

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



ORIGINAL

In the Matter of

1-800 Contacts, Inc.,
a corporation

Docket No. 9372

RESPONDENT 1-800 CONTACTS, INC.'S REPLY IN SUPPORT
OF ITS TRIAL BRIEF REGARDING ANTICIPATED OBJECTIONS
TO THE TESTIMONY OF DR. DAVID S. EVANS

INTRODUCTION

This Court should affirm its decision [REDACTED]

[REDACTED]

[REDACTED] This information was available to Complaint Counsel, yet it has never been produced to Respondent. As a result, Respondent has been prejudiced in its efforts to

[REDACTED]

It is immaterial why Complaint Counsel made the decision to receive information from Walgreens' lawyers only by telephone conversation and why they felt it was necessary to transmit it to Dr. Evans orally. But their decisions to do so, and their subsequent decision not to produce the [REDACTED] because they were not in writing, preclude Complaint Counsel

from relying on it at trial through its expert witness. This Court correctly rejected Complaint Counsel's attempt [REDACTED]

[REDACTED] and the facts set forth below fully support that ruling.

FACTS

A. Mr. Hamilton's Declaration and Dr. Evans' Expert Report

[REDACTED] eight days after the deadline for the parties to serve subpoenas *duces tecum*, Complaint Counsel produced to Respondent [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. Mr. Hamilton’s and Dr. Evans’ Hearing Testimony

During Mr. Hamilton’s trial testimony on April 12, 2017, Respondent objected to testimony related to Mr. Hamilton’s use of Google’s Keyword Planner on two grounds: (1) a violation of the best evidence rule, *see, e.g., New Show Studies LLC v. Needle*, No. 2:14-cv-01250, 2014 WL 12495640, at *13 (C.D. Cal. Dec. 29, 2014); and (2) Complaint Counsel’s failure to disclose information it received from either Mr. Hamilton or his counsel related to Mr. Hamilton’s use of the Google Keyword Planner.

In response, Complaint Counsel explained for the first time that this information was orally provided to Complaint Counsel by Mr. Hamilton’s attorneys but was not shared with Respondent. The Court then questioned Complaint Counsel about this oral transmission of information:

JUDGE CHAPPELL: You think there’s an exception that information merely provided orally doesn’t get passed on in a supplement if it’s something you’re going to try to bring out in trial.

MR. LOUGHLIN: Your Honor, everything I’m bringing out in trial was placed in a declaration that they have. There’s nothing – there’s nothing that I’m bringing out.

Trial Tr. 4/12/17 at 423:19-424:1.

Complaint Counsel represented that it would “only” ask Mr. Hamilton “questions that are in [his] declaration. I haven’t asked him anything that was not in the declaration.” *Id.* at 424:24-425:1. Complaint Counsel further represented that “all the testimony” Mr. Hamilton would “be giving” was “in general terms that [Mr. Hamilton] put this in [a] Keyword Planner and [he] got results.” *Id.* at 425:22-426:1. On this basis, the Court agreed to allow such general testimony, but stated that “[w]hen it comes time to decide on these issues, I’m going to decide what weight, if any, to give this evidence.” *Id.* at 426:17-19.

Consistent with Complaint Counsel’s representations, Mr. Hamilton’s testimony was limited to [REDACTED]

[REDACTED] And on cross-examination, Mr. Hamilton testified that he did not recall the specific bid amounts he put into the Keyword Planner for each of Respondent’s trademarked terms (*id.* at 444:24-445:11); he did not know what the Keyword Planner bases its conversion rates on (*id.* at 446:2-4); and he did not know how the Keyword Planner takes into account quality score (*id.* at 447:3-5). Ultimately, Mr. Hamilton testified that he “ha[s] really no idea” how the Keyword Planner “works.” *Id.* at 451:22-452:1.

