

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**       **Maureen K. Ohlhausen, Acting Chairman**  
                                  **Edith Ramirez**  
                                  **Terrell McSweeney**

**OPINION AND ORDER OF THE COMMISSION**

**By OHLHAUSEN, Acting Chairman:**

**I. Introduction**

Internet search engines like Google and Bing sell advertising opportunities to firms across an array of different industries through computerized auctions. This matter involves agreements entered into between an online retailer of contact lenses, Respondent 1-800 Contacts, Inc., and certain of its rivals that allegedly limited competition in internet-search-advertising auctions and restricted truthful, non-misleading advertising.

The alleged background facts are straightforward. Between 2004 and 2013, 1-800 Contacts and

On August 8, 2016, the Commission issued an administrative complaint, alleging that the “bidding agreements” between 1-800 Contacts and its rivals harmed competition in relevant markets that include the sale of search advertising by auction in response to user queries regarding contact lenses in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Complaint alleges that 1-800 Contacts restricted competition beyond “the scope of any property right that 1-800 Contacts may have in its trademarks” and that the bidding agreements “are not reasonably necessary to achieve any procompetitive benefit.” Compl. ¶ 32.<sup>1</sup>

Subsequently, 1-800 Contacts filed its Answer, which includes the two affirmative defenses that are at issue here. In its Second Defense, 1-800 Contacts asserts that the Section 5 claim “is barred, in whole or in part, because the lawsuits that gave rise to the trademark settlement agreements described in the Complaint have not been alleged to be and have not been shown to be objectively and subjectively unreasonable.” And in its Third Defense, Respondent asserts that the claim “is barred, in whole or in part, because 1-800 Contacts’ conduct is protected under the *Noerr-Pennington* doctrine and the First Amendment of the United States Constitution.”

Complaint Counsel has moved for partial summary decision as to these two defenses. For the reasons explained below, we grant the motion.

## **II. Legal Standard and Undisputed Facts**

Under Rule 3.24 of the Commission’s Rules of Practice, a party may move for summary decision in its favor “upon all or any part of the issues being adjudicated.” 16 C.F.R. § 3.24(a)(1). The same legal standard applies to those motions as to motions for summary judgment under Federal Rule of Civil Procedure 56. *See In re N. Carolina Bd. of Dental Exam’rs*, 151 F.T.C. 607, 610-11 (2011), *aff’d N. Carolina Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, 717 F.3d 359 (4th Cir. 2013), *aff’d* 135 S. Ct. 1101 (2015). Hence, if there is no genuine dispute as to any material fact “regarding liability or relief,” a final decision and order properly issues. 16 C.F.R. § 3.24(a)(2).

Here, Complaint Counsel moves for partial summary decision on the issue whether 1-800 Contacts has properly stated its Second and Third Defenses. Although 1-800 Contacts challenges many of the facts that Complaint Counsel identifies as undisputed, Complaint Counsel’s motion does not turn on any facts outside the pleadings. Rather, the parties’ briefs

respect, the present



#### **IV. Conclusion**

Because the Complaint alleges that 1-800 Contacts violated Section 5 solely by entering into private bidding agreements, we hold that the *Noerr-Pennington* doctrine does not apply and 1-800 Contacts' Third Defense fails as a matter of law. Similarly, because Complaint Counsel