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

In the Matter of

Docket No. 9372

least four experts to explain trademark law to the Court. But this Court does not need a single expert to help it understand an area of law—much less four.

Respondent's Motion should be denied.

Argument

Rule 3.31A(b) provides that "[e]ach side will be limited to calling at the evidentiary hearing 5 expert witnesses" unless the party shows that "extraordinary circumstances" justify a greater number. 16 C.F.R. § 3.31A(b). When enacting this rule, the Commission explained that "five expert witnesses per side is sufficient for ea

effect, it must operate as more than a requirement that expert testimony be relevant and non-cumulative.

The Commission's rules force parties to prioritize their presentation of evidence in an

Contacts trademarks. *Id.* ¶¶ 17-24. The fact that similar agreements were entered into with fourteen different competitors does not make the agreements—or the case—complicated.

For example, another case recently litigated before this Court, *In re North Carolina Board of Dental Examiners,* required only two experts for each party. *See* 2011 FTC LEXIS 137, at *41-47 (Jul. 14, 2011) (initial decision). In *NC Dental*, as in this case, Complaint Counsel charged an agreement among competitors in violation of Section 5 of the FTC Act, which encompasses violations of Section 1 of the Sherman Act. And there, as in this case, the defendant argued that its actions were in fact procompetitive and promoted "legal competition." *Id.* at *238. But this case is even simpler. *NC Dental* required an analysis of whether the dental board was capable of concerted action. *Id.* at *162. In this case, it is clear the parties to the agreements (independent, direct competitors) are capable of concerted action. Moreover, *NC Dental* involved the exploration of health and safety considerations, in addition to issues of state law. *In re N.C. Bd. of Dental Examiners*, 152 F.T.C. 640, 677 (2011) (noting respondent defended on the basis that its actions were "promoting the public health and enforcing state law") (citation omitted). And yet two experts per side were sufficient in *NC Dental*. 2011 FTC LEXIS 137 at *41-47.[1]

Indeed, this case has recently been made simpler by the Commission's grant of partial summary decision eliminating two of Respondent's defenses. Opinion and Order of the Commission, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017) ("Commission Order"). First, the

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[1] Similarly, in other recent cases the parties have been able to put on their case with fewer than five experts. In *McWane, Inc.*, No. 9351, the parties called one expert each. In *LabMD, Inc.*, No. 9357, the parties called five experts total. In *Sysco Corp.*, No. 9364, complaint counsel and respondent needed two experts each. And in *Staples Inc.*, No. 9367, complaint counsel had two experts and the respondent had three. We have copies of the notices exchanged by the parties in these cases, and will provide them to the Court or Respondent upon request.

Commission ruled that the *Noerr-Pennington* doctrine does not immunize Respondent's conduct, because "anticompetitive, private agreements lie beyond Noerr's protection." *Id.* at 3. Respondent's instant Motion suggests that it intends to persist in raising before this Court its already-rejected argument that "the circumstances and character of the agreements make antitrust scrutiny inappropriate." Resp. Mot. at 2. But Respondent should not be permitted to present any expert testimony in support of this notion. The Commission has already answered this question as a matter of law. Moreover, even if the Commission's decision did not foreclose this defense, this Court does not need the assistance of any experts to interpret legal precedent.

Second, the Commission held that Respondent may not offer the purported reasonableness of its trademark lawsuits as an affirmative defense to antitrust scrutiny, because while "the nature of the trademark disputes may inform the antitrust analysis, the reasonableness of those disputes is not an affirmative defense." Commission Order at 4. Respondent suggests that expert testimony will assist it in presenting evidence related to the reasonableness of its lawsuits, including evidence that its employees "believed" that the Bidding Agreements were appropriate because they believed that competitors' advertisements being displayed in response to searches for "1-800 Contacts" was confusing to consumers. Resp. Mot. at 6-7. But the Commission has already held that such a "belief" does not present a defense to an antitrust claim, consistent with decades of precedent establishing that a civil antitrust violation does not require proof of specific intent. *See U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 436 n.13 (while "a defendant's state of mind or intent is an element of a criminal antitrust offense" that is not generally true of civil antitrust offenses). In short, a defendant's subjective belief that an agreement makes the world a better place presents no defense to the antitrust laws. *See, e.g., National Society of Prof'l Engineers v. United States*, 425 U.S. 679, 693-94 (1978) (bidding

restraint could not be defended because it "ultimately inures to the public benefit by preventing the production of inferior work and by insuring ethical behavior . . . this Court has never accepted such an argument.").

