

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

In the Matter of)
1-800 CONTACTS, INC.,)
a corporation,)
Respondent)

)

DOCKET NO. 9372



COMPLAINT COUNSEL'S MOTION TO CLARIFY THE SCHEDULING ORDER

This Motion asks the Court to clarify that the Scheduling Order provides Complaint Counsel with seven hours of examination time when deposing a current employee of Respondent, and that the Scheduling Order does not entitle Respondent to cut short Complaint Counsel's seven hours in order to question its own witnesses.

Complaint Counsel seeks to depose Mr. Tim Roush, the current Chief Marketing Officer of Respondent 1-800 Contacts, Inc. Complaint Counsel is entitled to take up to seven hours to examine Mr. Roush because Mr. Roush is a party witness. Respondent, however, has asserted the unilateral right to use at least 1.5 of Complaint Counsel's seven hours to question Mr. Roush itself. Respondent's position is unreasonable. Nothing in the rules entitles Respondent to use any portion of the seven hours allotted to Complaint Counsel. The Court's Scheduling Order includes a provision for the splitting of deposition time for *non-party* witnesses. But for party witnesses, there is no such split. That is because Respondent has unfettered access to gather information and testimony from its own employees, including Mr. Roush, and has no need to depose them.

Respondent, of course, can conduct re-direct examination of Mr. Roush after Complaint Counsel has concluded its questioning if Respondent believes clarifications are necessary. And Complaint Counsel has already made clear that it has no objection to extending any deposition of Respondent's employees beyond seven hours to accommodate Respondent's questioning. But there is no basis for Respondent to claim the right to use Complaint Counsel's deposition time to question its own party witnesses.

Complaint Counsel respectfully requests that the Court order that Complaint Counsel is entitled to seven hours to examine Mr. Roush, and any other current employee of Respondent, during a deposition.

ARGUMENT

The Court's September 7, 2016, Scheduling Order sets forth rules governing the duration and allocation of time for depositions. Paragraph 12 of the Scheduling Order provides that all depositions are limited to seven hours "unless otherwise agreed to by the parties or ordered by the Administrative Law Judge." Paragraph 13 of the Scheduling Order provides that, for *non-party* depositions, the time shall be divided evenly between the parties, if any party so requests. There is no such time-split for party witnesses.

Mr. Roush is the current Chief Marketing Officer of Respondent. *See* Ex. A [REDACTED]

[REDACTED]; Ex. B [REDACTED]

[REDACTED]. Mr. Roush is therefore a party witness in this case. *See, e.g., Promote Innovation LLC v. Leviton Mfg. Co., Inc.*, No. 2:10-CV-235-TJW-CE, 2011 WL 672663, at *2 (E.D. Tex. Feb. 17, 2011) ("[C]urrent employees have an employment relationship with a party and should be considered party witnesses."); *Research*

Foundation of State University of New York v. Luminex Corp., 07-CV-1260, 2008 WL 4822276, at *4 (N.D.N.Y. 2008) (describing current employees as party witnesses); *Micromuse, Inc. v. Aprisma Management Technologies, Inc.*, No. 05-CV-0894, 2005 WL 1241924, at *5 (S.D.N.Y. 2005) (same). Because Mr. Roush is a party witness, Paragraph 13 of the Scheduling Order, which permits parties to allocate time evenly for *non-party* depositions, does not apply.

Respondent does not dispute that Mr. Roush is a party witness, or that a seven-hour deposition is appropriate. Nor does Respondent rely on the time-splitting provision in Paragraph 13 of the Scheduling Order. Instead, Respondent relies on FTC Rule 3.33(d), which states that “any party shall have the right to question [the deponent].” 16 C.F.R. § 3.33(d).¹ Respondent asserts that this language gives it the right to use any portion of the seven-hour deposition that it sees fit to question its own witness—in this case, 1.5 hours.

