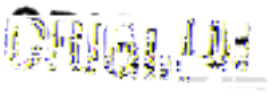
~~PUBLIC~~

04 24 2017
586476



FTC argued in that brief, "it is the role of the trial judge to determine the law of the case and it is inappropriate to delegate that function to an expert by allowing testimony on the controlling legal principles."[2]

II. BACKGROUND

otherwise define trade secrets.[5] In an antitrust case with mirror issues to this case, the Court excluded the testimony of plaintiff's law professor who sought to explain by reference to various patent law doctrines that the defendant could not have had a reasonable expectation of success in the underlying patent litigation. In re Wellbutrin SR Antitrust Litig., Nos. 04-5525, 04-5898, 05-396, 2010 WL 8425189, at *3-4 (E.D. Pa. Mar. 31, 2010). As noted, the FTC likewise successfully moved to exclude a retired Federal Judge's testimony on the meaning of patent law in an antitrust case that was based in part on patent issues.[6] Indeed, the arguments in this brief correspond closely to those presented by the FTC in that case.[7]

The above cases are directly on point. Here, Professor Tushnet's anticipated testimony consists largely of inadmissible explanations of the applicable trademark legal standards and doctrines. For example, Complaint Counsel seek to "educate" this Court by presenting the opinions of their expert regarding what can and cannot constitute trademark infringement or trademark dilution. See CCXD0007-003, -005-6, -009; CX8014 ¶¶ 20, 87. As in Wellbutrin SR, they offer these doctrinal

The

DATED: April 23, 2017

Respectfully submitted,

/s/ Steven M. Perry

Gregory P. Stone (gregory.stone@mto.com)
Steven M. Perry (steven.perry@mto.com)
Garth T. Vincent (garth.vincent@mto.com)
Stuart N. Senator (stuart.senator@mto.com)
Gregory M. Sergi (gregory.sergi@mto.com)
Zachary Briers (zachary.briers@mto.com)
Julian Beach (julian.beach@mto.com)
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue
Los Angeles, California 90071
Phone: (213) 683-9100
Fax: (213) 687-3702

Justin P. Raphael (justin.raphael@mto.com)
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, California 94105

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

Sean Gates (sgates@charislex.com)
CHARIS LEX P.C.
16 N. Marengo Avenue, Suite 300
Pasadena, California 91101
Phone: (626) 508-1717
Fax: (626) 508-1730

Counsel for Respondent 1-800 Contacts, Inc.

In the Matter of 1 r

Testimony

REBUTTAL OPINIONS

Trademark and Advertising Issues Posed by 1-800's Experts

- Does sale and use of trademarked terms in keyword advertising alone constitute infringement?
- Does empirical evidence suggest that consumers experience trademark confusion when they see rival ads generated by keyword advertising?
- Are the terms of the 1-800's settlement agreements "commonplace" or remedies that courts would order?
- Does sale and use of trademarked terms in keyword advertising alone constitute dilution?

TrademarkFramework

- Shorthandfacilitatescomparison and differentiation amongsimilarproductsT(tia)8.5(t)0.5(ic

Keyword Advertising Cases

- Case law consistently favors competitive advertising – "free riding" is really competition
- Cases Mr. Hogan cites do not stand for the proposition that keyword advertising alone is infringement

Keyword Only Cases

- Blue Nile – motion to dismiss denied because parties were not direct competitors – wholesaler vs. retailer
- FragranceNet – motion to dismiss related to validity of Plaintiff's marks, not to confusion
- LBF Travel – District Judge did not rule on dismissal of keyword infringement claims
- Rhino Sports – no liability for broad match ing; defendant free to bid on generic terms

Empirical Studies

- Studies show:
  - Varied search goals
  - Expectation of and appreciation for comparative advertising
- The American Airlines studies ask the wrong questions
- Confusion about whether a search result is organic or sponsored is not trademark confusion

Remedies

- No court has found liability based solely on keyword bidding
- No cases support use of broad matching prohibition or negative keyword requirement as a trademark remedy
- No court has implemented reciprocal restraints on bidding
- Hogan's cited cases do not support finding of "commonality"
- There is no way to say what settlement terms are "common"

Dilution

- Professor Goodstein's conception of dilution is not the legal definition
- Anti-dilution statute includes an explicit exclusion for comparative advertising like that at issue here

Source: 1800F_00045485.xls; cited in CX8014 (Tushnet Rebuttal Report).

See First Amended Complaint at 25, Binder v. Disability Group, Inc., 772 F. Supp. 2d 1172 (C.D. Cal. 2011), cited in CX8014 (Tushnet Rebuttal Report).

"[Defendant] Disability Group, Inc. has purchased keywords comprised, in whole or in part, of the BINDER & BINDER MARKS. Disability Group, Inc. has used the BINDER & BINDER MARKS as a heading to link to Defendant's website."

Id. ¶¶ 49 r50 (internal numbering omitted), cited in CX8014 (Tushnet Rebuttal Report).

Quotesfrom Cases

"Needless to say, a defendant must do more than use another's mark in commerce to violate the Lanham Act…. We have no idea whether Rescuecom can prove that Google's use of Rescuecom's trademark in its AdWords program causes a likelihood of confusion or mistake…. Whether Google's actual practice is in fact benign or confusing is not for us to judge at this time. We consider at the 12(b)(6) stage only what is alleged in the Complaint."

Rescuecom Corp. v. Google, Inc., 562 F.3d 123, 130–31 (2d Cir. 2009)

“[I]n the age of FIOS, cable modems, DSL and T1 lines, reasonable prudent and

“Perhaps in the abstract, one who searches for a particular business with a strong mark and sees an entry on the results page will naturally infer that the entry is for that business. But that inference is an unnatural one when the entry is clearly labeled as an advertisement and clearly

"Because Amazon clearly labels each of the products for sale by brand name and model number accompanied by a photograph of the item, it is unreasonable to suppose that the reasonably prudent consumer accustomed to shopping online would be confused about the source of the goods."

