PUBLIC

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

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

COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE AN OPPOSITION TO RESPONDENT'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA

Pursuant to Rule 3.22 of the Rules of Practice for Adjudicative Proceedings, Complaint Counsel respectfully moves for leave to file the attached brief opposing Respondent's Motion to Compel Compliance with Subpoena filed on January 3, 2017. In support of its motion for leave, Complaint Counsel states as follows:

1. Respondent's motion to compel requests an order compelling Google Inc. ("Google") to produce three settlement agreements responsive to Respondent's subpoena. Motion to Compel ("MTC") 1. Respondent's novel relevancy argument supporting its motion is that the sought-after documents relate to the issue of whether the challenged Bidding Agreements between Respondent and its competitors take "commonplace forms," *id.*, and are therefore immune from antitrust scrutiny. As explained in more detail in Complaint Counsel's Opposition, this argument is currently before the Commission as part of Complaint Counsel's Motion for Partial Summary Decision, which is fully briefed and pending resolution. This Opposition seeks to ensure that these motions are resolved in proper sequence in a way that is most efficient for the parties, the Court, and the Commission. Complaint Counsel does not believe that Google is aware of these issues, or it would otherwise raise them with the Court.

2. As explained in more detail in the Opposition, Respondent's sole relevancy argument relies on a misreading of the Supreme Court's decision in *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), the nature of vertical versus horizontal agreements, and the empirical meaning of the term "commonplace." Complaint Counsel respectfully submits that these arguments should not go unrebutted, as they risk needlessly expanding discovery against a third party in this case on the basis of a flawed legal theory.

3. Complaint Counsel's proposed opposition brief complies with the timing and word count requirements set forth in Rule 3.38(a).

For these reasons, as set forth in the proposed Opposition, Complaint Counsel respectfully requests leave to file its Opposition pursuant to Rule 3.22.

Dated: January 10, 2017

Respectfully submitted,

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Counsel Supporting the Complaint

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
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In the Matter of **1-800 CONTACTS, INC.,** **a corporation**	**Docket No. 9372**

[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE AN OPPOSITION TO RESPONDENT'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA

On January 10, 2017, Complaint Counsel filed a Motion for Leave to File an Opposition to Respondent's Motion to Compel Compliance With Subpoena. Complaint Counsel's Motion is GRANTED. IT IS HEREBY ORDERED that Complaint Counsel has leave to file its Opposition to Respondent's Motion to Compel Compliance With Subpoena.

ORDERED:

____
D. Michael Chappell
Chief Administrative Law Judge

Date: ________________

PUBLIC

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRAIVE LAW JUDGES

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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA

INTRODUCTION

Respondent's motion seeks to compel a third party, Google Inc. ("Google"), to produce three litigation settlement agreements in order to prove that Respondent's Bidding Agreements are "commonplace." Respondent's Motion to Compel ("MTC") 1. Complaint Counsel understands that Google intends to oppose Respondent's motion, and it will brief the issues specific to Respondent's request. However, there are certain policy considerations that Complaint Counsel respectfully asks the Court to consider.

First, Complaint Counsel submits that the Court should hold Respondent's motion to compel in abeyance. The novel legal argument underlying Respondent's motion is currently before the Commission as part of Complaint Counsel's Motion for Partial Summary Decision. This motion has been fully briefed. Complaint Counsel respectfully submits that it would be most efficient for the parties, the Court, and the Commission for the Court to await the Commission's resolution of Complaint Counsel's pending motion, which, should it be granted, could render this instant motion moot.

Second, should the Court decide to rule on Respondent's motion to compel now, the motion should be denied. The only link between Google's agreements and the claims and defenses in this action is Respondent's erroneous contention that antitrust immunity exists for settlement agreements that are "commonplace." In other words, Respondent claims that if many people restrain competition in a particular fashion, then that restraint becomes legal. That argument is wrong as a matter of law. Respondent's entire argument turns on the misreading of a single clause in *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), a reading that no other adjudicative body has adopted. Respondent's assertion that Google's agreements are relevant to this case is furthermore erroneous as a matter of law because it conflates vertical agreements between an advertising platform and {[redacted]} with horizontal agreements among direct competitors. Finally, the fact that Google may have entered into trademark settlement agreements with three {[redacted]} tells us nothing about whether agreements that reciprocally prohibit bidding on certain keywords are "commonplace."

ARGUMENT

I. THE COURT SHOULD HOLD RESPONDENT'S MOTION TO COMPEL IN ABEYANCE PENDING THE COMMISSION'S DECISION ON COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

The premise of Respondent's motion to compel is its misguided belief that the three settlement agreements it seeks from Google "are directly relevant to a key issue in this case," namely "whether the challenged agreements are 'commonplace forms' of settlement agreements," MTC 4 (citing *Actavis*), and as such, are exempt from antitrust scrutiny. As a threshold matter, this issue is currently before the Commission in Complaint Counsel's Motion for Partial Summary Decision, which is fully briefed and pending resolution. *See* Ex. A (Complaint Counsel's Motion For Partial Summary Decision; Memorandum of Law In Support of Its Motion); Ex. B (Respondent's Opposition); Ex. C (Complaint Counsel's Reply in Support of Its Motion)[1]. One of Respondent's arguments in opposing Complaint Counsel's Motion for Partial Summary Decision is identical to Respondent's sole relevancy argument here, namely, that Respondent is immune from antitrust scrutiny unless Complaint Counsel can show that the Bidding Agreements "are not a 'commonplace' form of agreement traditionally used to settle trademark disputes." Ex. B at 7 (citing *Actavis*). Should the Commission grant Complaint Counsel's Motion for Partial Summary Decision, it may remove this entire "issue" from the case by ruling that the asserted defense is invalid as a matter of law. Complaint Counsel therefore

[1] Due to file size limitations, the pleadings cited as Ex. A, B, and C, and provided herein, do not include any of the original exhibits attached to those pleadings. Those exhibits are available on the docket sheet for this matter at https://www.ftc.gov/enforcement/cases-proceedings/141-0200/1-800-contacts-inc-matter.

respectfully requests that the Court hold Respondent's motion to compel in abeyance pending the Commission's resolution of Complaint Counsel's Motion for Partial Summary Decision.

II. RESPONDENT'S MOTION TO COMPEL SHOULD BE DENIED BECAUSE THE DOCUMENTS IT SEEKS ARE IRRELEVANT AS A MATTER OF LAW

Discovery is appropriate "to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). The fatal flaw in Respondent's motion to compel is that the lone issue it identifies—"whether the challenged agreements are 'commonplace forms' of settlement agreements" (MTC 1)—is irrelevant as a matter of law to the allegations of the complaint, any proposed relief, or to Respondent's defenses. Thus, the Court should deny Respondent's motion to compel. *See United States v. Kellogg Brown & Root Servs., Inc.*, 284 F.R.D. 22, 33 (D.D.C. 2012) ("it is proper to deny discovery on matters only relevant to claims or defenses that have been stricken").

A. Whether The Bidding Agreements Are "Commonplace" Is Irrelevant As A Matter Of Law

If the Court elects to address the issue now before the Commission, it is clear that Respondent's requests are not appropriate. Respondent suggests that a "key issue in this litigation" is whether its Bidding Agreements are "'commonplace forms'" of settlement agreements, because such ordinary agreements are purportedly "not subject to antitrust scrutiny." MTC 1, 4 (quoting *Actavis*, 133 S. Ct. at 2233). But no court has ever suggested that the issue of whether an agreement is "commonplace" has *any* relevance to whether an agreement is immune from antitrust scrutiny, and Respondent cites none. That is because, as *Actavis* confirms, "this Court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws," no matter what "form" they take. 133 S. Ct. at 2232 (collecting authorities dating back to 1931).[2]

Respondent bases its relevancy argument on the misreading of half of a sentence from *Actavis*. Respondent claims that, in *Actavis*, "the Supreme Court … made clear that 'commonplace forms' of settlement agreements are not subject to antitrust scrutiny." MTC 4. *Actavis* did no such thing. Rather, in the context of explaining why "there is nothing novel about our approach" of applying antitrust scrutiny to settlement agreements, the *Actavis* majority addressed a scenario raised by the dissent where a plaintiff in a patent infringement action accepts "some amount less than [its] full demand as part of the settlement." 133 S. Ct. at 2233. The Court explained that, "[i]nsofar as the dissent urges that settlements taking these commonplace forms have not been thought *for that reason alone* subject to antitrust liability, we agree, and do not intend to alter that understanding." *Id.* (emphasis added). Respondent omits this italicized language, transforming an unremarkable observation about the antitrust implications of a hypothetical settlement agreement that contains nothing more than a compromise as to how much money a defendant owes a plaintiff into blanket antitrust immunity for any purportedly "commonplace" settlement agreement. Indeed, it would have been odd for the *Actavis* court to create unprecedented antitrust immunity in a single clause in the midst of a decision explaining why antitrust immunity was *inapplicable*: "The Supreme Court 'does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.'" *United States v.*

[2] *See also Blackburn v. Sweeney*, 53 F.3d 825, 826-28 (7th Cir. 1995) (settlement agreement resolving state court action held to be "an agreement to allocate markets so that the per se rule of illegality applies"); *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 641 (E.D. Mich. 2000) ("courts have not hesitated to impose antitrust liability in cases arising out of anticompetitive settlement agreements") (collecting cases); Ex. A (Complaint Counsel's Memorandum of Law in Support of Complaint Counsel's Motion For Partial Summary Decision), at 4-5 (collecting additional authorities).

