

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



_____)
In the Matter of)
)
1-800 Contacts, Inc.,)
a corporation,)
)
Respondent.)
_____)

DOCKET NO. 9372

ORDER ON MOTION TO CLARIFY THE SCHEDULING ORDER

I.

On November 3, 2016, Federal Trade Commission (“FTC”) Complaint Counsel filed a Motion to Clarify the Scheduling Order (“Motion”). Pursuant to the November 4, 2016 Order requiring an expedited response, Respondent 1-800 Contacts, Inc. (“Respondent”) filed its opposition on November 8, 2016 (“Opposition”). For the reasons set forth below, the Motion is GRANTED IN PART and DENIED IN PART.

II.

The Scheduling Order issued in this case provides that, “[n]o deposition . . . may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the Administrative Law Judge.” Scheduling Order, Additional Provision 12. Additional Provision 12 does not specify how the questioning time should be allocated between the parties.¹ Complaint Counsel seeks an order that “[d]uring each deposition in which the witness is a current employee of Respondent, Complaint Counsel is entitled to examine the witness for seven hours.” Proposed Order.

According to the Motion papers, Complaint Counsel seeks to depose Mr. Tim Roush, the current Chief Marketing Officer of Respondent. Respondent advised Complaint Counsel that Respondent intends to question Mr. Roush at the deposition, and that the time for this questioning should be included in the seven hour limitation provided under Additional Provision 12. Complaint Counsel contends that because Mr. Roush is an employee of Respondent, whom

¹ By contrast, with respect to non-parties, the deposition time allowed shall be divided evenly between the parties. Scheduling Order, Additional Provision 13.

Respondent can question at any time, Complaint Counsel should be allowed to examine Mr. Roush for the full seven hours allotted under Additional Provision 12. If Respondent wishes to question Mr. Roush on the record at the deposition, Complaint Counsel asserts, such questioning can occur after Complaint Counsel has concluded its questioning and the time for Respondent's questioning should not be deducted from the seven hour limitation. Complaint Counsel states that it informed Respondent that it has no objection to extending the deposition of any of Respondent's employees beyond the seven hours, in order to accommodate Respondent's questioning.

Respondent asserts that a deposition does not consist of direct examination alone; it consists of both direct and cross-examination. Respondent further asserts that Complaint Counsel has made no showing of a need to extend Mr. Roush's deposition beyond seven hours. Rather than compelling the witness to stay longer, Respondent urges that the seven hours be allocated equitably between the parties and has proposed 330 minutes for Complaint Counsel and 90 minutes for Respondent.

III.

The Federal Trade Commission Rule on depositions states: "any party shall have the right to question [each deponent]." 16 C.F.R. § 3.33(d). In limiting each deposition to a single, seven-hour day, Additional Provision 12 of Scheduling Order should not be read as taking away any party's right to question a deponent. Under the Federal Rules of Civil Procedure, which may be consulted for guidance and interpretation of Commission rules² "the examination and cross-examination of a deponent proceed as they would at trial." Fed. R. Civ. P. 30(c)(1). *See also ZCT Sys. Group v. FlightSafety Int'l*, 2010 U.S. Dist. LEXIS 38375, at *12-13 (N.D. Okla. Apr. 19, 2010) (holding that defendant "has the right to examine its own witness" at deposition of corporate representative).

The issue presented by Complaint Counsel's Motion is whether Additional Provision 12 is properly read to automatically allocate all 7 hours to Complaint Counsel for depositions of Respondent's employees, such that Respondent, 1-800 Contacts, may question the witness only if Complaint Counsel agrees or the deposition time is extended. This is not a reasonable interpretation. As a party in the case, Respondent has "the right to question [each deponent]." 16 C.F.R. § 3.33(d). Additional Provision 12 clearly contemplates that the parties are expected to agree to an allocation of the seven hour time period that allows sufficient time for the party noticing the deposition to question the witness, while allowing a reasonable time for the opposing party also to examine the witness. Where agreement cannot be reached, the parties, individually or jointly, may seek an appropriate order, including an order extending the seven hour limitation, upon a showing of good cause. In this instance, neither party has requested an extension of the seven hour limitation. Moreover, the record on the Motion is insufficient to conclude that good cause exists to extend the limitation at this time.

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.*, 2014 WL 253518 (Jan. 16, 2014).

IV.

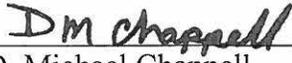
To the extent Complaint Counsel's Motion seeks to clarify the Scheduling Order, Complaint Counsel's Motion is GRANTED. The Scheduling Order is clarified herein.

However, Complaint Counsel has failed to demonstrate that the seven hour limitation in the Scheduling Order should be interpreted as allocating the entirety of any deposition of Respondent's employees to questioning by Complaint Counsel. Accordingly, to the extent Complaint Counsel's Motion seeks an interpretation of the Scheduling Order that would allocate to Complaint Counsel the entire seven hours of any deposition of Respondent's employees, Complaint Counsel's Motion is DENIED.

Furthermore, implicit in Complaint Counsel's motion is its assumption that Complaint Counsel will use the entire seven hours for its examination of Mr. Roush, and that an order extending the seven hour limitation is therefore necessary to accommodate Respondent's examination. However, Complaint Counsel has failed to demonstrate that it needs the full time, or that Respondent's request for 90 minutes of that time is unreasonable or unnecessary. Therefore, it is hereby ORDERED that Respondent may take up to 90 minutes to examine Mr. Roush.

Nothing in this order precludes the parties from agreeing to other time limits or either party from submitting a motion to extend the seven hour limitation on Mr. Roush's testimony for good cause.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: November 14, 2016