Respondent has cited no authority supporting its claim, because the applicable Rules do not allow Respondent to cut short Complaint Counsel’s examination so that Respondent may examine its own witnesses. The fact that Rule 3.33(d) provides all parties with the right to question a deponent merely reflects the fact that deponents are subject to both direct and cross-examination. 16 C.F.R. § 3.33(d); *see also* 16 C.F.R. § 3.33(e) (“any other party may serve cross questions”); Fed. R. Civ. P. 30(c)(1) (“The examination and cross-examination of a deponent proceed as they would at trial . . .”). Complaint Counsel does not dispute that Respondent may question its own witness on re-direct after Complaint Counsel has concluded its questioning. *See Alabama Aircraft Indus., Inc. v. The Boeing Co.*, No. 2:11-CV-03577-RDP, 2015 WL 10090631, at *2 (N.D. Ala. Dec. 22, 2015) (special master report and recommendation) (“[T]he party defending a deposition will always be afforded the opportunity to reasonably cross examine the

¹ Respondent also cites FTC Rule § 3.33(e) and Fed. R. Civ. P. 30(c)(1).

deponent, even in those situations where the deposing party had made full use of the seven (7) hour maximum") (recommending continuation of deposition to allow for adequate cross-examination and re-direct), *adopted sub nom, Alabama Aircraft Indus., Inc. v. Boeing Co.*, 2016 WL 557253 (N.D. Ala. Feb. 12, 2016). But nothing in the rules give Respondent the right to use any part of Complaint Counsel's seven hours to do so.

Instead, if Respondent wishes to examine its own witness on re-direct after Complaint Counsel has finished its questioning, Respondent can extend the deposition—including beyond seven hours if necessary. *See, e.g.*, Fed. R. Civ. P. 30(d) advisory committee notes to 2000 amendment ("Should the lawyer for the witness want to examine the witness, that may require additional time.")². After all, Mr. Roush is Respondent's current employee, and if Respondent wants Mr. Roush to stay longer to answer Respondent's own questions, they can have him do so.

Indeed, Complaint Counsel has already made clear its willingness to stay at the deposition for as long as necessary to allow Respondent to complete its questioning of Mr. Roush.³ Respondent has refused, insisting that its questioning must come out of Complaint Counsel's deposition time. Respondent's position is improper. It is also perplexing. As a matter of plain logic, there is no need for Respondent to examine its employees during depositions because it has unlimited access to its own witnesses. *See In re Nat'l W. Life Ins. Deferred*

² "[S]ince many adjudicative rules are derived from the Federal Rules of Civil Procedure, the latter may be consulted for guidance and interpretation of Commission rules where no other authority exists." *In re LabMD, Inc.*, FTC No. 9357, 2014 WL 253518 (Jan. 16, 2014) (Commission order) (citing FTC Operating Manual § 10.7).

³ *See* Ex. C (Email from D. Matheson to G. Vincent et al., Oct. 25, 2016) ("[P]ursuant to Paragraph 12 of the Scheduling Order, we are willing to agree that depositions of Respondent's current employees can go beyond seven hours. After the conclusion of Complaint Counsel's questioning, we are prepared to stay for any length of time while you examine Respondent's current employees, subject to our right to conduct reasonable cross examination after the conclusion of your questioning.").

Annuities Litig., No. 05-CV-1018 JLS (WVG), 2011 U.S. Dist. LEXIS 4950, at *8 (S.D. Cal. Jan. 19, 2011) (parties did not need to split the time for depositions of absent class members because plaintiffs' counsel "have unfettered access to Plaintiffs" and "can obtain declarations from Plaintiffs at their leisure").

The Scheduling Order provides for a time split for non-party witnesses, but has no corresponding provision for party witnesses. That is because there is no need for such a provision. A party has a right to question its opponent's party-witness for a full seven-hour deposition. Any additional re-direct examination does not count against those seven hours.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court order that Complaint Counsel is entitled to seven-hour depositions of any party witness in this case, including Mr. Roush.

Dated: November 10, 2016

Respectfully submitted,

/s/ Dan Matheson

Daniel J. Matheson

Geoffrey M. Green

Barbara Blank

Charles A. Loughlin

Kathleen M. Clair

Thomas H. Brock

Gustav P. Chiarello

Nathaniel M. Hopkin

Mika Ikeda

Charlotte S. Slaiman

Federal Trade Commission

Bureau of Competition

600 Pennsylvania Ave., NW

Washington, DC 20580

Telephone: (202) 326-2075

Facsimile: (202) 326-3496

Electronic Mail: dmatheson@ftc.gov

Counsel Supporting the Complaint

CERTIFICATE OF CONFERENCE

Pursuant to Paragraph 4 of the Scheduling Order entered in this matter on September 7, 2016, I hereby certify that Complaint Counsel, the moving party, has conferred by email and by telephone with counsel for Respondent 1-800 Contacts, Inc. on October 20, 2016; October 24, 2016; October 25, 2016; and October 27, 2016, in an effort to resolve the issues raised by Complaint Counsel's Motion to Clarify the Scheduling Order. Complaint Counsel and Respondent were unable to reach an agreement to resolve the motion.

