PUBLIC

ORIGINAL

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

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

COMPLAINT COUNSEL'S TRIAL BRIEF REGARDING ANTICIPATED OBJECTIONS TO THE TESTIMONY OF MR. BRYAN PRATT

Respondent intends to call one of its outside counsel, Mr. Bryan Pratt, to testify on April 28, 2017. This memorandum advises the Court of objections Complaint Counsel will likely raise; in particular, objections to any testimony by Mr. Pratt regarding the basis for any statements made in Complaints or correspondence written on behalf of 1-800 Contacts. During his deposition, Mr. Pratt refused to answer dozens of Complaint Counsel's questions that sought to probe the veracity of and factual basis for statements made in Complaints or correspondence, while answering related questions posed by Respondent's counsel. Mr. Pratt based his refusal to answer Complaint Counsel's questions on either the work product doctrine or the attorney-client privilege. Because these privileges cannot be used as a sword and a shield, we anticipate that we will object if Mr. Pratt attempts to provide any related information during the hearing.

BACKGROUND

As the Court is aware, we filed an *in limine* motion to preclude Mr. Pratt from testifying. *See* Memorandum in Support of Complaint Counsel's Motion in Limine to Preclude Testimony from Respondent's Outside Counsel, Based on Previous Invocations of Attorney-Client Privilege (March 22, 2017). The Court denied our motion, ruling that "[i]t cannot be determined on the

present record, outside the context of trial, that Respondent seeks to rely on its counsels' opinions, advice, or other privileged information in defense of this action, or that Complaint Counsel will be unable to effectively challenge the witnesses' trial testimony due to the privileged information withheld at their depositions." Order Denying Motion in Limine to Preclude Testimony of Bryan Pratt and Mark Miller at 2 (April 3, 2017). The Court further instructed the parties that its "Order is not a determination as to the admissibility of any particular testimony that may be offered at trial." *Id.* at 4. Accordingly, Complaint Counsel submits this trial brief to explain the objections that appear most likely to arise regarding Mr. Pratt's testimony.

ARGUMENT

Based on Respondent's previous briefing and representations, we understand that a principal focus of Mr. Pratt's testimony will be "factual issues regarding 1-800-Contacts' trademark cease-and-desist letters and litigation, including issues addressed in the Complaint or by the retailer witnesses' testimony on which Complaint Counsel intend to rely." 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. at 1 (March 28, 2017) (hereinafter, "Resp. Opp. to MIL"). Mr. Pratt might permissibly recount the contents of the complaints filed against Respondent's competitors and testify as to the allegations that were made. However, Mr. Pratt should not be permitted to testify to the truth of any allegations made in complaints, correspondence, or conversations, because Respondent broadly asserted privilege over the factual basis of the complaints' allegations,[1] as well as the investigation that Mr. Pratt

[1] Such instances arose frequently at Mr. Pratt's deposition. For example, when questioned about the Complaint 1-800 Contacts filed against Memorial Eye, Mr. Pratt testified as follows:

conducted before preparing complaints.[2]

Likewise, Respondent anticipates that Mr. Pratt will testify regarding "oral and written communications and negotiations with counsel (and, in some instances, employees) of

---

> Q. Next paragraph, paragraph 21, Memorial Eye's actions are specifically aimed at diverting web users who are expressly looking for 1-800 Contacts and the 1-800 Contacts goods and services is the first sentence of that paragraph. Did I read that correctly?
>
> MR. STONE: Objection. Improper as to form. Document speaks for itself. Best evidence.
>
> THE WITNESS: So far as I tracked it.
>
> Q. (By Mr. Matheson) Okay. What evidence did you have before you filed this complaint that Memorial Eye's actions were specifically aimed at diverting web users who were expressly looking at 1-800 Contacts?
>
> MR. STONE: Instruct you not to answer on the grounds of attorney work product.
>
> Q. (By Mr. Matheson) Follow that instruction?
>
> A. I am.
>
> Q. What empirical evidence have you seen that web users who are expressly looking for 1-800 Contacts were actually diverted by Memorial Eye's actions?
>
> MR. STONE: Same objection; same instruction.
>
> Q. (By Mr. Matheson) Are you going to refuse to answer based on the advice of counsel?
>
> A. I am.

See Exhibit A (Dec. 15 Dep. Tr. and Jan. 5 Dep. Tr. (together, "Dep. Tr.")) at 195:15-196:17.

[2] Mr. Pratt refused to testify as to the investigations he conducted prior to filing lawsuits:

> Q. (By Mr. Matheson) . . . [W]hat other things did you investigate prior to filing a lawsuit against Lens.com?
>
> A. And I'll refuse to answer that based on attorney-client privilege, work product.
>
> …
>
> Q. Did you always investigate factors other than a screenshot indicating the appearance of an advertisement on a search engine results page prior to filing a lawsuit on behalf of 1-800 Contacts relating to the display of search advertising?
>
> MR. STONE: I think you can answer that yes or no.
>
> THE WITNESS: Yes.
>
> Q. (By Mr. Matheson) If I asked you in any specific case what were those factors, would you decline to answer in order to protect a privilege?
>
> A. Unless there's an instance where the privilege has already been waived, yes.

Dep. Tr. at 95-96.