Multi Time Mach., Inc. v. Amazon.com, Inc., 804 F.3d 930, 938 (9th Cir. 2015), cert. denied, 136 S.Ct. 1231 (2016).

“BPI points to no case indicating that the simple purchase of advertising

"The Hatfields used up to seven Web sites to sell Products to the general public. The Web sites displayed pictures and descriptions of Products and used Plaintiffs' trademarks. The Hatfields also used Plaintiffs' trademarks in the meta tags of their Web sites. Further, Defendants paid a company called Overture.com for an 'Overture Premium Listing' for 'Australian Gold' and 'Swedish Beauty,' guaranteeing that one of Defendants' Web sites would be among the first three listed if either of Plaintiffs' trademarks was used in an internet search query."

Australian Gold, Inc. v. Hatfield, 436 F.3d 1228, 1233 (10th Cir.

"We conclude that the factors other than evidence of actual confusion (even if we assume that 1 r800's mark is a strong one) firmly support the unlikelihood of confusion. This case is readily distinguishable from Australian Gold, in which the alleged infringer used its competitor's trademarks on its websites."

1 800 Contacts, Inc. v. Lens.Com, Inc., 722 F.3d 1229, 1245 (10th Cir. 2013).

EXHIBIT C

PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL TRADE COMMISSION	:	CIVIL ACTION
	:	
v.	:	
	:	
ABBVIE INC., et al.	:	NO. 14-5151

ORDER

AND NOW, this 27th day of March, 2017, it is hereby ORDERED that the motion of plaintiff Federal Trade Commission to strike the report and exclude the testimony of defendants' legal expert Roderick R. McKelvie (Doc. # 229) is GRANTED. See Berckeley Inv. Grp., Ltd. v. Colkitt, 455 F.3d 195, 217 (3d Cir. 2006).

BY THE COURT:

/s/ Harvey Bartle III
J.

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2017, I filed **RESPONDENT 1-800 CONTACTS, INC.'S TRIAL BRIEF REGARDING ANTICIPATED OBJECTIONS TO THE TESTIMONY OF PROFESSOR REBECCA TUSHNET** using the FTC's E-Filing System,

Notice of Electronic Service

I hereby certify that on April 23, 2017, I filed an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s Trial Brief Regarding Anticipated Objections to the Testimony of Professor Rebecca Tushnet, 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 April 23, 2017, I served via E-Service an electronic copy of the foregoing Respondent 800 Contacts, Inc.'s Trial Brief Regarding Anticipated Objections to the Testimony of Professor Rebecca Tushnet, upon:

Thomas H. Brock
Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

Barbara Blank
Attorney
Federal Trade Commission
bblank@ftc.gov
Complaint

Gustav Chiarello
Attorney
Federal Trade Commission
gchiarello@ftc.gov
Complaint

Kathleen Clair
Attorney
Federal Trade Commission
kclair@ftc.gov
Complaint

Joshua B. Gray
Attorney
Federal Trade Commission
jbgray@ftc.gov
Complaint

Geoffrey Green
Attorney
Federal Trade Commission
ggreen@ftc.gov
Complaint

Nathaniel Hopkin
Attorney
Federal Trade Commission

nhopkin@ftc.gov
Complaint

Charles A. Loughlin
Attorney
Federal Trade Commission
cloughlin@ftc.gov
Complaint

Daniel Matheson
Attorney
Federal Trade Commission
dmatheson@ftc.gov
Complaint

Charlotte Slaiman
Attorney
Federal Trade Commission
cslaiman@ftc.gov
Complaint

Mark Taylor
Attorney
Federal Trade Commission
mtaylor@ftc.gov
Complaint

Gregory P. Stone
Attorney
Munger, Tolles & Olson LLP
gregory.stone@mto.com
Respondent

Steven M. Perry
Attorney
Munger, Tolles & Olson LLP
steven.perry@mto.com
Respondent

Garth T. Vincent
Munger, Tolles & Olson LLP
garth.vincent@mto.com
Respondent

Stuart N. Senator
Munger, Tolles & Olson LLP
stuart.senator@mto.com
Respondent

Gregory M. Sergi
Munger, Tolles & Olson LLP
gregory.sergi@mto.com
Respondent

Justin P. Raphael
Munger, Tolles & Olson LLP
Justin.Raphael@mto.com
Respondent

Sean Gates
Charis Lex P.C.
sgates@charislex.com
Respondent

Mika Ikeda
Attorney
Federal Trade Commission
mikeda@ftc.gov
Complaint

Zachary Briers
Munger, Tolles & Olson LLP
zachary.briers@mto.com
Respondent

Chad Golder
Munger, Tolles, and Olson
chad.golder@mto.com
Respondent

Julian Beach
Munger, Tolles & Olson LLP
julian.beach@mto.com
Respondent

Aaron Ross
Attorney
Federal Trade Commission
aross@ftc.gov
Complaint

Thomas Dillickrath
Attorney
Federal Trade Commission
tdillickrath@ftc.gov
Complaint

Jessica S. Drake
Attorney
Federal Trade Commission
jdrake@ftc.gov
Complaint

W. Stuart Hirschfeld
Attorney
Federal Trade Commission
shirschfeld@ftc.gov
Complaint

David E. Owyang
Attorney
Federal Trade Commission
dowyang@ftc.gov
Complaint

Henry Su
Attorney
Federal Trade Commission

hsu@ftc.gov
Complaint

Steven Perry
Attorney