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protracted, expensive proceedings “do not necessarily result in decisions that are more just or fair.” *Id.* The various steps the Commission took to eliminate this delay and expense included a presumptive limit on each side to calling five expert witnesses.

The Commission was explicit: “It has been the Commission’s experience that five expert witnesses per side *is sufficient for each party to present its case.*” *Id.* at 58838 (italics added). Five experts per side were sufficient “in the *vast* majority of cases.” 74 Fed. Reg. 1813 (January 13, 2009) (interim final rulemaking) (italics added). And, the Commission was equally explicit that a side would be entitled to have more than 5 witnesses in only “*extraordinary circumstances.*” Rule 3.31A(b) (italics added); 73 Fed. Reg. at 58838 (proposed rules); 74 Fed.Reg. at 1813 (interim final rulemaking).

The Commission’s evaluation of the need for expert witnesses has been borne out by the facts. In all but one of the Part 3 cases since 2009 – many of which were far more complex than this case -- both complaint counsel and the respondent have needed far fewer experts than the rules permit. *The North Carolina Board of Dental Examiners*, No. 9343, involved conduct that was subject to significant regulatory oversight by the state board of dental examiners; each party presented two experts.⁶ *McWane, Inc.*, No. 9351, involved industry standards of the American Water Works Association and the newly-enacted American Recovery and Reinvestment Act of 2009. Each side called one expert.⁷ And, in a case the Court recently completed, *LabMD, Inc.*, No. 9357, the parties combined presented a *total* of five experts.⁸ Two recent merger cases also

⁶ See North Carolina Federation of Dentists, 152 F.T.C. 640 (Dec. 2, 2011) (Commission opinion and order) available at <https://www.ftc.gov/sites/default/files/documents/cases/2011/12/111207ncdentalopinion.pdf>. Notably, neither the Court nor either party saw the need for an expert to advise the Court about the nuances of North Carolina state law. In its January 13, 2017, notice, in contrast, Respondent has identified *two* experts who will testify about trademark law.

⁷ See *McWane Inc.*, No. 9351, 2014 WL 556261, *4 (F.T.C. Jan. 30, 2014) (opinion of the Commission) available at https://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion_0.pdf.

⁸ See Opinion of the Commission (July 29, 2016) at 6-7, reproduced at <https://www.ftc.gov/system/files/documents/cases/160729labmd-opinion.pdf>.

involved fewer than five experts per side. *Sysco Corp.*, No. 9364, for example, involved an \$8.2 billion dollar merger, which allegedly would have had anticompetitive effects in two distinct product markets and more than thirty different geographic markets. Complaint counsel and the respondent needed two experts each. And, in *Staples Inc.*, No. 9367, a \$6.3 billion merger, complaint counsel had two experts and the respondent had three.⁹

To our knowledge, there has been only one case since the 2009 Amendments, *Pom Wonderful LLC*, No. 9344, a consumer protection case, in which a party has even sought leave to have more than five experts. But in *Pom*, the respondents were defending the scientific merit of a variety of health clac 0 Ta v ed9(t)-16eqctt ma(ar)-1eifmxmxeal(e)]TJ v(e)]TJu(m)-6(f)-11 e [/mof.um.1()6(a

only three experts—two economists and one survey expert—well within the limits of the Part 3 regulations.

In response, Respondent has

CONCLUSION

For the foregoing reasons, Respondent should be ordered to withdraw two of the expert witnesses by February 23, 2017.¹²

Dated: February 4, 2017

Respectfully submitted,

/s/ Daniel J. Matheson

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Geoffrey M. Green
Barbara Blank
Charles A. Loughlin
Thomas H. Brock
Kathleen M. Clair
Gustav P. Chiarello
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Counsel Supporting the Complaint