Respondents' competitors regarding trademark issues." Resp. Opp. to MIL at 1. Mr. Pratt might be able to recount the conversations he had with third parties, inasmuch as these communications are not privileged. However, because Mr. Pratt regularly refused to testify as to his legal analysis underlying these conversations,[3] these statements can be admitted only to prove that Mr. Pratt made the statement, and not for the purpose of suggesting that the position that Respondent took was well-founded or supportable. *Cary Oil Co. v. MG Ref. & Mktg.*, 257 F. Supp. 2d 751, 762 (S.D.N.Y. 2003) (". . . to the extent that Defendants have withheld facts from discovery that relate to the Consent Order, they will not be allowed to introduce such facts in any form at trial."); *In re Residential Capital, LLC*, 491 B.R. 63 (Bankr. S.D.N.Y. Apr. 12, 2013) ("A court should 'exclude any testimony or evidentiary presentations by the Defendants at trial if that same testimony or evidence was withheld from Plaintiffs during discovery based on attorney-client privilege.'").

Importantly, Respondent's assertion of these privileges – and Mr. Pratt's refusal to answer our questions – was frequent and reflected a broad assertion of privilege covering all questions on these topics. In more than ***twenty-eight*** instances, Respondent instructed Mr. Pratt not to answer questions, covering a range of topics. *E.g.*, Dep. Tr. at 13-14, 48, 51-53, 63, 64, 65, 66, 69, 70, 70-71, 94, 95-96, 97, 98, 99, 100, 189-90, 191,193, 194, 195, 196, 197, 203-04,

[3] For example, Mr. Pratt would not testify as to his thinking regarding the circumstances in which a competitor might have infringed Respondent's trademarks:

> Q. Did you ever conclude that an advertiser infringed one of 1-800 Contacts' trademarks solely on the basis of the appearance of its advertisement on a search engine results page?
>
> MR. STONE: Give me just a second. I'm going to instruct the witness not to answer on the grounds that that would invade the attorney work product privilege and perhaps the attorney-client privilege as the question is currently framed.
>
> Q. (By Mr. Matheson) Are you going to follow your attorney's instructions, sir?
>
> A. I am.

Dep. Tr. at 111-12.

227, 236.[4] In light of these assertions of privilege, Mr. Pratt should not be permitted to testify regarding the truth of statements made in complaints and other documents.[5]

CONCLUSION

Complaint Counsel respectfully requests that the Court sustain its objections in the event that Mr. Pratt attempts to testify regarding the veracity of, or factual basis underlying, any assertions made in letters or Complaints authored by attorneys on behalf of 1-800 Contacts.

[4] Notably, this only reflects Respondent's objections to, and Mr. Pratt's refusal to answer the initial questions on particular topics, and does not reflect the inevitable follow-up questions that also would have triggered the same objection.

[5] Moreover, Complaint Counsel notes that statements in the documents themselves are clearly hearsay. *Steed v. EverHome Mortg. Co.*, 308 Fed.Appx. 364, 369 n.2 (11th Cir. 2009) (per curiam) (unpublished) (excluding a complaint as hearsay because the contents of a complaint are hearsay and the existence of the complaint was not itself probative evidence); *Century '21' Shows v. Owens*, 400 F.2d 603, 609–10 (8th Cir. 1968) (pleadings "are clearly hearsay and of no probative value against [a non-pleader]"); *see also Johnson v. Ford Motor Co.*, 988 F.2d 573, 579 (5th Cir. 1993) (excluding evidence where "[Plaintiff] has attempted to introduce a brief summary of claims, lawsuits, and complaints . . . which amounts to nothing more than a summary of allegations by others which constitute hearsay"); *United States v. Ruffin*, 575 F.2d 346, 357 (2d Cir. 1978) (finding trial court committed reversible error in allowing testimony about the contents of documents which were themselves hearsay, because "the government was eliciting from the witness classic 'multiple hearsay'").

Dated: April 27, 2017

Respectfully submitted,

/s/ Daniel J. Matheson
Daniel J. Matheson
Kathleen M. Clair
Barbara Blank
Thomas H. Brock
Gustav P. Chiarello
Joshua B. Gray
Nathaniel M. Hopkin
Mika Ikeda
Aaron Ross
Charlotte S. Slaiman
Charles Loughlin
Geoffrey M. Green

Counsel Supporting the Complaint

EXHIBIT A

REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2017, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

I also certify that I delivered via electronic mail a copy of the foregoing documents to:

Gregory P. Stone
Steven M. Perry
Garth T. Vincent
Stuart N. Senator
Gregory M. Sergi
Munger, Tolles & Olson LLP
350 South Grand Avenue
50th Floor
Los Angeles, CA 90071
gregory.stone@mto.com
steven.perry@mto.com
garth.vincent@mto.com
stuart.senator@mto.com
gregory.sergi@mto.com

Justin P. Raphael
Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
justin.raphael@mto.com

Sean Gates
Charis Lex P.C.
16 N. Marengo Ave.
Suite 300
Pasadena, CA 91101
sgates@charislex.com

Counsel for Respondent 1-800 Contacts, Inc.

Dated: April 27, 2017

By: /s/ Daniel J. Matheson
Attorney

CERTIFICATE FOR ELECTRONIC FILING

I 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.

April 27, 2017

By: /s/ Daniel J. Matheson
Attorney