Apple, Inc., 791 F.3d 290, 324 (2d Cir. 2015) (quoting *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000)).

Nor did the Third Circuit adopt Respondent's erroneous reading of *Actavis*, as Respondent suggests. *See* MTC 4-5 (citing *King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp.*, 791 F.3d 388, 402 (3d Cir. 2015), for the proposition that *Actavis* "explained that its holding should not be read to subject to antitrust scrutiny 'commonplace forms' of settlement"). Respondent once again omits critical context, namely, the rest of the quoted sentence, where *King Drug* made clear that it was discussing situations "such as tender by an infringer of less than the patentee's full demand." 791 F.3d at 402. *King Drug* never suggested that *Actavis* created a broad antitrust immunity, contrary to decades of established precedent, based on a brand new test of whether the settlement agreement was "commonplace." That is because no such immunity exists, or has ever existed.

To the contrary, *King Drug* highlighted the Supreme Court's *rejection* of arguments identical to that which Respondent makes here. As the Third Circuit observed, in *Palmer v. BRG of Ga., Inc.*, 874 F.2d 1417, parties to a market allocation agreement attempted to justify their scheme by claiming that it was "an ordinary copyright royalty arrangement which courts have routinely sustained." *King Drug*, 791 F.3d at 407 & n.28 (quoting *Palmer v. BRG of Ga., Inc.*, 874 F.2d 1417, 1434 (11th Cir. 1989), *rev'd*, *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 50 (1990) (per curiam)). The Supreme Court nonetheless found this "ordinary" agreement to be "unlawful on its face," that is, a *per se* violation of the antitrust laws. *Palmer*, 498 U.S. at 49-50. Far from supporting Respondent's novel argument, Respondent's own authority confirms that whether or not an agreement is "commonplace" has no bearing on whether it is "immune" from antitrust scrutiny.

In sum, the question of whether or not a settlement agreement is "commonplace" has no relevance to "the allegations of the complaint, … the proposed relief, or … the defenses of any respondent," 16 C.F.R. § 3.31(c)(1), because no such defense exists as a matter of law. The Court should therefore deny Respondent's motion to compel.

B. Respondent's Motion Ignores The Distinction Between Horizontal And Vertical Agreements

Respondent's motion should also be denied because Google's agreements with {[redacted]} bear no relevance on the question of whether Respondent's agreements with its *competitors* are "commonplace," let alone lawful. Respondent's assertion that "[t]he terms of the Google agreements … bear on whether the terms of relief in Respondent's agreements are commonplace forms of settlements" (MTC 5-6 (footnote omitted)), glosses over the critical distinction that agreements between Google and {[redacted]} are *vertical* agreements, whereas agreements between Respondent and its competitors are *horizontal* ones.

It is bedrock antitrust law that horizontal agreements are analyzed under a significantly more stringent standard than vertical agreements. *See Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007) (explaining that "the [Supreme] Court [has] rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones," and citing *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, n.18 (1982), for the proposition that "horizontal restraints are generally less defensible than vertical restraints"). *See also Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54 (1977) (explaining that, in contrast to horizontal restrictions, vertical restrictions have certain "redeeming virtues"). This is because agreements among competitors "pose the most significant dangers of competitive harm." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1902(a) (3d ed. 2016). Because Google's agreements with {[redacted]} do not present the same "significant dangers of competitive harm" as Respondent's agreements with its direct competitors, any analogy between Google's and Respondent's agreements is inapposite.

Indeed, Respondent fails to explain how Google's agreements with three {[redacted]} are in any way comparable to Respondent's Bidding Agreements with numerous rivals, each of whom was afforded *reciprocal* rights under the Bidding Agreements at issue in this case. Nor does Respondent explain how Google's "assessment of the risks of potential liability" (MTC 6) from dealing with three {[redacted]} are in any way relevant to Respondent's decision to enter into at least 14 separate bilateral agreements with its closest competitors. Simply put, Respondent's motion overlooks one of the most basic distinctions in antitrust law, and in doing so, fails as a matter of law to establish any relevancy between Google's settlement agreements and the Bidding Agreements at issue in this case.

C. Three Settlement Agreements of a Single Third Party Reveal Nothing About Whether Bidding Agreements Among Competitors Are "Commonplace"

Even if Google's agreements with {[redacted]} were comparable to Respondent's Bidding Agreements—and, as explained in Part B, *supra*, they clearly are not—Respondent's assertion that "the Google settlement agreements are relevant to whether the relief in Respondent's settlements are 'commonplace'" is empirically unfounded. According to public estimates, Google has more than {[redacted]}.[3] The claim that three trademark settlement agreements could tell this Court anything about whether such agreements are "commonplace" even as to *Google*, let alone as to the millions of firms that own (and seek to protect their) trademarks, is not serious. Indeed, between 2005 to 2013, one report found that there were over 35,000 trademark cases filed in the United States, an average of over 3,900 cases

[3] [redacted].

per year.[4] Among this sea of trademark litigation, showing that Respondent's bidding agreements may be "similar" to three other (non-analogous) settlement agreements of a third party is a far cry from showing that such agreements are "commonplace," and, thus, not relevant to this case.

CONCLUSION

For the reasons stated above, the Court should hold Respondent's motion to compel in abeyance pending the Commission's resolution of Complaint Counsel's motion for partial summary decision, or, in the alternative, deny Respondent's motion.

Dated: January 10, 2017

Respectfully submitted,

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[4] *See* Brian Howard, *Lex Machina 2015 End-of-Year Trends*, LEX MACHINA, Jan. 7, 2016, at Fig. 8, https://lexmachina.com/lex-machina-2015-end-of-year-trends/.

Ex. A

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

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

COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

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Dated: November 3, 2016

COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION AND [PROPOSED] ORDER

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that, pursuant to Federal Trade Commission Rule of Practice 3.24, Complaint Counsel hereby respectfully move for a partial summary decision in this action. For the reasons set forth in the accompanying Memorandum, this motion should be granted.

By this Motion, Complaint Counsel seek partial summary decision dismissing Respondent's Second Defense (the *Noerr-Pennington* doctrine and the First Amendment to the United States Constitution) and Third Defense (that the Bidding Agreements settled litigation that was not objectively or subjectively baseless). Both defenses fail as a matter of law.

Between 2004 and 2013, Respondent entered into fourteen Bidding Agreements with rival sellers of contact lenses. Thirteen of the Bidding Agreements ended threatened or actual trademark lawsuits. These private settlements do not constitute "petitioning" protected by the First Amendment and the *Noerr* doctrine. Rather, they are merely private agreements between Respondent and thirteen of its competitors. The Commission's Complaint alleges that the Bidding Agreements violate Section 5 of the FTC Act. The Second and Third Defenses alleged in Respondent's Answer and Defenses assert that the Bidding Agreements are immune from antitrust scrutiny under the *Noerr* doctrine, and argue that the underlying trademark litigations were not objectively baseless. For the reasons set forth in the accompanying Memorandum, these defenses fail as a matter of law. This Motion is supported by the accompanying Memorandum and the authorities cited therein.

Complaint Counsel does not seek summary decision as to the remaining defenses in Respondent's Answer and Defenses, or as to the allegations of the Complaint. Complaint

Counsel requests entry of an Order granting partial summary decision on Respondent's Second and Third defenses and directing Chief Administrative Law Judge Chappell to receive evidence and issue an initial decision on all of the remaining factual and legal allegations in the Complaint. A Proposed Order is attached.

Respectfully submitted,

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Dated: November 3, 2016

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

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

[PROPOSED] ORDER

Having carefully considered Complaint Counsel's Motion for Partial Summary Decision, Respondent 1-800 Contacts, Inc.'s Opposition thereto, and Complaint Counsel's Reply, and all supporting and opposing declarations and other evidence, and the applicable law, it is hereby ORDERED AND ADJUDGED, that Respondent's Second Defense and Third Defense fail as a matter of law, and Complaint Counsel's Motion for Partial Summary Decision as to this issue is hereby GRANTED.

Chief Administrative Law Judge Chappell is hereby directed to receive and consider all of the parties' evidence on all other factual and legal allegations in the Administrative Complaint. *See* Section 3.24(a)(5) of the Commission's Rules of Practice, 16 C.F.R. § 3.24(a)(5).

ORDERED:

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED:

PUBLIC

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:	**Edith Ramirez, Chairwoman** **Maureen K. Ohlhausen** **Terrell McSweeny**

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

MEMORANDUM OF LAW IN SUPPORT OF COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

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Dated: November 3, 2016

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

This case challenges fourteen agreements between Respondent and its competitors that restrict price competition and reduce the availability of truthful, non-confusing advertising (hereinafter the "Bidding Agreements"). Respondent asserts that the Bidding Agreements are immune from antitrust scrutiny under the *Noerr-Pennington* doctrine because thirteen of the fourteen Bidding Agreements settled lawsuits alleging trademark infringement. Respondent also asserts that Complaint Counsel's claims are barred because the lawsuits underlying thirteen of the fourteen settlement agreements were not objectively and subjectively baseless. Respondents' assertions are set forth in their Answer as their Second and Third Defenses to Complaint Counsel's Complaint. Neither Defense is valid.