On April 19, 2017, Respondent submitted a Trial Brief Regarding Anticipated Objections to the Testimony of Dr. David Evans. Respondent explained (at 3) that Dr. Evans should be precluded from testifying about Mr. Hamilton’s use of the Keyword Planner because the “actual results of the Keyword Planner have never been provided to Respondent.” Respondent noted (at 4) that “Complaint Counsel have not explained why the information was never written down and could only be transmitted through oral communications, first by outside counsel for a third party

to Complaint Counsel, and then by Complaint Counsel to Dr. Evans or his assistants.” If Complaint Counsel wanted Dr. Evans to rely on this material at trial, Respondent argued (at 4), then the proper course “was to obtain the available written evidence that substantiates those results and the methodology involved and provide them to Respondent so that Respondent could have a fair opportunity to challenge them.”

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



ARGUMENT

The facts described above support the Court's decision to exclude Dr. Evans' reliance on Keyword Planner information that was not disclosed to Respondent. Complaint Counsel's response brief is devoted to explaining that Complaint Counsel were under no legal obligation to provide that information to Respondent and that Respondent could have obtained that information from Walgreens. But those arguments are beside the point.

Without the inputs used in and outputs generated from the Keyword Planner exercise, Respondent has no way to test (and the Court has no way to know) even the most fundamental aspect of the reliability of Dr. Evans' opinion: whether the figures relied on by Dr. Evans are actually the same as the figures Mr. Hamilton obtained from the Keyword Planner. Nor can Respondent test whether Dr. Evans' use of the figures was appropriate given the undisclosed inputs into the Keyword Planner. These inputs are necessary to understand what Mr. Hamilton did with the Keyword Planner and to cross-examine Dr. Evans about his reliance on it, but they have never been provided to Respondent.

Complaint Counsel argue that they do not possess that information, and need not disclose it to Respondent, because they received it from Walgreens orally and then transmitted to Evans orally. Having chosen to go that route, Complaint Counsel insist (at 3) that they were under no obligation to disclose the Keyword Planner information to Respondent because their oral communications with Mr. Hamilton and Walgreens's counsel are protected by the work-product privilege. But Complaint Counsel cannot avoid production of material information on which their expert seeks to base an opinion simply because they chose to avoid obtaining it in writing.

As this Court rightly recognized, Complaint Counsel cannot assert work-product privilege to “prevent providing information to respondent while trying to utilize testimony on this subject.” Rough Trial Tr. 4/21/17 at 117:5-7; *see In re McWane, Inc.*, Dkt. No. 9351, 2012 FTC LEXIS 126, at *7-8 (July 13, 2012) (quoting *In re Motor Up Corp., Inc.*, Dkt. No. 9291, 1999 FTC LEXIS 262, at *5 (Aug. 5, 1999)) (discussing the “sword and shield” doctrine). This commonsense ruling should not be reconsidered. Respondent would be unfairly prejudiced if it is denied access to the inputs and outputs of an exercise performed by a third party (who could not recall what he did) and yet Complaint Counsel’s expert is allowed to testify about what he was told were the results of that exercise—an exercise that he, too, cannot describe in terms of its inputs, methodology, or other outputs.

DATED: April 25, 2017

Respectfully submitted,

/s/ Steven M. Perry _____

Gregory P. Stone (gregory.stone@mto.com)
Steven M. Perry (steven.perry@mto.com)
Garth T. Vincent (garth.vincent@mto.com)
Stuart N. Senator (stuart.senator@mto.com)
Gregory M. Sergi (gregory.sergi@mto.com)
Zachary Briers (zachary.briers@mto.com)
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue
Los Angeles, California 90071
Phone: (213) 683-9100
Fax: (213) 687-3702

Justin P. Raphael (justin.rafael@mto.com)
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, California 94105

Chad Golder (chad.golder@mto.com)
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, DC 20004

Sean Gates (sgates@charislex.com)
CHARIS LEX P.C.
16 N. Marengo Avenue, Suite 300
Pasadena, California 91101
Phone: (626) 508-1717
Fax: (626) 508-1730

Counsel for Respondent 1-800 Contacts, Inc.

