

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



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

DOCKET NO. 9372

**ORDER DENYING RESPONDENT'S MOTION TO
COMPEL COMPLIANCE WITH SUBPOENA**

I.

On January 3, 2017, Respondent 1-800 Contacts, Inc. ("Respondent") filed a Motion to Compel Compliance with Subpoena ("Motion"). Non-party Google Inc. ("Google") filed its Opposition to the Motion on January 10, 2017.

On January 10, 2017, Federal Trade Commission ("FTC") Complaint Counsel filed a Motion for Leave to File an Opposition to Respondent's Motion to Compel Compliance with Subpoena, together with its Opposition. Respondent's Opposition to Complaint Counsel's Motion for Leave, filed on January 12, 2017, has been considered and Complaint Counsel's Motion for Leave is GRANTED.

For the reasons set forth below, Respondent's Motion is DENIED.

II.

The subpoena request at issue seeks production by Google of three settlement agreements of Google that resolved claims against Google for trademark infringement, in connection with Google's allegedly allowing the use of trademark terms as keywords for paid search advertising ("Settlement Agreements"). As an initial matter, Respondent asserts that Google failed to file a motion to quash and therefore waived its objections to the subpoena, citing *FTC v. O'Connell Assocs., Inc.*, 828 F. Supp. 165, 168 (E.D.N.Y. 1993). Google responds that it timely served Respondent with responses and objections to the subpoena, and that the parties thereafter spent months negotiating the scope of the subpoena.¹ Google further responds that Rule 3.34(c) does not

¹ Google argues that it retained its rights to object pursuant to Rule 3.37. The reference in Rule 3.37 to production of documents by non-parties states that "[a] person not a party to the action may be compelled to produce documents . . . as provided in § 3.34." 16 C.F.R. § 3.37(a). Given the holding *infra*, it is unnecessary to address this argument.

state that objections are waived unless a subpoenaed party moves to quash and that *O'Connell* is inapposite.

Commission Rule 3.34 sets the deadline and required contents for filing a motion to limit or quash a subpoena. It does not require a non-party to file a motion to quash. 16 C.F.R. § 3.34. Moreover, under the circumstances presented, the fact that Google did not file a motion to quash is not properly deemed to be a waiver of its objections to the subpoena, particularly where, as here, Respondent was on notice of Google's specific objections and the parties were negotiating. In addition, *O'Connell* does not stand for the proposition that a party in a Part 3 proceeding waives its objections if it does not file a motion to quash. *O'Connell* addressed a Civil Investigative Demand ("CID") under Part 2 of the FTC Rules of Practice, not Part 3. Part 2 is a non-adversarial proceeding where the FTC must file suit in federal court to enforce compliance with the CID. 15 U.S.C. § 57b-1(e). *O'Connell*, 828 F. Supp. at 168. The court in *O'Connell* held that the respondents must exhaust their administrative remedies before seeking relief from a district court. *Id.* at 168-69. Here, the Administrative Law Judge is hearing Google's objections in the first instance. For all the foregoing reasons, Google's failure to file a motion to quash does not justify finding a waiver of its objections to the subpoena.

III.

Pursuant to Rule 3.38, Respondent moves for an order compelling Google to produce three settlement agreements responsive to Respondent's subpoena or, in the alternative, for an order certifying "to the Commission a request that court enforcement of the subpoena . . . be sought." 16 C.F.R. § 3.38(c). As a preliminary matter, however, Respondent must demonstrate, pursuant to Rule 3.31(c) that these documents are "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). Absent this showing, there is no right to discover the documents requested by the subpoena, and the subpoena should not be enforced.

Respondent argues that the Settlement Agreements are relevant to show that the alleged Bidding Agreements challenged in this case² represent "commonplace" forms of settlement agreements, which Respondent argues are immune from antitrust scrutiny pursuant to *FTC v. Actavis, Inc.*, 133 S. Ct 2223 (2013). Respondent contends these Settlement Agreements are also relevant to disputing allegations in the Complaint that the alleged Bidding Agreements were not the result of an accurate assessment of trademark infringement liability, but were entered into in order to "avoid prolonged and costly litigation" and that the Bidding Agreements "go well beyond" prohibition of trademark infringement. *See* Complaint ¶¶ 18, 19, 21. Respondent further argues that { [REDACTED] }³ may be used to dispute allegations in the Complaint that Respondent's alleged Bidding Agreements harm search engines

² The Complaint alleges that certain "Bidding Agreements" that Respondent made with various competing online contact lens sellers constitute a restraint of trade and an unfair method of competition in the alleged markets for the auctioning of keyword search online advertising and the retail sale of contact lenses, in violation of Section 5 of the FTC Act. Complaint ¶¶ 28-29, 31.

³ The use of bold font and braces in this Order is to reflect material that the parties have designated as Confidential Subject to Protective Order and does not indicate that the material contained therein has been granted *in camera* treatment.

because, as Respondent states, “rational companies do not { [REDACTED] }. Motion at 6. Respondent acknowledges that it deposed Google’s in-house trademark counsel about the Settlement Agreements, but contends that the Settlement Agreements themselves are the best evidence of their terms, not all of which were known by the trademark counsel, and that determining whether Respondent’s alleged Bidding Agreements are commonplace settlement agreements requires Respondent to compare the terms of the Settlement Agreements to the alleged Bidding Agreements “side-by-side.”

On the issue of relevance, Google responds that *Actavis* does not hold that settlement agreements are lawful if they are commonplace. Google further argues that even if Respondent’s interpretation of *Actavis* is correct, the Settlement Agreements are not relevant to show that the alleged Bidding Agreements are commonplace because the Settlement Agreements are not similar to the Bidding Agreements, in terms of applicable law or underlying facts. Google asserts that the Settlement Agreements are vertical agreements { [REDACTED] }, subject to a rule of reason analysis, not horizontal agreements among competitors, as the Bidding Agreements are alleged to be. In addition, Google asserts that the Settlement Agreements were entered into a decade ago, when the law on the use of trademarks as keywords was less developed, and that the substantive law regarding whether or not a search engine infringes a trademark when its customers bid on competitors’ trademarked keywords has evolved since the time of the Settlement Agreements. Furthermore, Google argues, the Settlement Agreements are not sufficiently factually similar to override the policy against requiring production of settlement agreements. Among other things, Google notes, there are different parties, trademarks, and legal issues. For example, { [REDACTED] }.

IV.

Having fully reviewed and considered the Motion, Google’s Opposition, Complaint Counsel’s Opposition, the exhibits thereto, and all arguments raised therein, Respondent has failed to demonstrate that the Google Settlement Agreements must be produced. Among other things, the record fails to support Respondent’s argument that the Settlement Agreements are relevant because they are similar to the alleged Bidding Agreements.

For the above stated reasons, the Motion is **DENIED**. This is not a ruling as to the admissibility of any evidence at trial.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: January 17, 2017

Notice of Electronic Service

I hereby certify that on January 17, 2017, I filed an electronic copy of the foregoing Order Denying Respondent's Motion to Compel Compliance with Subpoena- Public, with:

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I hereby certify that on January 17, 2017, I served via E-Service an electronic copy of the foregoing Order Denying Respondent's Motion to Compel Compliance with Subpoena- Public, upon:

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