The *Noerr-Pennington* doctrine exempts from antitrust scrutiny only genuine "petitioning" that seeks action from a governmental body. It is inapplicable to an agreement among private parties that restrains competition, regardless of whether the agreement settles litigation. The doctrine is equally inapplicable to private agreements that settle litigation brought in "good faith," and to private agreements that settle entirely baseless litigation. Thus, Complaint Counsel respectfully asks the Commission to issue an Order ruling that Respondent's Second and Third Defenses fail to present cognizable defenses to the Complaint.

I. SUMMARY OF UNDISPUTED FACTS

Between 2004 and 2013, Respondent entered into fourteen Bidding Agreements with rival sellers of contact lenses. Statement of Undisputed Facts ¶¶ 7-20. All but one of the Bidding Agreements ended threatened or actual trademark lawsuits. The Bidding Agreements restrict Respondent and each of those fourteen rivals from purchasing or using certain internet search keywords to trigger the placement of advertisements on search engine results pages. *Id.* ¶¶ 28-32. The Bidding Agreements further require the rivals to use certain terms as "negative keywords" to prevent search engines from displaying an ad even where the party did not purchase the keyword. *Id.* ¶¶ 29, 33-38. These restrictions on placing ads apply regardless of the content of the ad – regardless of whether the ad causes confusion and regardless of whether the ad is truthful. There is no dispute about the terms of the Bidding Agreements. And Respondent admits that it entered into these agreements. *Id.* ¶¶ 6, 20. The anticompetitive effects alleged in the Complaint all flow from these private agreements. *Id.* ¶ 40 (citing Compl. ¶ 31) (alleging nine examples of anticompetitive effects resulting from Respondent's Bidding Agreements).

Respondent's Second and Third Defenses to the Complaint in this case assert that the Bidding Agreements are immune from antitrust scrutiny under the *Noerr* doctrine, and argue that the underlying trademark litigations were not objectively baseless.

II. STANDARD FOR SUMMARY DECISION

A "party may move . . . for summary decision in the party's favor upon all or any part of the issues being adjudicated." 16 C.F.R. § 3.24(a). If the party seeking summary decision meets its burden by identifying portions of the record that demonstrate the absence of a genuine issue of material fact, the opposing party must establish "specific facts showing that there is a genuine issue for trial." *In re North Carolina State Board of Dental Examiners*, 151 F.T.C. 607, 611 (2011) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)); *see also* 16 C.F.R. § 3.24(a)(3). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial,'" and summary decision should be granted in favor of the moving party. *North Carolina State Board*, 151 F.T.C. at 611 (quoting *Matsushita*, 475 U.S. at 587).

Motions for partial summary decision can be particularly helpful in expediting resolution when the legal sufficiency of a defense is at issue. For example, in *North Carolina State Board*, the Commission determined that there was no genuine issue of material fact regarding "the propriety of the [respondent's] invocation of the state action doctrine as an affirmative defense," *id.* at 609, and issued an Order dismissing respondent's defense, *id.* at 633. Here, as in *North Carolina State Board*, there is no genuine issue for trial regarding the propriety of Respondent's Second and Third Defenses, which rest on the inapposite *Noerr* doctrine.

III. PRIVATE SETTLEMENTS ARE NOT EXEMPT FROM ANTITRUST SCRUTINY

The essence of the *Noerr* doctrine is that parties do not violate the antitrust laws by seeking governmental action, even if the governmental action sought would result in anticompetitive effects. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961) ("[N]o violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (*Noerr* precludes antitrust liability for restraints "'incidental' to a valid effort to influence governmental action" or "valid governmental action" resulting from such efforts).[1]

The *Noerr* doctrine generally protects the act of filing a good-faith lawsuit, as this constitutes "petitioning" activity that seeks action from the government in the form of a decision by a court. *See Cal. Motor Transp.*, 404 U.S. at 510 ("Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition."); *Andrx Pharms., Inc. v. Elan Corp., PLC*, 421 F.3d 1227, 1233 (11th Cir.

[1] *Noerr* immunizes "petitioning" activity that seeks to influence government action, because Congress did not intend the Sherman Act—which regulates "business activity"—to regulate "political activity." 365 U.S. at 137. The *Noerr* doctrine protects petitioning and advocacy before all branches of government. *Noerr*, 365 U.S. at 135 (petitioning legislature); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (petitioning executive officials); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (petitioning administrative agencies and courts).

2005) ("*Noerr-Pennington* immunity thus shields a defendant from antitrust liability for resorting to litigation to obtain from a court an anticompetitive outcome."). But the *Noerr* doctrine is inapplicable to settlement agreements among private parties that restrain competition. In such settlements, the restraint on competition results from the *agreement*, not from any governmental act, such as a court decision. As a result, litigation settlements between private parties have long been treated as commercial business activity subject to the antitrust laws.[2] The Supreme Court explicitly confirmed that private settlements of intellectual property disputes are subject to antitrust scrutiny in *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), stating that "this Court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws." *Id*. at 2232.

Indeed, the law is clear that when parties "voluntarily withdraw their dispute from the court and resolve it by agreement among themselves there would be no purpose served by affording *Noerr-Pennington* protection. The parties by so doing must abide with any antitrust consequences that result from their settlement." *In re N.M. Nat. Gas Antitrust Litig.*, MDL No. 403, 1982 U.S. Dist. LEXIS 9452, at *16 (D.N.M. Jan. 26, 1982). *See Andrx Pharms., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 819 (D.C. Cir. 2001) ("[A] final, private settlement agreement resolving [a] patent infringement litigation . . . would not enjoy *Noerr-Pennington* immunity.").[3]

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[2] *See, e.g., United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963) (settlement of patent interference claim before the PTO held to violate Sherman Act); *Duplan Corp. v. Deering Milliken, Inc.*, 594 F.2d 979, 981 (4th Cir. 1979) (finding a patent settlement agreement to be the core of a horizontal agreement in violation of the antitrust laws).

[3] *See also In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 395 (D. Mass. 2013) ("Courts are largely uniform in their view that private settlement agreements entered into during the pendency of litigation . . . fall outside the ambit of *Noerr-Pennington* immunity."); *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 641 (E.D. Mich. 2000) ("courts have consistently observed that private agreements settling litigation may result in antitrust liability when they are attended by anticompetitive results") (internal quotation and citation omitted).

In this case, just as in *New Mexico Natural Gas* and *Biovail*, the source of each anticompetitive restraint at issue is not governmental action, but instead, an agreement among private parties resolving litigation, which is unquestionably subject to antitrust scrutiny.[4]

IV. PRIVATE SETTLEMENT AGREEMENTS ARE SUBJECT TO ANTITRUST SCRUTINY EVEN IF THE UNDERLYING LITIGATION IS NOT OBJECTIVELY OR SUBJECTIVELY BASELESS

Respondent's Defenses (in particular, its Second Defense) appear to reference the rule that a lawsuit potentially covered by the *Noerr* doctrine will lose its antitrust immunity if the lawsuit is a sham, that is, if the lawsuit is both objectively and subjectively baseless. *See Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) (the act of filing a lawsuit is not protected by *Noerr* if it "conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process") (citation omitted). But the issue of sham litigation is inapposite here, because the Complaint in this matter challenges *agreements* among private parties that resolved lawsuits, not the filing of the lawsuits themselves. As discussed above, the *Noerr* defense is inapplicable to the settlement agreements at issue here; it follows that the objectively and subjectively baseless standard invoked in Respondent's Second Defense is entirely irrelevant.

For example, in *Andrx Pharmaceuticals v. Elan Corp.*, the Court held that, even though the *Noerr* doctrine immunized the defendant's act of filing lawsuits against the plaintiff, the

[4] Indeed, private agreements resolving litigation are subject to antitrust scrutiny even when incorporated into a consent judgment entered by a court. For example, in *In re Androgel Antitrust Litigation*, No. 1:09-CV-955-TWT, 2014 WL 1600331 (N.D. Ga. Apr. 21, 2014), the court rejected the argument that an agreement providing for a "reverse payment" from one drug manufacturer to another was "protected by the *Noerr-Pennington* doctrine because the underlying litigation was terminated by a consent judgment." *Id.* at *1. The court explained that "the consent decree was formed by [the parties] to settle their dispute, not by the Court in order to terminate pending litigation. . . . [therefore] the 'source . . . of the anticompetitive restraint at issue' is the parties' reverse payment agreement itself, not the governmental action. The Defendants' private agreement should not be due *Noerr-Pennington* immunity." *Id.* at *8 (quoting *Allied Tube*, 486 U.S. at 499). *See also In re Nexium*, 968 F. Supp. 2d at 396 ("The entry of a consent judgment cannot be construed as conduct that is 'incidental' to litigation.").

doctrine did not protect from antitrust scrutiny the defendant's settlement agreements resolving patent litigation. 421 F.3d at 1233-36. Similarly, in *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), the Seventh Circuit held that a litigation settlement agreement represented a *per se* unlawful agreement to restrict advertising, even though the underlying suit was clearly meritorious, as the trial court ruled in favor of the plaintiff and ordered an accounting of partnership assets. *Id*. at 826-28.

Respondent suggests that, somehow, filing "*bona fide*" or "good faith" trademark infringement lawsuits against rivals insulates the resulting settlement agreements from antitrust scrutiny. But the question of whether the underlying lawsuit was "bona fide" or filed in "good faith" is not determinative of whether the challenged agreement is procompetitive or anticompetitive. Because private agreements settling litigation are subject to antitrust scrutiny irrespective of the merits of the underlying lawsuit, Respondent's defenses are irrelevant to the allegations of the Complaint, and fail to provide Respondents with any legally cognizable defense.