EXHIBIT A

EXHIBIT B

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2017, I filed the foregoing document using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I served via electronic mail a copy of the foregoing document on:

Daniel Matheson, *dmatheson@ftc.gov*
BC-1040-1800-SearchAdTeam-DL@ftc.gov

DATED: April 25, 2017

By: /s/ Eunice Ikemoto
Eunice Ikemoto

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: April 25, 2017

By: /s/ Steven M. Perry
Attorney

Notice of Electronic Service

I hereby certify that on April 27, 2017, I filed an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s Reply in Support of Its Trial Brief Regarding Anticipated Objections to the Testimony of Dr. David S. Evans, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on April 27, 2017, I served via E-Service an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s Reply in Support of Its Trial Brief Regarding Anticipated Objections to the Testimony of Dr. David S. Evans, upon:

Thomas H. Brock
Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

Barbara Blank
Attorney
Federal Trade Commission
bblank@ftc.gov
Complaint

Gustav Chiarello
Attorney
Federal Trade Commission
gchiarello@ftc.gov
Complaint

Kathleen Clair
Attorney
Federal Trade Commission
kclair@ftc.gov
Complaint

Joshua B. Gray
Attorney
Federal Trade Commission
jbgray@ftc.gov
Complaint

Geoffrey Green
Attorney
Federal Trade Commission
ggreen@ftc.gov
Complaint

Nathaniel Hopkin
Attorney

Federal Trade Commission
nhopkin@ftc.gov
Complaint

Charles A. Loughlin
Attorney
Federal Trade Commission
cloughlin@ftc.gov
Complaint

Daniel Matheson
Attorney
Federal Trade Commission
dmatheson@ftc.gov
Complaint

Charlotte Slaiman
Attorney
Federal Trade Commission
cslaiman@ftc.gov
Complaint

Mark Taylor
Attorney
Federal Trade Commission
mtaylor@ftc.gov
Complaint

Gregory P. Stone
Attorney
Munger, Tolles & Olson LLP
gregory.stone@mto.com
Respondent

Steven M. Perry
Attorney
Munger, Tolles & Olson LLP
steven.perry@mto.com
Respondent

Garth T. Vincent
Munger, Tolles & Olson LLP
garth.vincent@mto.com
Respondent

Stuart N. Senator
Munger, Tolles & Olson LLP
stuart.senator@mto.com
Respondent

Gregory M. Sergi
Munger, Tolles & Olson LLP
gregory.sergi@mto.com
Respondent

Justin P. Raphael
Munger, Tolles & Olson LLP
Justin.Raphael@mto.com
Respondent

Sean Gates
Charis Lex P.C.
sgates@charislex.com
Respondent

Mika Ikeda
Attorney
Federal Trade Commission
mikeda@ftc.gov
Complaint

Zachary Briers
Munger, Tolles & Olson LLP
zachary.briers@mto.com
Respondent

Chad Golder
Munger, Tolles, and Olson
chad.golder@mto.com
Respondent

Julian Beach
Munger, Tolles & Olson LLP
julian.beach@mto.com
Respondent

Aaron Ross
Attorney
Federal Trade Commission
aross@ftc.gov
Complaint

Thomas Dillickrath
Attorney
Federal Trade Commission
tdillickrath@ftc.gov
Complaint

Jessica S. Drake
Attorney
Federal Trade Commission
jdrake@ftc.gov
Complaint

W. Stuart Hirschfeld
Attorney
Federal Trade Commission
shirschfeld@ftc.gov
Complaint

David E. Owyang
Attorney
Federal Trade Commission
dowyang@ftc.gov
Complaint

Henry Su
Attorney

Federal Trade Commission
hsu@ftc.gov
Complaint

Steven Perry
Attorney