¹² If the Court is inclined to grant Respondent leave to call seven experts, we respectfully ask the Court to consider the significant disadvantages we would face if, after receiving Respondent's seven expert reports on February 23, 2017, we are required to serve our rebuttal reports by March 8, 2017. Therefore, while we do not believe this would be a satisfactory resolution of this dispute, we respectfully ask the Court, if it approves Respondent going forward with more than five experts, to extend the deadline for our rebuttal reports from March 8, 2017, to March 14, 2017, the deadline for our depositions of their experts from March 20, 2017, to March 24, 2017, and the time for filing *in limine* motions until March 30, 2017.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)	
)	
1-800 CONTACTS, INC.,)	
a corporation,)	DOCKET NO. 9372
)	
Respondent)	
)	

**[Proposed] ORDER GRANTING COMPLAINT COUNSEL’S MOTION
TO LIMIT RESPONDENT TO FIVE (5) EXPERT WITNESSES**

On February 4, 2017, Complaint Counsel filed a *Motion and Memorandum In Support to Limit Respondent to Five (5) Expert Witnesses*. Finding good cause for the motion, Complaint Counsel’s Motion is GRANTED. Respondent is HEREBY ORDERED to withdraw two of the

CERTIFICATE OF SERVICE

I hereby certify that on FEBRUARY 4, 2017 I served COMPLAINT COUNSEL'S MOTION TO LIMIT RESPONDENTS TO FIVE (5) EXPERT WITNESSES via electronic mail on the following counsel for Respondents:

Steven Perry, Steven.Perry@mto.com
Justin Raphael, Justin.Raphael@mto.com
Stuart Senator, Stuart.Senator@mto.com
Gregoy Stone, Gregory.Stone@mto.com
Gregory Sergi, Gregory.Sergi@mto.com
Garth Vincent, Garth.Vincent@mto.com

Date: February 4, 2017

By: /s/Dan Matheson
Dan Matheson

STATEMENT OF CONFERENCE WITH OPPOSING COUNSEL

Pursuant to paragraph 4 of the Additional Provisions of the Scheduling Order, Complaint Counsel states that, as set forth in the motion, we have conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement.

Dated : February 4, 2017

/s/ Daniel Matheson

Ex. A

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

In the Matter of

1-800 CONTACTS, INC.,
a corporation

Docket No. 9372

RESPONDENT'S EXPERT WITNESS LIST

Pursuant to Paragraph 19(a) of the Scheduling Order and Rule 3.31(a),

Respondent hereby provides a list of experts that it currently intends to call as witnesses at the hearing. Respondent reserves the following right

1. Not to call at the hearing one or all of the persons listed;
2. To call any of the persons identified by Complaint Counsel as expert witnesses, including any identified as rebuttal experts;
3. To add experts to this list and/or present supplemental or surrebuttal reports and opinions, if necessary or appropriate, following Complaint Counsel's opening expert reports and/or rebuttal expert reports; and
4. To call any of these individuals or any other person at the hearing in order to respond to testimony or other evidence presented by Complaint Counsel, including in surrebuttal.

Respondent acknowledges the provision of Rule 3.31A(b) that "[e]ach side will be limited to calling at the evidentiary hearing 5 expert witnesses including rebuttal or

surrebuttal expert witnesses and expects to reduce its list after receiving Complaint Counsel's expert reports and/or file a motion seeking leave to call additional expert witnesses.

Subject to the foregoing, including its reservations of rights, Respondent provides the following list of experts:

EXPERT WITNESSES

1. Dr. Kevin Murphy. Professor Murphy's background, qualifications, and publications within the past ten years are described in his curriculum vitae, a copy of which is provided herewith as Exhibit A. Transcripts of Professor Murphy's testimony in *US Airways, Inc. v. Sabre Holdings Corp.*, United States District Court, Southern District of New York, Case No. 1:14-cv-02725-MGC are provided as Exhibit B. Transcripts of Professor Murphy's testimony in *Aspinall v. Philip Morris, USA, Inc.*, Superior Court for the Commonwealth of Massachusetts, Case No. 98-600-BLSI, are provided as Exhibit C. Neither Professor Murphy nor Respondent have in their possession, custody, or control any transcripts of other trial or deposition testimony given within the past four years that are not under seal.
2. Dr. Anindya Ghose. Professor Ghose's background, qualifications, and publications within the past ten years are described in his curriculum vitae, provided as Exhibit D. In addition, Professor Ghose testified at a deposition in *In re Facebook, Inc., IPO Securities and Derivative Litigation*, United States District Court, Southern District of New York, Case No. 1:12-cv-02389. Neither Professor Ghose nor Respondent have in their possession, custody, or control any transcripts of trial or deposition testimony given within the past four years that are not under seal.
3. Dr. Michael Ostrovsky. Professor Ostrovsky's background, qualifications, and publications within the past ten years are described in his curriculum vitae, provided as Exhibit E. Professor Ostrovsky has not given trial or deposition testimony within the past four years.
4. Dr. William Landes. Professor Landes's background, qualifications, and publications within the past ten years are described in his curriculum vitae, provided as Exhibit F. Professor Landes has not given trial or deposition testimony within the past four years.
5. Mr. Howard S. Hogan. Mr. Hogan's background, qualifications, and publications within the past ten years are described in his curriculum vitae, provided as Exhibit G. Mr. Hogan has not given trial or deposition testimony within the past four years.

6. Dr. Ronald Goodstein. Professor Goodstein's background, qualifications, and publications within the past ten years are described in his curriculum vitae, provided as Exhibit H. Professor Goodstein has not given trial or deposition testimony within the past four years.
7. Dr. Kent Van Liere. Dr. Van Liere's background, qualifications, and publications within the past ten years are described in his curriculum vitae, provided as Exhibit I. The transcript of Dr. Van Liere's deposition in In re: Lumber Liquidators Chinese-Manufactured Flooring Products Marketing, Sales Practice and Products Liability Litigation, United States District for the Eastern District of Virginia, Case No. 1:11-cv-00023-LJM, is provided as Exhibit J.

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Chad Golder (chad.golder@mto.com)
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, DC 20004

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2017, I served RESPONDENT'S EXPERT WITNESS LIST on the following Complaint Counsel:

Thomas H. Brock, tbrock@ftc.gov
Barbara Blank, bblank@ftc.gov
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Mark Taylor, mtaylor@ftc.gov

DATED: January 13, 2017

By: /s/ Gregory P. Stone
Gregory P. Stone

Ex. B

Matheson, Daniel

Tuesday, January 31, 2017 4:52 PM

'Stone, Gregory'; Raphael, Justin; Blank, Barbara; Loughlin, Chuck; Slaiman, Charlotte; Green, Geoffrey; Chiarello, Gustav; Gray, Joshua Barton; Clair, Kathleen; Taylor, Mark; Hopkin, Nathaniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.

~800CON_FTC_ATTYS; Sean Gates <sgates@charislex.com> (sgates@charislex.com)

RE: Dkt. 9372 - Complaint Counsel's Expert Witness List

Greg,

Thank you for your suggestion. However, we do not believe it will be productive to agree on a briefing schedule and a joint request to the Court for a ruling unless we request that the Court issue a ruling on or before February 22. It risks putting the Court in a difficult position if Respondent files its opposition shortly before the holiday weekend and we request a ruling coming soon after the holiday. To avoid this risk, it may be best if Complaint Counsel simply files its motion without an agreement regarding the briefing schedule, unless you are

you would not otherwise be working on, which reports would be due in accordance with the Scheduling Order on March 8.

Please let us know if this proposal is acceptable.

Best regards,

Greg

From: Matheson, Daniel [<mailto:dmatheson@ftc.gov>]

Sent: Monday, January 30, 2017 1:01 PM

To: Stone, Gregory; Raphael, Justin; Blank, Barbara; Loughlin, Chuck; Slaiman, Charlotte; Green, Geoffrey; Chiarello, Gustav; Gray, Joshua Barton; Clair, Kathleen; Taylor, Mark; Hopkin, Nathaniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.