CONCLUSION

For the reasons stated above, the Commission should find that the agreements challenged here are subject to antitrust scrutiny and are not immunized by the *Noerr* doctrine, regardless of whether the litigation that led to the agreements was filed in good faith, or was objectively or subjectively unreasonable. Complaint Counsel therefore respectfully asks the Commission to enter an Order granting summary decision in Complaint Counsel's favor regarding Respondent's Second Defense and Third Defense.

Dated: November 3, 2016

Respectfully Submitted,

/s/ Dan Matheson

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

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

COMPLAINT COUNSEL'S STATEMENT OF UNDISPUTED FACTS

Pursuant to Rule 3.24, Complaint Counsel submits, in support of its motion for partial summary decision, the following statement material facts as to which there is no genuine dispute:

A. 1-800 Contacts Entered at Least Fourteen Agreements With Contact Lens Retailers

1. 1-800 Contacts, Inc. ("1-800 Contacts") is a retailer of contact lenses and sells contact lenses primarily over the internet. Matheson Decl. Tab 2, Answer ¶ 14.[1]

2. 1-800 Contacts has more U.S. online sales of contact lenses than any other retailer. Matheson Decl. Tab 2, Answer ¶ 1.

3. 1-800 Contacts sent cease-and-desist letters to online contact lens retailers whose advertisements appeared in response to a search engine query for "1-800 Contacts" (or variations thereof). Matheson Decl. Tab 2, Answer ¶ 17.

[1] "Matheson Decl." refers to the Declaration of Daniel Matheson, to which all exhibits and pleadings referred to herein are attached.

4. Those cease-and-desist letters stated that the conduct of the recipient may constitute trademark infringement. Matheson Decl. Tab 2, Answer ¶ 17.

5. 1-800 Contacts filed complaints in federal court against certain of those online contact lens retailers for trademark infringement. Matheson Decl. Tab 2, Answer ¶ 18.

6. 1-800 Contacts entered into agreements resolving trademark disputes with thirteen online contact lens retailers. Matheson Decl. Tab 2, Answer ¶ 20.

7. 1-800 Contacts entered into an agreement with **{**[redacted]**}**. Matheson Decl. Tab 3, **{**[redacted]**}**.

8. 1-800 Contacts entered into an agreement with **{**[redacted]**}**. Matheson Decl. Tab 4, **{**[redacted]**}**. 1-800 Contacts later entered into another agreement with **{**[redacted]**}** which provided that the earlier agreement would remain in full force. Matheson Decl. Tab 5, **{**[redacted]**}**. The later agreement was incorporated in a consent decree entered by a court. Matheson Decl. Tab 6, CX0316 (Order of Permanent Injunction).

9. 1-800 Contacts entered into an agreement with **{**[redacted]**}**. Matheson Decl. Tab 7, **{**[redacted]**}**.

10. 1-800 Contacts entered into an agreement with **{**[redacted]**}**. Matheson Decl. Tab 8, **{**[redacted]**}**.

11. 1-800 Contacts entered into an agreement with **{**[redacted]**}**. Matheson Decl. Tab 9, **{**[redacted]**}**.

12. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 10, {[redacted]}.

13. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 11, {[redacted]}.

14. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 12, {[redacted]}.

15. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 13, {[redacted]}.

16. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 14, {[redacted]}.

17. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 15, {[redacted]}.

18. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 16, {[redacted]}.

19. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 17, {[redacted]}.

20. 1-800 Contacts also entered into a sourcing and services agreement with a contact lens retailer. Matheson Decl. Tab 2, Answer ¶ 20; Tab 18, **{**[redacted]**}**. 1-800 Contacts has never sued **{**[redacted]**}** for infringement of 1-800 Contacts' trademark rights. 1-800 Contacts did not enter into the sourcing and services agreement to settle litigation. Matheson Decl. Tab 2, Answer ¶ 20.

21. In total, 1-800 Contacts has entered into at least fourteen agreements with rival contact lens retailers ("Bidding Agreements").

B. Search Engine Advertising

22. An internet search engine is a website that uses software to locate information on other internet websites based on a search engine user's "query," which is a word or phrase entered by user. Search engines such as Google and Bing are available to the general public, and do not charge end users for entering queries. Matheson Decl. Tab 1, Compl. ¶ 7; Tab 2, Answer ¶ 7.

23. A search engine results page is the list of results produced by an internet search engine. A search engine results page includes "organic" or "natural" search results that are identified by the search engine's software as relevant to the user's query. A search engine results page may also include advertisements.

24. Search engines use an auction process to sell advertising space on the search engine results page. Matheson Decl. Tab 1, Compl. ¶ 10; Tab 2, Answer ¶ 10. Advertisers seeking to place advertisements on a search engine results page submit bids to the search engine. A bid denotes the maximum amount the advertiser is willing to pay to the search engine each time a user clicks on a displayed advertisement.

25. Advertisers choose the auctions they enter by placing bids on particular terms, called "keywords." A keyword instructs the search engine to display an advertisement if the user enters that keyword as a search engine query and certain other conditions are met. Alternatively, the advertiser may allow the search engine to choose the auctions the advertiser enters by instructing the search engine to match its bids to queries that the search engine deems relevant to the advertiser.

26. Advertisers may also ensure that their ads are not displayed in response to certain searches by submitting "negative keywords" to the search engine. A "negative keyword" instructs a search engine not to display an advertisement in response to a search query that contains that particular term or terms. Matheson Decl. Tab 1, Compl. ¶ 13; Tab 2, Answer ¶¶ 13, 24.

27. When a user enters a query, the search engine evaluates relevant bids. Whether an advertisement is displayed depends upon the amount of the bid, the quality of the advertisement as determined by the search engine, and negative keywords, if any. Quality refers to the search engine's assessment of whether the advertisement will be relevant and useful to the user.

C. The Terms of the Bidding Agreements Challenged in the Administrative Complaint

28. While the Bidding Agreements were phrased in various ways, each required a rival of 1-800 Contacts to refrain from bidding on 1-800 Contacts' specified trademark terms as keywords.

29. Four of the Bidding Agreements prohibit a rival of 1-800 Contacts from causing its website or advertisements to appear in response to any internet search for 1-800 Contacts' brand name, trademarks, or URLs and from causing its brand name, internet link or websites to

appear as a listing in a search engine results page when a user specifically searches for 1-800 Contacts' brand name, trademarks or URLs. These agreements were reached between 1-800 Contacts and **{**[redacted]**}**. Matheson Decl. Tab 3, **{**[redacted]**}**; Tab 4, **{**[redacted]**}**; Tab 7, **{**[redacted]**}**; Tab 8, **{**[redacted]**}**.

30. Seven of the agreements prohibit a rival of 1-800 Contacts from engaging in internet advertising or any other action that causes any website, advertisement, or a link to any website to be displayed in response to any search that includes 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, or 1-800 Contacts' URLs, as listed in an exhibit to the agreement. These agreements were reached between 1-800 Contacts and **{**[redacted]**}**. Matheson Decl. Tab 9, **{**[redacted]**}**; Tab 10, **{**[redacted]**}**; Tab 11, **{**[redacted]

[redacted]}; Tab 12, {[redacted]}; Tab 13, {[redacted]}; Tab 15, {[redacted]}; Tab 16, {[redacted]}.

31. Two of the Bidding Agreements prohibit a rival of 1-800 Contacts from purchasing or using any of 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, or 1-800 Contacts' URLs, as listed in an exhibit to the agreement, as triggering keywords in any internet search advertising campaign. Matheson Decl. Tab 14, {[redacted]}; Tab 17, {[redacted]}.

32. One of the Bidding Agreements prohibits a rival of 1-800 Contacts from purchasing or using any of 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, or 1-800 Contacts' URLs, as listed in a schedule to the agreement, as triggering keywords in any internet search advertising campaign. Matheson Decl. Tab 18, {[redacted]}.

33. Thirteen of the Bidding Agreements explicitly require a rival of 1-800 Contacts implement negative keywords.

34. Seven Bidding Agreements explicitly require a rival of 1-800 Contacts to implement negative keywords in order to prevent any advertisement or a link to its website from appearing as a listing in the search results page of an internet search engine, when a user enters a search that includes 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, or 1-800 Contacts' URLs, as listed in an exhibit to the agreement. These Bidding Agreements were reached between 1-800 Contacts and **{**[redacted]**}**. Matheson Decl. Tab 9, **{**[redacted]**}**; Tab 10, **{**[redacted]**}**; Tab 11, **{**[redacted]**}**; Tab 12, **{**[redacted]**}**; Tab 13, **{**[redacted]**}**; Tab 15, **{**[redacted]**}**; Tab 16, **{**[redacted]**}**.

35. Two Bidding Agreements require a rival of 1-800 Contacts to implement negative keywords listed in an exhibit to the agreement whenever they purchased any keywords through any search engine provider, in order to prevent the generation of advertisements and internet

links triggered by those keywords. The list includes 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, and 1-800 Contacts' URLs. These Bidding Agreements were reached between 1-800 Contacts and {[redacted]}. Matheson Decl. Tab 7, {[redacted]}; Tab 8, {[redacted]}.

36. Two Bidding Agreements require a rival of 1-800 Contacts to implement terms listed in an exhibit to the agreement as negative keywords in all search engine advertising campaigns. The list includes 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, and 1-800 Contacts' URLs. These Bidding Agreements were reached between 1-800 Contacts and {[redacted]}. Matheson Decl. Tab 14, {[redacted]}; Tab 17, {[redacted]}.

