

[5] *Cf. Mass. Mutual Life Ins. Co. v. Residential Funding Co., LLC*, 65 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.” *See* Response to Separate Statement ¶¶ 7-19. Such dispute over verbiage cannot affect the outcome of this suit, and there is no genuine dispute that 13 of the 14 agreements settled litigation – indeed, Complaint Counsel’s opening Memorandum stated that “thirteen of the fourteen Bidding Agreements settled lawsuits alleging trademark infringement.” Mem. at 1. Thus, these purported “disputes” si summary judgment cannot rest on generalized assertions, but must set forth “concrete particulars” showing the need for trial.”) (quoting *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978)). And the purported dispute is not “material,” because the fact that some arcane aspects of search engine operations are evolving does not affect the basic facts regarding search engine advertising. Those aspects of search engine operations will not affect the outcome of this case, and are not material to the issues presented in Complaint Counsel’s Motion.

Respectfully submitted,

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I hereby certify that on November 25, 2016, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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November 25, 2016

By: /s/ Dan Matheson

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Dated: January 10, 2017

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

January 10, 2017

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