Dated: November 10, 2016

/s/ Dan Matheson

Daniel J. Matheson

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2075
Facsimile: (202) 326-3496
Electronic Mail: dmatheson@ftc.gov

Counsel Supporting the Complaint

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[PROPOSED] ORDER

Having carefully considered Complaint Counsel's Motion to Clarify the Scheduling Order and Respondent's Opposition thereto, it is hereby

ORDERED, during each deposition noticed by Complaint Counsel in which the witness is a current employee of Respondent, Complaint Counsel is entitled to examine the witness for seven hours.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

Ex. A

REDACTED IN ENTIRETY

Ex. B

REDACTED IN ENTIRETY

PUBLIC

Ex. C

From: Matheson, Daniel
Sent: Tuesday, October 25, 2016 3:38 PM
To: 'Vincent, Garth'
Cc: ~800CON_FTC_ATTYS; BC-1040-1800-Search Ad Team-DL
Subject: RE: Deposition scheduling

Garth,

Please let us know the contact information for Ms. Blackwood's counsel, we will reach out to him or her to discuss the deposition.

Regarding the time split for Ms. Blackwood's deposition, we do not anticipate that 3.5 hours will be enough to conduct our questioning of one of 1-800 Contacts' most senior executives, who served as Chief Marketing Officer for nearly five years during a critical period in which 1-800 Contacts' restraints harmed competition. We anticipate that 5.5 hours may be enough time if you would agree to a 5.5-1.5 split, or if you are amenable to agreeing to a longer deposition, as provided for by Paragraph 12 of the Scheduling Order. While we will obviously do our best to be efficient in our questioning of Ms. Blackwood, we reserve our right to move the Court for additional time if we are unable to complete our questioning in the time allotted. We anticipate that such a motion might be necessary if you insist on limiting our initial examination to 3.5 hours.

Regarding depositions of current employees of 1-800 Contacts, we do not agree that you are entitled to some of the 7 hour examination period. As I indicated during our meet and confer, pursuant to Paragraph 12 of the Scheduling Order, we are willing to agree that depositions of Respondent's current employees can go beyond seven hours. After the conclusion of Complainant Counsel's questioning, we are prepared to stay for any length of time while you examine Respondent's current employees, subject to our right to conduct reasonable cross examination after the conclusion of your questioning. You stated that you will not agree to any depositions of Respondent's current employees lasting longer than seven hours. As we understand it, your position is that the day must be limited to seven hours of testimony in each case, including any direct examination Respondent chooses to conduct. You stated that your position is that Complaint Counsel must agree in advance to examine each of Respondent's current employees for less than seven hours in order to facilitate Respondent's direct examination of its own witnesses. We are willing to consider such requests when made with respect to specific witnesses (and of course, in all cases, we will endeavor to be as efficient as we can), but as a general rule we do not agree that Complaint Counsel is obliged to cut short its examination of Respondent's current employees to accommodate your efforts to conduct reasonable direct examination. You control your current employees, and you can simply ask them to stay for a bit longer and examine them after the conclusion of Complaint Counsel's questioning. Nonetheless, in the spirit of compromise and to avoid burdening the Court, we are willing to agree that Complaint Counsel will question each of Respondent's fact witnesses for 6.5 hours, reserving the final 30 minutes for questions from Respondent. And we are willing to stay for any length of time after 7 hours while you continue to question your witnesses, subject to a reasonable opportunity for cross.

Please let us know if you agree. If you do not agree we will move to compel a 7-hour deposition of Mr. Roush as soon as we can satisfy any remaining meet and confer obligations on the issue of time splits for 1-800 Contacts' witnesses. For the avoidance of doubt, in such a motion we will ask the Court to clarify that Complaint Counsel is entitled to all 7 hours.

