

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

01 12 2017
585312

In the Matter of

1-800 CONTACTS, INC.,

Respondent.

Docket No. 9372

ORIGINAL

**RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S
MOTION FOR LEAVE TO FILE OPPOSITION TO RESPONDENT'S
MOTION TO COMPEL COMPLIANCE WITH SUBPOENA**

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January 12, 2017

Respondent moved for an order compelling Google Inc. to produce three settlement agreements responsive to Respondent's subpoena. Complaint Counsel now seeks to intervene on Google's behalf, despite knowing "that Google intends to oppose Respondent's motion" and

settlements [

] and thus would rebut this allegation.²

The Complaint alleges that companies settled with Respondent “to avoid prolonged and costly litigation” and that the agreements “go well beyond prohibiting trademark infringing conduct.” (Complaint ¶¶ 19, 21.) The sought-after settlements would rebut this allegation, showing that even a well-financed defendant chose to [

]. In addition, the

Google settlements [

], showing that the

Complaint’s allegation that Respondent’s settlements are overly restrictive is not well-founded.

The Complaint alleges that Respondent’s agreements harmed search engines. (Complaint ¶ 31.) Google’s settlement agreements, especially any that show Google [

], will tend to show search engines are not harmed by [

].

Relevancy is also demonstrated by Respondent’s Answer. *In re Kaiser Alum. & Chem. Corp.*, 1976 FTC LEXIS 68, *5 (F.T.C. Nov. 12, 1976) (“The relevancy of the information sought is determined by laying the subpoena along side the defenses raised by [Respondent’s] answer to the complaint.”) Respondent contends that its agreements “are legitimate, reasonable, and commonplace settlements of *bona fide* trademark litigation based on other contact lens retailers’ unauthorized use of 1-800 Contacts’ trademarks as keywords to trigger Internet search advertising.” (Respondent’s Answer and Defenses to Administrative Complaint at 1.) Google’s settlements, which [], would support this contention.

The relevance of Google’s settlements is also demonstrated by the fact that Microsoft, which operates at a riwr. Nov. 12, 197611.t

in response to the identical subpoena request. (Declaration of Sean Gates ¶¶ 2-3.) In fact, one of these agreements was with the very same litigant with which Google settled ([REDACTED]). (*Id.* at ¶ 3.)

The Court should deny Complaint Counsel's motion for leave to file an opposition.

Dated: January 12, 2017

Respectfully submitted,

/s/ Sean Gates

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In the Matter of

1-

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2017, I filed the foregoing documents 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
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing documents to:

John Harkrider	Thomas H. Brock
Alexander Bergersen	Barbara Blank
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Dated: January 12, 2017

Respectfully submitted,

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CERTIFICATE OF 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.

Dated: January 12, 2017

Respectfully submitted,

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Notice of Electronic Service

I hereby certify that on January 12, 2017, I filed an electronic copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion for Leave to File Opposition (PUBLIC), with:

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

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

I hereby certify that on January 12, 2017, I served via E-Service an electronic copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion for Leave to File Opposition (PUBLIC), upon:

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