

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

03 28 2017
586151

In the Matter of

1-800 Contacts, Inc.,
a corporation,

Respondent.

Docket No. 9372

ORIGINAL

**RESPONDENT 1-800-CONTACTS, INC.'S [AMENDED] OPPOSITION TO
COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO PRECLUDE THE
TESTIMONY OF MESSRS. BRYAN PRATT, ESQ. AND MARK MILLER, ESQ.**

I. INTRODUCTION

Complaint Counsel's motion to preclude the testimony of Bryan Pratt and Mark Miller does not satisfy the governing standard, as set forth by the Scheduling Order, and should be denied. The motion is based on the unfounded and inaccurate assumption that Messrs. Pratt and Miller will testify at trial regarding privileged communications with their

at trial” if Complaint Counsel believe that testimony is cumulative or irrelevant. *Id.* Complaint Counsel’s motion should be denied.

his individual capacity, and they deposed Mark Miller on February 8, 2017, both in his individual capacity and as a Rule 3.33(c)(1) company witness. Miller Tr. 11:7-21.¹

During their depositions, Messrs. Pratt and Miller declined to answer a handful of questions on privilege grounds. Those few questions involved either: (1) the substance of specific confidential communications between Messrs. Pratt or Miller and officers or employees of 1-800 Contacts; or (2) core attorney work product prepared in connection with litigation. Messrs. Pratt and Miller did not testify at their depositions, and will not testify at trial, about the content of those (or any other) privileged materials. *See* Pratt Tr. 33:4-34:13. In other words, Respondent will *not* at trial elicit privileged testimony as a “sword” that was previously “shielded” on the basis of a privilege. Nor has Respondent deprived Complaint Counsel of the fair opportunity to cross-examine its witnesses on the subjects about which they will testify. Messrs. Pratt and Miller collectively answered hundreds of questions posed by Complaint Counsel in the course of more than two full days of questioning. The Miller deposition, for example, began at 8:45 a.m. and ended over eight hours later at 5:15 p.m. (with a lunch break). Miller Tr. 3, 120, 254. Complaint Counsel’s motion cites to only *three* instances in that entire day when Miller was instructed not to answer a question on privilege grounds. Motion at 3.²

¹ Mr. Miller was designated by Respondent as its witness on two topics set out in Complaint Counsel’s Rule 3.33(c)(1) deposition notice. Miller Tr. 11:7-12:1.

² Mr. Pratt’s transcript shows that he was instructed not to answer a question on privilege grounds approximately ten times; many of those instructions involved a single topic (*e.g.*, about claims that he had decided *not* to assert). *Id.*

III. ARGUMENT

A. The Sword And Shield Doctrine Does Not Apply Here, Because Messrs. Pratt And Miller Will Not Testify At Trial Regarding Privileged Matters.

Complaint Counsel's motion does not challenge the propriety of the privilege assertions that Respondent has made. Motion at 5. Instead, the motion argues that Messrs. Pratt and Miller should not be allowed to "use privilege as both a sword and a shield" by testifying at trial about privileged communications or attorney work product. *Id.* But 1-800 Contacts has not advanced an advice of counsel defense, and the cases that Complaint Counsel rely on are inapposite. In *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992), for example, the defendant asserted that its position on a tax issue was "reasonable" according to advice given by its tax counsel. *Id.* The Ninth Circuit upheld the District Court's determination that by "rel[ying] upon the advice of counsel to support the reasonableness of its [SEC filing], Pennzoil waived the attorney-client privilege with respect to those communications." *Id.* at 1163. Neither *Chevron* nor any of Complaint Counsel's other cases are on point, because 1-800 Contacts is not offering or relying on an "advice of counsel" defense on any issue, and Messrs. Pratt and Miller will not testify as to privileged communications. In other words, "[b]ecause it does not appear that privileged materials are being used as a 'sword,' the fact that other, assertedly privileged documents are being shielded is insufficient to invoke the 'sword and shield' doctrine." *See In re McWane, Inc.*, 2012 WL 3597375, at *4 (Aug. 14, 2012). *See also Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) (privilege is not waived unless the "advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication").