37. One Bidding Agreement required a rival of 1-800 Contacts to agree to entry of a stipulated permanent injunction. Matheson Decl. Tab 5, {[redacted]}. The injunction requires the rival, for the purpose of preventing the rival's internet advertising from appearing in response to a search for 1-800 Contacts' intellectual property rights, to implement as negative keywords 1-800 Contacts'

trademarks, variations on 1-800 Contacts' trademarks, and 1-800 Contacts' URLs, as listed in an exhibit to the permanent injunction. This Bidding Agreement was reached between 1-800 Contacts and **{**[redacted]**}**. *Id.* **{**[redacted]**}**; Tab 6, CX0316 at -004 (Order of Permanent Injunction, Exhibit A) (listing trademark terms and variations).

38. One Bidding Agreement requires a rival of 1-800 Contacts to implement as negative keywords in all internet search engine advertising campaigns 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, and 1-800 Contacts' URLs, as listed in a schedule to the agreement. This agreement was reached between 1-800 Contacts and **{**[redacted]**}**. Matheson Decl. Tab 18, **{**[redacted]**}**.

39. The agreements are bilateral, meaning that 1-800 Contacts must also refrain from using each party's trademark terms as keywords for internet search advertising and must use each party's trademarks terms as negative keywords. Matheson Decl. Tab 2, Answer ¶ 23.

40. The Administrative Complaint alleges that the fourteen agreements unreasonably restrain competition and injure consumers. Matheson Decl. Tab 1, Compl. ¶ 31.

Respectfully submitted,

/s/ Dan Matheson

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Counsel Supporting the Complaint

Dated: November 3, 2016

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

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

DECLARATION OF DANIEL J. MATHESON

1. I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could and would testify competently under oath to such facts.

2. I am an attorney at the Federal Trade Commission and Complaint Counsel in this proceeding. Attached to this declaration are the exhibits submitted in support of Complaint Counsel's Motion for Partial Summary Decision.

3. Tab 1 is a true and correct copy of the Administrative Complaint issued by the Federal Trade Commission in the above-captioned matter dated August 8, 2016.

4. Tab 2 is a true and correct copy of the Answer and Defenses of Respondent 1-800 Contacts, Inc. dated August 29, 2016.

5. Tab 3 is a true and correct copy of **{**[redacted]**}**.

6. Tab 4 is a true and correct copy of **{**[redacted]**}**.

7. Tab 5 is a true and correct copy of **{**[redacted]**}**.

8. Tab 6 is a true and correct copy of CX0316, an Order of Permanent Injunction issued in *1-800 Contacts, Inc. v. Vision Direct, Inc.*, No. 08-cx-01949 (S.D.N.Y. May 15, 2009).

9. Tab 7 is a true and correct copy of **{**[redacted]**}**.

10. Tab 8 is a true and correct copy of **{**[redacted]**}**.

11. Tab 9 is a true and correct copy of **{**[redacted]**}**.

12. Tab 10 is a true and correct copy of **{**[redacted]**}**.

13. Tab 11 is a true and correct copy of **{**[redacted]**}**.

14. Tab 12 is a true and correct copy of **{**[redacted]**}**.

15. Tab 13 is a true and correct copy of **{**[redacted]**}**.

16. Tab 14 is a true and correct copy of **{**[redacted]**}**.

17. Tab 15 is a true and correct copy of **{**[redacted]**}**.

18. Tab 16 is a true and correct copy of **{**[redacted]**}**.

19. Tab 17 is a true and correct copy of **{**[redacted]**}**.

20. Tab 18 is a true and correct copy of **{**[redacted]**}**.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 1st day of November, 2016, at Washington, DC.

/s/ Dan Matheson
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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2016, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
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I also certify that I delivered via electronic mail a copy of the foregoing document to:

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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 3, 2016 By: /s/ Dan Matheson

Ex. B

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

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

<u>MEMORANDUM OF LAW OF RESPONDENT 1-800 CONTACTS, INC. IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION</u>

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I. INTRODUCTION

Complaint Counsel's Motion for Partial Summary Decision should be denied for two reasons. *First*, Complaint Counsel base their claim on litigation-related conduct that has long been recognized to be protected from antitrust liability unless shown to be objectively and subjectively unreasonable. In their motion, they describe their claim as exclusively challenging thirteen trademark settlement agreements and one vertical supply agreement. But what Complaint Counsel allege in their Complaint is quite different than what they describe in their motion. The Complaint alleges (¶ 16) that Respondent's efforts to enforce its trademark rights through the court system were part of a "plan" "devised" to keep prices for contact lenses high. According to the Complaint, Respondent executed this plan by sending cease-and-desist letters (¶ 17), making threats to sue (¶ 18), filing lawsuits (¶ 26), entering settlement agreements (¶¶ 20-21), and threatening further litigation against the settling parties if they violated those agreements (¶ 25). And although multiple courts have held that these actions were based on Respondent's reasonable belief that other retailers were infringing its trademarks, the Complaint asserts that Respondent acted "without regard to whether" these retailers "infringed [Respondent's] trademarks" (¶ 27) and that its infringement claims were "inaccurate" (¶ 18).

A fair reading of the Complaint suggests that *all* of these allegations are part of the challenged conduct in this case. Indeed, the Complaint alleges (at ¶ 31) that "Respondent's conduct, as alleged herein, had the purpose, capacity, tendency, and likely effect of restraining competition unreasonably and injuring consumers…." And the "Notice of Contemplated Relief" confirms the broad scope of these allegations. Complaint Counsel would do more than enjoin Respondent from just entering into settlement agreements. They would prospectively prohibit

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the same litigation and pre-litigation activity alleged throughout their Complaint. *See* Compl. at 9 (Nos. 2-5).[1]

The Complaint's allegations thus plainly include petitioning activity protected by the First Amendment. It has been settled for decades that the *Noerr-Pennington* doctrine shields the filing of lawsuits and pre-litigation communications from antitrust scrutiny, unless it is shown that those actions are not objectively and subjectively reasonable. As a consequence, Respondent's Second and Third Affirmative Defenses, taken together, properly assert that Complaint Counsel's claim is barred "in whole or in part" by the *Noerr-Pennington* doctrine. Accordingly, Complaint Counsel's motion for partial summary decision should be denied.

Second, Complaint Counsel do not dispute, nor could they, that it is their burden under *FTC v. Actavis*, 133 S. Ct. 2223 (2013), to prove that Respondent's settlement agreements are subject to antitrust scrutiny. As the Complaint suggests, Complaint Counsel may try to avoid their *Actavis* burden by challenging the *bona fides* of the underlying litigation. Such a challenge would require Complaint Counsel to show that the lawsuits described in the Complaint were objectively and subjectively unreasonable and that Respondent's conduct is not protected by *Noerr* and the First Amendment. Should Complaint Counsel attempt that end-run, they first must overcome Respondent's Second and Third Affirmative Defenses, which are properly asserted in anticipation of such an effort by Complaint Counsel to sidestep their burden under *Actavis*.

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[1] Such relief would be a prior restraint in violation of the First Amendment. *See Simon Prop. Grp., Inc. v. Taubman Cts., Inc.*, 262 F. Supp. 2d. 794 (E.D. Mich. 2003).

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II. RESPONDENT'S SECOND AND THIRD AFFIRMATIVE DEFENSES SHOULD NOT BE STRICKEN

A. The *Noerr-Pennington* Doctrine Protects Litigation and Pre-Litigation Activity

Because "[t]he right of access to the courts is … but one aspect of the right to petition," the *Noerr–Pennington* doctrine provides antitrust immunity based on the filing of a lawsuit. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). So long as the litigation is not a "sham," it is immunized under *Noerr-Pennington*. *See Prof'l Real Estate Inv'rs v. Columbia Pictures*, 508 U.S. 49, 60 (1993). For litigation to qualify as "sham," an antitrust plaintiff must prove *both* that (1) the litigation was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" and (2) that the lawsuit was brought for a subjectively anticompetitive purpose. *Id*.

The *Noerr–Pennington* doctrine also protects activities that are "'incidental' to a valid effort to influence governmental action." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988). *Noerr–Pennington* immunity thus applies to a wide range of good faith pre-litigation activities. These activities include sending cease-and-desist letters and making threats to sue.[2] Immunizing these kinds of pre-litigation communications serves the greater interests of the judicial system[3], and excluding them "from the reach of *Noerr* is simply bad

[2] *See, e.g., Sweet St. Desserts, Inc. v. Chudleigh's Ltd.*, 2016 WL 3924239, at *4 (3d Cir. Jul. 21, 2016) (cease-and-desist letters) (unpublished); *Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343 (9th Cir. 2013) (same); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006) (demand letters); *Globetrotter Software v. Elan Computer Grp.*, 362 F.3d 1367 (Fed. Cir. 2004) (threats to litigate); *Coastal States Mktg. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983) (same); *but see Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885 (10th Cir. 2000) (en banc).

[3] *E.g.*, *Sosa*, 437 F.3d at 936 (sending demand letters "permits parties to frame their legal positions, often streamlining any subsequent litigation, and thereby reducing legal costs and facilitating access to the courts"); *Coastal States Mktg.*, 694 F.2d at 1367 ("The litigator should not be protected only when he strikes without warning. If litigation is in good faith, a token of (footnote continued)

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policy." Hovenkamp, et al., IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law § 11.3 (2d. ed., 2015 Supp.).