Respectfully,

Dan

From: Vincent, Garth [mailto:Garth.Vincent@mto.com]
Sent: Monday, October 24, 2016 6:21 PM
To: Matheson, Daniel; Blank, Barbara; Clair, Kathleen; Slaiman, Charlotte
Cc: ~800CON_FTC_ATTYS
Subject: RE: Deposition scheduling

Dan,

I am writing to follow up on our discussion last Friday about the depositions of individuals no longer employed by 1-800 Contacts and the Scheduling Order's provisions governing all "non-party" depositions. None of the individuals you have referenced are parties to this action, nor do we see anything in Paragraph 13 of the Scheduling Order's Additional Provisions, or anywhere else, that would suggest that these former employees should be deemed "parties" for purposes of their depositions. We agree with your assessment that there is unlikely to be a time issue with most of the former employee deponents and are happy to try to work with you where we can. However, Joan Blackwood is not a former employee where we can agree in advance to reduce our examination time contemplated by the Scheduling Order. I've never spoken directly with Ms. Blackwood (rather my discussions have been through her attorney) and I don't know enough about her particular situation in order to agree in advance to depart from the Scheduling Order's provision that "the time and allocation for a non-party deposition shall be divided evenly between [the parties]." Of course, we would be happy to cede to you any additional time that we do not use from our portion of the 7 hour period.

With regard to the deposition of current employees of 1-800 Contacts, it appears clear that we are entitled to at least some of the 7 hour examination period in order to ensure, among other things, that we have a complete and accurate record. We would propose the following split absent an agreement to the contrary regarding a particular witness: 5.5 hours for Complaint Counsel; 1.5 hours for Respondent. Please let us know if that is acceptable to you as a general rule going forward.

Garth

Garth T. Vincent | Munger, Tolles & Olson LLP
355 South Grand Avenue | Los Angeles, CA 90071
Tel: 213.683.9170 | Cell: 310.948.0788 | garth.vincent@mto.com | www.mto.com

From: Vincent, Garth
Sent: Thursday, October 20, 2016 5:53 PM
To: Matheson, Daniel (dmatheson@ftc.gov); Blank, Barbara (bblank@ftc.gov); Clair, Kathleen (kclair@ftc.gov); Slaiman, Charlotte (cslaiman@ftc.gov)
Subject: FW: Deposition scheduling

Dan,

I am in receipt of your October 18 letter regarding scheduling of depositions for various individuals no longer employed by 1-800 Contacts. We are happy to help facilitate the scheduling of dates and accommodations for these depositions of former employees to the extent we are able to do so.

I do not know Ms. Judd but will see what we can do to try to locate her and determine how she would like to proceed. As you know, Mr. Craven was already deposed in this matter for a full day and was represented by counsel for Luxottica. I have heard that he is no longer employed by Luxottica but will try to locate and contact him as well to see how he would like to proceed. As previously discussed, we have been able to locate and make contact with Mr. Aston, Mr. Galan and Ms. Blackwood. I will check with them about their availability for the dates you have proposed and get back to you as soon as I have heard back from them.

PUBLIC

We obviously do not agree with the suggestion that individuals no longer employed by 1-800 Contacts are party witnesses not subject to the provisions of Paragraph 13 of the Scheduling Order's Additional Provision, or the proposal to take two separate four hour depositions per day with all time being allotted to Complaint Counsel's examination. We intend to adhere to the clearly stated provisions of Paragraph 13 for individuals no longer employed by 1-800 Contacts and use one-half of the total allotted time. With regard to current 1-800 Contacts employees (i.e., party witnesses), we reserve the right to use either half the time or continue the deposition on the next day if necessary in order to complete our examination, depending on the circumstances of the particular witness.

I will endeavor to get back to you promptly regarding dates and accommodations for the depositions of each of the former employees you have identified to the extent we are able to do so.

Garth

Garth T. Vincent | Munger, Tolles & Olson LLP
355 South Grand Avenue | Los Angeles, CA 90071
Tel: 213.683.9170 | Cell: 310.948.0788 | garth.vincent@mto.com | www.mto.com

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, 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
355 South Grand Avenue
35th 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.rafael@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: November 10, 2016

By: /s/ Dan 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.

November 10, 2016

By: /s/ Dan Matheson
Attorney