III. <u>Respondent's Rationale for Exceeding the Five Expert Limit is Not Persuasive</u>

Respondent suggests that this case is extraordinary and requires testimony from six experts because it "arises at the intersection of two areas of law" and "requires analysis of massive troves of data." Resp. Mot. at 8. Neither argument holds water.

First, the claim that an assessment of the Bidding Agreements requires an understanding of both antitrust and trademark law does not justify additional experts. Indeed, the fact that Respondent offers one such defense here, based in trademark law, does not make this case extraordinary. If anything, the fact that Respondent's defense is based on trademark law suggests *fewer* experts are needed in this case than in others. Expert testimony on an "area of law" is unnecessary. This Court can interpret federal law without reliance on expert testimony. The Court does not require four experts[2] (or even one) to explain the procompetitive benefits of trademark protection, the fact that confusing uses of a trademark can violate a trademark holder's rights, or the proper use of surveys in trademark lawsuits. Resp. Mot. at 4-7.

Second, Respondent's suggestion that the case requires analysis of large and complicated

Under those circumstances, the court allowed the respondents to offer eight experts. Five were medical field experts who could testify to whether medical science supported the claims made in the advertisements. *Id.* at *13. The court also allowed testimony by an expert on materiality, which is an element of a deceptive advertising claim. *See Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992) (citation omitted). It further allowed testimony by a linguistics expert because whether or not the advertisements made the alleged claims implicitly was at issue in the matter. *POM Wonderful*, 2011 FTC LEXIS 25 at *12 (Respondents may "defend[] themselves against allegations of implied claims by introducing extrinsic evidence of consumer perceptions, through expert testimony"). Finally, it allowed the testimony of a substantiation expert because the required level of substantiation in a deceptive advertising case is dependent in part on expert testimony. *Id.* at *14 ("[I]n defending against Complaint Counsel's theory that competent and reliable scientific evidence is necessary to substantiate Respondents' claims, Respondents should not be precluded from proffering expert opinion that an alternative substantiation level is appropriate, including an analysis of the Pfizer factors.").[4]

An antitrust case does not require experts on substantiation, materiality, or linguistics. It also does not require multiple experts who can testify to the state of medical science in a variety of specific fields. It may be possible to imagine an antitrust case which would need as much expert testimony as *POM Wonderful*, but this is not such a case.

V. <u>Conclusion</u>

For the reasons stated above, Complaint Counsel respectfully requests that the Court deny Respondent's Motion.

[4] The initial decision in *POM Wonderful* cites these experts extensively throughout and analyzes their testimony at length, further demonstrating how crucial expert opinion is to consumer protection cases and to *POM Wonderful* specifically. *See generally In re POM Wonderful LLC & Roll Global LLC*, 2012 FTC Lexis 106 (May 17, 2012).

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In the Matter of **1-800 CONTACTS, INC.,** **a corporation**	**Docket No. 9372**

[PROPOSED] ORDER

Upon consideration of Respondent's Motion to Call Six (6) Expert Witnesses at Trial, and Complaint Counsel's Opposition to Respondent's Motion and Cross-Motion to Limit Respondents to Five Designated Experts, it is hereby ORDERED that Respondent's Motion is DENIED. It is further ordered that Respondent shall serve its amended expert designation on Complaint Counsel no later than one business day following the date of this order.

ORDERED:

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D. Michael Chappell
Chief Administrative Law Judge

Dated:

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2017, I f

CERTIFICATE FOR ELECTRONIC FILING

I ceifacy 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 paifaes and the adjudicator.

February 22, 2017

By: /s/ Daniel J. Matheson
Attorney