B. The Complaint Challenges Plainly Protected Conduct

Complaint Counsel do not dispute that *Noerr-Pennington* protects the filing of non-"sham" lawsuits. Mem. of Law at 3. Nor do they dispute that the doctrine bars antitrust liability for restraints "incidental" to legitimate petitioning activity. *Id*. Nevertheless, they base much of their claim on such protected conduct, describing a course of conduct that includes an array of litigation-related activity alleged to be part of Respondent's purported "plan" (¶ 16) to restrain competition:

- Paragraphs 17 and 18 allege that Respondent sent "inaccurate" cease-and-desist letters to contact lenses retailers, accusing them of trademark infringement;
- Paragraph 18 alleges that Respondent "threatened to sue" companies that did not cease their infringing activity;
- Paragraph 20 questions Respondent's infringement claims, calling them "purported";
- Paragraph 25 alleges that Respondent "aggressively policed" the settlement agreements, including by "threatening further litigation and demanding compliance" when it suspected violations;
- Paragraph 26 discusses Respondent's trademark litigation against Lens.com; and

that sincerity is a warning that it will be commenced and a possible effort to compromise the dispute."); *Select Comfort Corp. v. The Sleep Better Store*, 838 F.Supp.2d 889, 899 (D. Minn. 2012) (noting that the trademark statutes require that defendants be placed on notice in order to claim monetary remedies, and holding that cease-and-desist letters "are desirable methods of petitioning by effectively and efficiently vindicating intellectual property rights").

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- Paragraph 27 alleges that Respondent undertook all of these actions "without regard to whether the advertisements were likely to cause consumer confusion or infringed 1-800 Contacts' trademarks."

Tying these allegations together, Paragraph 31 charges that "Respondent's conduct, as alleged herein, had the purpose, capacity, tendency, and likely effect of restraining competition unreasonably and injuring consumers and others" in several ways.

All of these allegations target protected petitioning activity. Respondent's lawsuits fall squarely within *Noerr-Pennington*. Its cease-and-desist letters and threats to sue are incidental to litigation and fully protected. And its efforts to enforce settlement agreements are equally protected under *Noerr-Pennington,* because a threat to sue based on a settling party's continued trademark infringement is still a threat to sue, whether or not it follows a settlement.

Although Complaint Counsel's motion does not argue otherwise, it is important to note that Respondent's litigation-related activity was objectively and subjectively reasonable. Although the Complaint alleges that Respondent's trademark infringement claims were "inaccurate" and "purported," courts have held that 1-800 Contacts' claims were *not* "sham." In *1-800 Contacts, Inc. v. Memorial Eye, P.A.*, 2010 WL 988524 (D. Utah 2010), the court rejected defendant's argument that Respondent's trademark infringement litigation was "sham," explaining:

> [T]he Tenth Circuit has held that the purchase of another's trademark through a search engine for the purpose of diverting internet traffic and using goodwill associated with that trademark, as alleged here, violates the Lanham Act. Consequently, the Court finds that Plaintiff's claim is not baseless and, it is therefore, protected by *Noerr–Pennington* immunity.

Id. at * 6.

Another court similarly rejected Lens.com's contention that Respondent's trademark claim was a "sham," explicitly noting that the lawsuit was found to have a "legal and factual

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basis"—and that the Tenth Circuit affirmed that decision. *See Lens.com, Inc. v. 1-800 Contacts, Inc.*, No. 2:12-cv-352, Order, Docket Item 91, at 2 (D. Utah Mar. 2, 2014) (Ex. Z to Perry Decl.). Complaint Counsel make no argument that the situation was any different with respect to the other infringers. And for good reason: numerous courts have found that trademark claims may lie for uses of trademarks in internet keyword advertising similar to those that Respondent challenged.[4]

Given these holdings, the trademark infringement claims that Respondent asserted in its lawsuits and pre-litigation communications cannot be considered "sham." Complaint Counsel do not contend otherwise in their motion. Instead, they argue that "the issue of sham litigation is inapposite here, because the Complaint in this matter challenges agreements among private parties that resolved lawsuits, not the filing of the lawsuits themselves." Mem. of Law at 5. But that argument ignores the many other allegations of the Complaint, summarized above, that seek to establish liability on the basis of constitutionally-protected conduct. Respondent's Second and Third Affirmative Defenses are properly raised in response to these allegations.

C. Complaint Counsel Has Not Clearly Ruled Out An Effort To Evade Their *Actavis* Burden By Challenging The *Bona Fides* Of The Underlying Litigation

Complaint Counsel do not contend that antitrust scrutiny applies to *all* private settlements such that it necessarily applies to the trademark settlement agreements at issue here. Even before *Actavis*, the Commission recognized that antitrust liability "ordinarily" does not "attach" to traditional settlement agreements, and that it is "well-established that [voluntary settlement] agreements do not generally violate the antitrust laws." Brief for Petitioner at 26, *FTC v. Watson*

[4] *E.g.*, *Edible Arrangements, LLC v. Provide Commerce, Inc.*, 2016 WL 4074121 (D. Conn. 2016); *Glob. Tel-Link Corp. v. Jail Call Servs., LLC*, 2015 WL 1936502 (E.D. Va. Apr. 28, 2015); *LBF Travel v. Fareportal, Inc.*, 2014 U.S. Dist. LEXIS 156583 (S.D.N.Y. Nov. 5, 2014).

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Pharms., Inc., (2013) (No. 12-416), 2013 WL 267027; *see also id.*at 25 (acknowledging that a patent holder's "good-faith effort to enforce its patent through litigation cannot subject it to liability under the antitrust laws, even though the purpose of such litigation is to forestall competition").

Actavis reaffirmed that settlement agreements are subject to antitrust scrutiny only in limited situations. As the Court explained, "[i]nsofar as the dissent urges that settlements taking these commonplace forms have not been thought for that reason alone subject to antitrust liability, we agree, and do not intend to alter that understanding." 133 S. Ct. at 2233. For antitrust scrutiny to apply after *Actavis,* Complaint Counsel must at a minimum prove that the challenged settlements: (1) are not a "commonplace" form of agreement traditionally used to settle trademark disputes; and (2) that the "general legal policy favoring the settlement of disputes" is outweighed by the considerations that the Court set forth when considering "reverse payment" patent settlements. *Id.* at 2234. Complaint Counsel make no attempt in their motion to meet this burden.

Moreover, Complaint Counsel could not meet their burden if they tried. The settlements involved commonplace non-use trademark agreements.[5] They grew out of *bona fide* trademark infringement disputes. *See infra* at 5-6.[6] The agreements were within the range of litigation

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[5] *See* McCarthy on Trademarks and Unfair Competition § 18:82 (4th ed. 2016 update) ("An agreement not to use or register a mark, usually entered into to settle an infringement dispute, is not against public policy and is an enforceable promise."); *see also Orion Bancorp, Inc. v. Orion Residential Fin., LLC*, 2008 WL 816794, at *3 (M.D. Fla. 2008) (enjoining use of trademarks in internet keyword advertising); *MasterCard Int'l Inc. v. Trehan*, 629 F. Supp. 2d 824, 833 (N.D. Ill. 2009) (same); *Glob. Tel-Link Corp.* at *1 (same).

[6] Courts have held that the non-"sham" nature of the litigation may bear on whether there are "suspicious" circumstances surrounding the settlements such that antitrust scrutiny should apply. *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 993 (N.D. Ill. 2003) (Posner, J.).

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outcomes.[7] The resolution of trademark disputes is to be encouraged.[8] Unlike reverse payments, there is no risk that parties settling trademark disputes will seek to divide monopoly profits because trademarks do not confer monopoly rights.[9] And there is no "workable surrogate" like the size of a reverse payment that a court could use to avoid a "detailed exploration" of the underlying trademark dispute. *Actavis*, 133 S.Ct. at 2236-37.

Unable to sustain their *Actavis* burden for these and other reasons, Complaint Counsel may try to avoid it by challenging the *bona fides* of the underlying litigation. In that event, Complaint Counsel would have the burden to prove "sham" litigation, but Respondent would be entitled to demonstrate, as set forth in its Second and Third Affirmative Defenses, that its conduct was not objectively and subjectively unreasonable and was protected by the First Amendment under *Noerr-Pennington*. This, too, suffices to defeat Complaint Counsel's motion for partial summary judgment.

III. <u>CONCLUSION</u>

For the foregoing reasons, Complaint Counsel's Motion for Partial Summary Decision should be denied.

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[7] *E.g.*, *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123 (2nd Cir. 2009) (finding "use in commerce" in analogous situation); **{**

} (Tab 6 to Matheson Decl.).

[8] *E.g.*, *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 55 (2d Cir. 1997) (trademark settlements are "favored under the law"); *Lebewohl v. Heart Attack Grill LLC*, 890 F. Supp. 2d 278, 301-03 (S.D.N.Y. 2012) (approving a concurrent non-use settlement agreement with territorial restrictions in the absence of current confusion and encouraging litigants to "work together to try to resolve their differences cooperatively").

[9] *E.g.*, *Clorox Co.*, 117 F.3d at 56 ("A trademark, unlike other intellectual property rights, does not confer a legal monopoly on any good or idea; it confers rights to a name only.")

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DATED: November 16, 2016 Respectfully submitted,

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The Honorable D. Michael Chappell
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CERTIFICATE FOR ELECTRONIC FILING

I hereby 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.