Cc: ~800CON_FTC_ATTYS; Sean Gates sgates@charislex.com (sgates@charislex.com)

Subject: RE: Dkt. 9372 - Complaint Counsel's Expert Witness List

Greg,

We discussed this afternoon the schedule on which Respondent anticipates making a decision on whether to narrow its list of experts, or in the alternative to file a motion seeking leave to call

From: Stone, Gregory [mailto:Gregory.Stone@mto.com]
Sent: Sunday, January 29, 2017 6:01 PM
To: Matheson, Daniel; Raphael, Justin; Blark, Barbara; Loughlin, Chuck; Slaiman, Charlotte; Green, Geoffrey; Chiarello, Gustav; Gray, Joshua Barton; Clair, Kathleen; Taylor, Mark; Hopkin, Nathaniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.
Cc: ~800CON_FTC_ATTYS; Sean Gates sgates@charislex.com (sgates@charislex.com)
Subject: RE: Dkt. 9372 - Complaint Counsel's Expert Witness List

Dan,

We can discuss this topic during our meet and confer tomorrow. We acknowledge, as we did in our expert disclosure, that the rule limits the number of experts who can testify at trial, subject to a motion to expand that number. I do not believe that the rule limits the number of experts who can be designated by a party prior to the time that trial testimony is elicited, however. At the same time, I recognize that your familiarity with the rules is much greater than ours, so if there are other provisions we should also consider, please let us know. It would be fine if you point those out to us during tomorrow's meet and confer.

From: Matheson, Daniel [mailto:dmatheson@ftc.gov]
Sent: Friday, January 27, 2017 1:35 PM
To: Stone, Gregory; Raphael, Justin; Blank, Barbara; Loughlin, Chuck; Slaiman, Charlotte; Green, Geoffrey; Chiarello, Gustav; Gray, Joshua Barton; Clair, Kathleen; Taylor, Mark; Hopkin, Nathaniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.
Cc: ~800CON_FTC_ATTYS; Sean Gates sgates@charislex.com (sgates@charislex.com)
Subject: RE: Dkt. 9372 - Complaint Counsel's Expert Witness List

Greg,

Thanks for providing these dates. We would like to meet and confer early next week regarding the identity of the experts Respondent intends to call at the hearing. If convenient, we can address the issue during our meet and confer scheduled for January 20 at 2:00 Eastern.

As you are aware, absent an Order authorizing additional experts due to "extraordinary circumstances, Respondents limited to five expert witnesses at the hearing under Rule 3.31A(b). ("Each side will be limited to calling at the evidentiary hearing 5 expert witnesses including any rebuttal or surrebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances.")

Our position is that after receiving Complaint Counsel's experts' reports, Respondent should promptly amend its expert witness list to identify which experts it will call at the hearing to conform with Rule 3.31A(a). ("The parties shall serve each other with a list of experts promptly

Respondent's expert witness list, or any motion under Rule 3.31A(b), must be made promptly enough to ensure that Complaint Counsel does not occasion unnecessary burdens related to experts who will ultimately not testify.

Please let us know when you are available next week to discuss this issue.

Regards,

Dan

From: Stone, Gregory [<mailto:Gregory.Stone@mto.com>]

Sent: Friday, January 27, 2017 2:18 PM

To: Matheson, Daniel; Raphael, Justin; Blark, Barbara; Loughlin, Chuck; Slaiman, Chab71 Tc s[(Friday)6.4(, Janu)6n g ITm (From

Notice of Electronic Service

I hereby certify that on February 04, 2017, I filed an electronic copy of the foregoing Complaint Counsel's Motion and Memorandum to Limit Respondent o Five Expert Witnesses, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

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

I hereby certify that on February 04, 2017, I served via E-Service an electronic copy of the foregoing Complaint Counsel's Motion and Memorandum to Limit Respondent o Five Expert Witnesses, upon:

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