B. Complaint Counsel Has Not Shown That Messrs. Pratt And Miller’s Testimony Is Clearly Inadmissible On All Potential Grounds

Complaint Counsel’s fallback argument is that Messrs. Pratt and Miller could provide relevant testimony *only* if they discussed *privileged* communications and that any testimony on non-privileged matters would be “irrelevant and immaterial.” Motion at 6. To prevail on that argument, Complaint Counsel would need to prove that *all* of Messrs. Pratt and Miller’s non-privileged testimony “is clearly inadmissible on all potential grounds.” Scheduling Order, ¶ 9. Complaint Counsel have not met this high standard.

“Relevant, material, and reliable evidence shall be admitted.” 16 C.F.R. § 3.43(b). In a bench trial, a party that seeks to exclude *all* potential testimony by a witness faces an especially high standard, because “the risk of prejudice from giving undue weight to marginally relevant evidence is minimal.” **Scheduling Order, ¶ 9**. Here, Messrs. Miller and Pratt’s anticipated testimony is directly relevant to the allegations in the Complaint. *See* Complaint, ¶¶ 17-19; 25-27 (referring repeatedly to communications between 1-800 Contacts and retailers about trademark disputes); Pratt Tr. 38:18-39:18; Miller Tr. 108:18-109:9, 173:19-174:5, 178:2-22, 180:12-18, 217:22-220:23 (discussing their communications with third party retailers and how they interpreted the settlement agreements). Moreover, Complaint Counsel themselves designated fact witnesses from two contact lens retailers to te

and Miller’s non-privileged testimony about their oral and written communications with retailers will also refute any assertion that contact lens retailers entered into the challenged agreements as a part of a “conspiracy” to restrain trade, as Complaint Counsel asserted at the Preliminary Hearing. *See, e.g.*, Miller Tr. 202:5-204:13.

C. Complaint Counsel’s Mischaracterization of the Commission’s February 1, 2017 Order Does Not Assist Them In Meeting The Standard For Relief Here.

The Court should also reject Complaint Counsel’s further argument that the Commission’s February 1, 2017 Order renders irrelevant any and all testimony by Messrs. Pratt and Miller, for the argument is based on an inaccurate description of that Order. Contrary to Complaint Counsel’s contention, the February 1 Order did not hold that “whether or not the underlying litigations were ‘bona fide,’ sham or otherwise has *no bearing* on the legality of the restraints contained within the settlement agreements.” Motion at 6 (emphasis added). Complaint Counsel included a similarly expansive argument in its opposition to Respondent’s Motion to Permit Respondent to Call Six (6) Expert Witnesses, and this Court rejected that argument. *See* Order Granting Respondent’s Motion to Permit Respondent to Call Six Expert Witnesses, at 4 (observing that the Commission’s February 1, 2017 “holdings do not foreclose Respondent from attempting to disprove Complaint Counsel’s allegations that the Challenged Agreements were unjustified and anticompetitive, or from defending the Challenged Agreements as procompetitive”). Messrs. Pratt and Miller should be allowed to provide their non-privileged testimony that goes to these issues.

IV. CONCLUSION

The Court should deny Complaint Counsel's motion *in limine*.

Dated: March 28, 2017

Respectfully submitted,

/s/ Steven Perry

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2017, I filed **RESPONDENT 1-800-CONTACTS, INC.'S AMENDED OPPOSITION TO COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO PRECLUDE THE TESTIMONY OF MESSRS. BRYAN PRATT, ESQ. AND MARK MILLER, ESQ.** using the FTC's E-Filing System, which will send notification of such filing to all counsel of record as well as the following:

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

DATED: March 28, 2017

By: /s/ Eunice Ikemoto
Eunice Ikemoto

CERTIFICATE FOR ELECTRONIC FILING

I hereby 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: March 28, 2017

By: /s/ Steven M. Perry
Steven M. Perry
Attorney

Notice of Electronic Service

I hereby certify that on March 28, 2017, I filed an electronic copy of the foregoing Respondent's [AMENDED] Opposition to Motion In Limine to Preclude the Testimony of Messrs. Bryan Pratt, Esq. and Mark Miller, Esq., with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
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Donald Clark
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I hereby certify that on March 28, 2017, I served via E-Service an electronic copy of the foregoing Respondent's [AMENDED] Opposition to Motion In Limine to Preclude the Testimony of Messrs. Bryan Pratt, Esq. and Mark Miller, Esq., upon:

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