DATED: November 16, 2016 By: */s/ Gregory P. Stone*
Attorney

Ex. C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

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

COMPLAINT COUNSEL'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY DECISION

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INTRODUCTION

Respondent's Opposition ("Opp.") identifies no material factual disputes; rather, it contests the legal implications of Complaint Counsel's allegations. First, Respondent suggests that, because the Complaint refers to certain pre-litigation conduct, these acts are necessarily "part of the challenged conduct in this case." Opp. at 1. This argument fails because the only acts or practices challenged by the Complaint are Respondent's *agreements* with its rivals. Private agreements are not immunized from antitrust scrutiny either by the *Noerr-Pennington* doctrine or by the First Amendment.[1] Thus, Respondent's Second and Third Defenses fail because these agreements would not be exempt from antitrust liability even if Respondent could show that the trademark lawsuits underlying their settlement agreements were objectively or subjectively reasonable.

Second, Respondent turns the Supreme Court's *Actavis* decision on its head, asserting that, under *Actavis*, only certain types of litigation settlement agreements are subject to antitrust scrutiny. Based on this patently incorrect premise, Respondent next asserts that Complaint Counsel cannot challenge the restraints at issue unless Respondent coerced those agreements through "sham" litigation. Opp. at 8. Yet this argument fails because *Actavis* reaffirms the basic principle that *all* private settlements are subject to antitrust scrutiny—regardless of the merits of the underlying litigation.

Finally, Respondent erroneously suggests that Complaint Counsel's motion must be denied because one element of the relief sought implicates Respondent's future ability to

[1] *See* Mem. at 4-6. As explained, *Noerr-Pennington* does not immunize from antitrust scrutiny a private agreement that settles litigation, or that resolves a pre-litigation dispute, any more than the doctrine would immunize a simple commercial agreement entirely divorced from litigation issues. Respondents' overbroad argument would lead to the absurd result that the antitrust laws could not reach any agreement between parties – no matter how anticompetitive – as long as the parties had pending non-sham litigation.

threaten and file litigation against its rivals. As explained below, the First Amendment does not prevent the Commission from ordering relief necessary to address and prevent recurrences of an antitrust violation, and the propriety of such relief does not depend on whether the lawsuits that gave rise to the agreements challenged here were objectively or subjectively reasonable.

ARGUMENT

A. The Complaint Challenges Respondent's Agreements With its Rivals, Not Respondent's Litigation-Related Activity

Respondent mischaracterizes the Complaint. Respondent's Opposition incorrectly asserts that Complaint Counsel attempts to "establish liability on the basis of constitutionally-protected conduct." Opp. at 6. For example, Respondent's Opposition observes that the Complaint "alleges that Respondent 'aggressively policed' the settlement agreements, including by threatening further litigation and demanding compliance." Opp. at 4 (citing Complaint ¶ 25). But the Complaint simply describes Respondent's litigious behavior as part of the background or context in which the challenged agreements arose and were maintained, thus resulting in ongoing anticompetitive harm. Such allegations do not transform pre- or post-litigation conduct into a basis on which Complaint Counsel will "establish liability."[2] As the Complaint explicitly states, Respondent's liability is based on the terms of its *agreements* with competitors, and on the impact of these agreements on competition, not on the background allegations identified in Respondent's Opposition. *See* Compl. ¶¶ 1, 3, 25, 32, 33. Similarly, if the challenged agreements had an anticompetitive impact, this impact is not excused by the purported merits of Respondent's pre-agreement conduct toward its rivals. *See* Mem. at 6 (the question of whether

[2] Respondent also takes issue with the Complaint's characterization of Respondent's pre-agreement behavior. Opp. at 4 (criticizing use of the word "purported" in Complaint ¶ 20); *id.* (objecting to description of Respondent's "inaccurate" legal theory in Complaint ¶¶ 17-18). But these are not acts or practices on which Complaint Counsel will "establish" Respondent's liability.

the underlying lawsuit was "bona fide" or filed in "good faith" is not determinative of whether the challenged agreement is procompetitive or anticompetitive).

B. Private Litigation Settlements – Like Other Private Agreements – Are Subject to Antitrust Scrutiny

Respondent is entirely incorrect in asserting that "Complaint Counsel do[es] not contend that antitrust scrutiny applies to *all* private settlements." Opp. at 6. (emphasis in original). To the contrary, Complaint Counsel **does** contend that all private settlements are subject to antitrust scrutiny, just as all commercial agreements between private actors are subject to antitrust scrutiny. Complaint Counsel's opening Memorandum was clear on this point: "the source of each anticompetitive restraint at issue is . . . an agreement among private parties resolving litigation, which is unquestionably subject to antitrust scrutiny." *See* Mem. at 5. Indeed, this proposition is not subject to serious dispute. It has been reaffirmed by the Supreme Court on a number of occasions, including most recently in *Actavis*,[3] as well as by the Commission.[4]

[3] *See generally* Mem. 4 (quoting *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2232 (2013) for the proposition that "this Court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws"); Mem. at 5-6 (citing *Andrx Pharmaceuticals v. Elan Corp.*, 421 F.3d 1227, 1233 (11th Cir. 2005); *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995)).

[4] Respondent's Opp. incorrectly implies that the Commission's brief to the Supreme Court in *Actavis* stated that private litigation settlement agreements are "ordinarily" immune from antitrust liability *See* Opp. at 6 (citing Petitioner's Brief, *FTC v. Watson Pharms., Inc.*). Contrary to the impression created by Respondent's selective quotation, Petitioner's brief in *Actavis* explicitly stated that "private agreements that settle patent litigation do not enjoy the antitrust immunity afforded to litigation itself," and confirmed that "the antitrust analysis [of such agreements] requires a nuanced examination of the specific terms of the parties' agreement." *See* Exhibit A (Petitioner's Brief, *FTC v. Watson Pharms., Inc.*) at 27. Likewise, since *Actavis* the Commission has made it clear that *Actavis* held that litigation settlements "are not immune from antitrust scrutiny and are to be evaluated under the traditional antitrust rule of reason." Exhibit B (Federal Trade Commission's Brief as Amicus Curiae, *In re: Wellbutrin XL Antitrust Litig.*, Case No. 2:08-cv-2431 (E.D. Pa. Sept. 26. 2013)) at 4; *id.* at 7 ("it is incorrect to suggest . . . that *Actavis* merely created a narrow exception to an otherwise blanket antitrust immunity," because the Court's "directive to consider traditional antitrust factors is not a special rule limited to "reverse payment" cases.").

Whether a settlement will result in antitrust liability is a different question. *Actavis* is clear that all private settlement agreements are subject to antitrust *scrutiny*; and it places the burden of proving ultimate *liability* on the plaintiff. Respondent's Opposition ignores this crucial distinction between "scrutiny" and "liability" when it invents an "*Actavis* burden" that, according to Respondent, must be satisfied before a private settlement agreement may even be evaluated to determine if it violates the antitrust laws. Indeed, in the portion of the *Actavis* opinion cited by Respondent, the Court expressly discussed whether certain settlements could be "subject to antitrust *liability*." *See FTC v. Actavis*, 133 S. Ct. 2223, 2233 (2013) (emphasis added). No portion of the Court's opinion supports the notion that private settlement agreements may be subject to antitrust *scrutiny* only after a plaintiff clears some special hurdle.

Moreover, Respondent's contrived "*Actavis* burden" is not relevant to the disposition of this Motion. The issue presented by Complaint Counsel's instant Motion for Partial Summary Judgment is whether Respondent's *Noerr*-related Defenses present a sufficient and legally cognizable defense for the restraints at issue.[5] Respondent's "*Actavis* burden" argument, which is not hinted at in its Answer, appears to concede that *Noerr* does not immunize the restraints

[5] *Cf. Mass. Mutual Life Ins. Co. v. Residential Funding Co., LLC*, 55 F. Supp.3d 235, 237 (D. Mass. 2014) (granting plaintiff's motion for partial summary judgment regarding legally insufficient "loss causation" defense); *id.* at 246 (explaining that summary judgment on the defenses was appropriate in part because "judicial resources are not saved by permitting a complex issue to remain lurking in these cases when the court is convinced that the Supreme Judicial Court would not recognize this defense."); *URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ.*, 915 F. Supp. 1267, 1279 (D.R.I. 1996) (when considering motions for summary judgment under Fed. R. Civ. Pro. 56, "in order to distill the issues to be tried, the Court may bar certain legal arguments and affirmative defenses if it is clear that they run counter to the governing law.") (citing 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2737, at 462–463 (1983)). These federal court cases are persuasive because the Commission reviews a "motion for summary decision pursuant to Rule 3.24 of our Rules of Practice, the provisions of which "are virtually identical to the provisions of Federal Rule of Civil Procedure 56, governing summary judgment in the federal courts."" Opinion of the Commission, *In re Jerk, LLC*, FTC Docket No. 9361 (March 25, 2015) at 3 (quoting *Polygram Holding, Inc.*, 2002 WL 31433923, at *1 (FTC Feb. 26, 2002)).

from antitrust scrutiny and instead suggests an entirely different defense in which the "bona fides" of its claims against its competitors should be taken into account as one of a range of relevant factors. Opp. at 7-8 (suggesting that factors relevant to the analysis of a settlement include the litigation's "bona fides," whether the settlement is "commonplace" and "within the range of litigation outcomes," and whether a workable surrogate exists that allows a court to avoid grappling with the merits of the underlying litigation). Respondent's Opposition argues that this panoply of factors is relevant to the legality of the Bidding Agreements.[6] But no authority supports the contention that, if Respondent's underlying trademark claims were non-sham, then the Bidding Agreements are necessarily exempt from antitrust liability. Again, such a position is untenable as it would mean that parties could enter into *any* anticompetitive agreement as long as there was non-sham litigation pending between them.

