

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 COMPLAINT COUNSEL’S MOTION
TO DISREGARD AND STRIKE CERTAIN EXPERT OPINIONS**

I.

On May 16, 2017, Federal Trade Commission (“FTC”) Complaint Counsel filed a Motion to Disregard and Strike Certain Portions of the Report and Testimony of Dr. Kent Van Liere, Respondent’s proffered consumer confusion expert (“Motion”). Respondent filed an opposition to the Motion on May 26, 2017 (“Opposition”). On May 30, 2017 Complaint Counsel filed a Request for Reply Brief, together with its proposed Reply. The Request for Reply is GRANTED. The Motion is DENIED, as explained below.

II.

Complaint Counsel contends that Respondent violated Additional Provision 19(b) of the Scheduling Order issued in this case by failing to produce the results of certain Internet searches that Dr. Van Liere allegedly relied upon in formulating his survey on consumer confusion, and that this alleged withholding deprived Complaint Counsel of the ability to test Dr. Van Liere’s conclusions. Additional Provision 19(b) requires, with some exceptions not here pertinent, that “[a]t the time an expert report is produced, the producing party shall provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case” Complaint Counsel maintains that certain of Dr. Van Liere’s testimony and opinions must therefore be stricken from the record, or in the alternative, must be disregarded.

Respondent replies that there has been no violation of the Scheduling Order. Respondent asserts that Dr. Van Liere did not rely on the allegedly withheld material in formulating his survey and that Complaint Counsel’s assertions to the contrary are not supported by the record. Respondent further argues that Complaint Counsel has not been harmed by the alleged

withholding and that Complaint Counsel's request to exclude opinions and testimony of Dr. Van Liere for an alleged Scheduling Order violation is excessive.

III.

Complaint Counsel's objections to certain of Dr. Van Liere's opinions and testimony, as raised in the Motion, were raised and argued during the trial of this matter, including Complaint Counsel's contention that such opinions and testimony must be stricken. Tr. 3134-3135. A ruling was issued from the bench directing the parties that any argument that an opinion by an expert should not be considered because "the party on the other side was not given appropriate documents relied upon by the expert," shall be made in post-trial briefing. Tr. 3135-3136. Accordingly, the Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: May 31, 2017

Notice of Electronic Service

I hereby certify that on May 31, 2017, I filed an electronic copy of the foregoing Order Denying Complaint Counsel's Motion to Disregard and Strike Certain Expert Opinions, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
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I hereby certify that on May 31, 2017, I served via E-Service an electronic copy of the foregoing Order Denying Complaint Counsel's Motion to Disregard and Strike Certain Expert Opinions, upon:

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