C. Respondent's Defenses Are Not Relevant to the Propriety of the Relief Sought

Respondent takes issue with Items 2, 3, 4, and 5 of the Complaint's Notice of Contemplated Relief. *See* Opp. 1-2 (citing Notice of Contemplated Relief, Items 2-5). Items 2 and 3 prohibit Respondent from entering new agreements with terms similar to those challenged in the Complaint,[7] while Item 4 prohibits Respondent from enforcing the challenged provisions in its current agreements. *See* Compl. at 9 (Nos. 2, 3, 4). Item 5 would prohibit Respondent from threatening or filing ***future*** lawsuits premised on the notion that its trademarks are

[6] To the extent Respondent's interpretation of *Actavis* (and the asserted exemption for "settlements within the range of litigation outcomes" (Opp. at 7-8)) constitutes "part of the issues being adjudicated" now that it has been raised for the first time in Respondent's Opposition, Complaint Counsel reserves the right to move separately for a summary decision on this issue. *See* 16 C.F.R. §3.24(a).

[7] Item 2 would prohibit Respondent from forming an agreement "that restrains competition in any search advertising auction." *Id.* (No. 2). Item 3 would prohibit Respondent from forming an agreement with a competitor "to forbear from disseminating truthful and non-misleading advertising." *Id.* (No. 3).

automatically infringed every time a competitor's advertisement is displayed in response to an internet search that includes one of Respondent's trademarked terms.[8] Respondent asserts that these forms of relief "confirm" that the Complaint's allegations encompass conduct protected by the *Noerr-Pennington* doctrine. Opp. at 1. This argument fails, because injunctive relief need not be narrowly cabined by the violations proven. Instead, once the Commission finds a violation of antitrust law, it "has wide latitude in forming an appropriate remedy." *Rubbermaid, Inc. v. FTC*, 575 F.2d 1169, 1174 (6th Cir. 1978). Indeed, the Commission should draw upon its expertise and exercise "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" at issue. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). "Whether the case involves consumer protection or competition violations, the "wide discretion" described in *Ruberoid* is subject only to two constraints: the order must bear a "reasonable relation" to the unlawful practices, and it must be sufficiently clear and precise that its requirements can be understood." *In re POM Wonderful LLC*, 2012 FTC LEXIS 18, 93-95 (F.T.C. Jan. 11, 2012) (internal citations omitted). Relief that anticipates and addresses future conduct is entirely appropriate "so long as [it] bears a reasonable relationship to the act or practice found unlawful." Opinion of the Commission, *In re McWane, Inc.*, FTC Docket No. 9351, at *39, (Jan. 30, 2014) [hereinafter "*In re McWane*"], *available at* https://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion_0.pdf, *aff'd*, 783 F.3d 814 (11th Cir. 2015).

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[8] Item 5 would prohibit Respondent "from filing or threatening to file a lawsuit against any contact lens retailer alleging trademark infringement . . . that is based on the use of 1-800 Contacts' trademarks in a search advertising auction." Compl. 9 (No. 5). However, it allows Respondent to pursue litigation based on the actual content of the advertising (referred to as "advertising copy") in the event that "Respondent has a good faith belief that such advertising copy gives rise to a claim." *Id.*

Here, each of the remedies sought by Complaint Counsel bears a reasonable relationship to the Bidding Agreements challenged in the Complaint. Compl. 9 (Notice of Contemplated Relief). But the nexus between the relief sought and the violations found is a question for another day. The propriety of the relief sought is not at issue in Complaint Counsel's instant Motion, because none of relief sought is foreclosed by the *Noerr-Pennington* defenses Respondent advances.

Specifically, Items 2, 3, and 4 would prevent Respondent from entering identical agreements in the future, and require Respondent to abandon enforcement of the current provisions in order to "cease and desist from the violation of law" charged in the Complaint. 15 U.S.C. § 45(b).[9] Because *Noerr-Pennington* does not apply to private agreements, *see supra* at 3-4, Respondent's Second and Third Defenses would not bar this relief.

Respondent's Defenses likewise fail with respect to Item 5. As explained above, the Commission may exercise its discretion to fashion reasonable prospective relief even if Respondent were to establish that the ***past*** lawsuits that gave rise to the agreements at issue were "bona fide" or filed in "good faith." Nor can Respondent defeat Complaint Counsel's Motion for Partial Summary Judgment by claiming that the relief sought in Item 5 would constitute "a prior restraint in violation of the First Amendment." Opp. at 2 n.1. Once an antitrust violation has been found, it does not violate *Noerr* or the First Amendment for the Commission to prevent future violations of law through reasonable and appropriate limitations on Respondent's ability to initiate future litigation; the Commission has done this in past cases.[10]

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[9] *See also In re McWane* at *41 (finding a violation of Section 5 based on Respondent's exclusive dealing policies and issuing a cease and desist order prohibiting the Respondent from "implementing or enforcing" any exclusive dealing policy).

[10] Decision and Order, *In re Motorola Mobility LLC and Google Inc.*, FTC Docket No. C-4410 (July 23, 2013) *available at*

Moreover, the Commission may appropriately hold that that Respondent's restraints are anticompetitive; by doing so, it will necessarily find that the restraints "exceed the scope of any property right that 1-800 Contacts may have in its trademarks," Compl. ¶ 32, by preventing the display of ***all*** search advertising in response to internet searches containing trademarked terms, regardless of the content of the ad.[11] *See* Compl. ¶¶ 18, 21, 24. In reaching this conclusion, the Commission would not need to determine, or even consider, the bona fides of the litigations that resulted in the challenged settlement agreements.

D. Respondent Identifies No Disputed Material Facts

Respondent has identified no genuine disputes as to material facts that defeat summary judgment. Instead, it only quibbles with allegations in ways that have no effect on the outcome of the Complaint or of this Motion. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or

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https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf; Decision and Order, *In re Robert Bosch Gmbh*, FTC Docket No. C-4377 (Apr. 24, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2013/04/130424robertboschdo.pdf.

[11] This conclusion is consistent with the results reached by federal courts, which have held that even if a trademark is *used* when search advertising appears in response to a search that includes a trademarked term, such a use is not necessarily *confusing*. Thus, a trademark does not entitle the holder to prohibit its competitors from displaying all search advertising triggered by the mark, because a trademark protects its holder only from *confusing* uses of its mark and whether a particular use is confusing depends on the content of the advertisement at issue. *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1256 (10th Cir. 2013) (affirming grant of summary judgment in favor of accused trademark infringer Lens.com with respect to search advertising that did not include 1-800 Contacts' mark within the text of the advertisement, because the display of such advertisements in response to searches containing 1-800 Contacts' trademarks was not confusing); *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1153-54 (9th Cir. 2011) ("In the keyword advertising context the likelihood of confusion will ultimately turn on what the consumer saw on the screen and reasonably believed, given the context . . . . The labeling and appearance of the advertisements as they appear on the results page . . . must be considered as a whole.") (citations and quotation marks omitted).

unnecessary will not be counted."); *Mass. Mutual Life*, 55 F. Supp.3d 235, 239 ("a fact is "material" when it might affect the outcome of the suit under the applicable law."). For example, Respondent "disputes" thirteen facts asserted by Complaint Counsel as "incomplete and misleading" solely on the basis that Complaint Counsel's Separate Statement described Respondent's challenged restraints as "agreements" rather than "settlement agreements." *See* Response to Separate Statement ¶¶ 7-19. But this dispute over verbiage cannot affect the outcome of this suit, and there is no genuine dispute that 13 of the 14 agreements settled litigation – indeed, Complaint Counsel's opening Memorandum stated that "thirteen of the fourteen Bidding Agreements settled lawsuits alleging trademark infringement." Mem. at 1. Thus, these purported "disputes" simply add additional detail, while confirming that the facts set forth by Complaint Counsel are correct. *See also* Response to Separate Statement ¶¶ 4, 5, 28-31, 33-38.

Likewise, Respondent identifies no *material* dispute regarding paragraphs 24 through 27 of Complaint Counsel's Statement of Undisputed Facts. Those paragraphs explain the basic contours of search engine advertising that have remained constant throughout the relevant time period. Statement ¶¶ 24- 27. Respondent does not advance any disagreement with any of the factual information in these statements. *Cf.* 16 C.F.R. §3.24 (a)(3) (a party opposing summary decision must set forth "specific facts showing that there is a genuine issue of material fact for trial."). Instead, it claims a "dispute" based only on extremely general, and entirely unrelated, FTC Bureau of Consumer Protection statements to the effect that *some* aspects of search engines functions are "constantly evolving." Response to Separate Statement ¶¶ 24-27. These generalized assertions do not establish a genuine factual dispute. *See* Opinion of the Commission, *In re Jerk, LLC*, FTC Docket No. 9361 (March 25, 2015) at 4 ("a party opposing summary judgment cannot rest on generalized assertions, but must set forth "concrete particulars" showing the need for trial.") (quoting *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978)). And the purported dispute is not "material," because the fact that some arcane aspects of search engine operations are evolving does not affect the basic facts regarding search engine advertising. Those aspects of search engine operations will not affect the outcome of this case, and are not material to the issues presented in Complaint Counsel's Motion.

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November 25, 2016 By: /s/ Dan Matheson

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2017, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

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Federal Trade Commission
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The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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January 10, 2017 By: /s/ Daniel J. Matheson
Attorney