

Interlocutory Orders, Etc.

IN THE MATTER OF
1-800 CONTACTS, INC.*Docket No. 9372. Order, February 12, 2019*

Order staying Respondent's obligation to comply with Paragraphs III.B., IV.A.2.(a), and IV.B.2. of the Final Order until the United States Court of Appeals for the Second Circuit issues a ruling disposing of the petition for review, but denying respondent's Application for a Stay Pending Review by a United States Court of Appeals in all other respects.

**ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S APPLICATION FOR STAY
PENDING JUDICIAL REVIEW**

On November 7, 2018, the Commission issued an Opinion ruling that 1-800 Contacts, Inc. ("1-800 Contacts" or "Respondent") had violated Section 5 of the FTC Act by entering into and enforcing fourteen agreements with its competitors restricting search advertising and search advertising auctions. On that same day, the Commission issued a cease and desist order ("the Final Order"), described more fully below. Respondent has applied for a stay of most of the Final Order's provisions pending judicial review by a federal court of appeals.¹ We grant Respondent's application for a stay as to paragraphs III.B., IV.A.2.(a), and IV.B.2. and deny it as to the other Final Order provisions.²

The Final Order prohibits the conduct held to violate Section 5 and contains several fencing-in provisions. Specifically, the Final Order bars 1-800 Contacts from entering into any agreement with a Seller, defined as anyone that markets or sells contact lens products, that would regulate or limit the Seller's ability to participate in a search advertising auction, including by restricting use of keywords or requiring use of negative keywords, or that would regulate or limit search advertising. Final Order II.A., B. The Final Order clarifies, however, that these prohibitions do not preclude 1-800 Contacts from initiating a lawsuit or enforcing a court order, including an order approving a settlement. Final Order II.A., B. Further, 1-800 Contacts is not precluded from requiring the Seller to clearly identify itself and to refrain from making false or deceptive claims or from representing that 1-800 Contacts is the source of

¹ We use the following abbreviations in this opinion:

Opinion: Opinion of the Commission

App.: Respondent 1-800 Contacts, Inc.'s Application for a Stay Pending Review by a United States Court of Appeals

Reply: Respondent 1-800 Contacts, Inc.'s Reply Brief in Support of Its Application for a Stay Pending Review by a United States Court of Appeals

² We also deny as moot the parties' Joint Motion Regarding the Schedule for Respondent's Application for Stay. The timeframes requested in that Motion were the same as those specified by the Commission rules. *See* 16 C.F.R. §§ 3.56(d), 4.3(a), (d). Commissioner Phillips dissents from the parts of the Commission's order denying 1-800 Contacts' request for a stay because he believes 1-800 Contacts is likely to succeed on the merits of its appeal, for the reasons expressed in his dissenting opinion on the merits of this case.

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advertised goods or is affiliated with the Seller or from using a name confusingly similar to 1-800 Contacts' trademark. Final Order II.

The Final Order also prohibits 1-800 Contacts from entering into any agreement with a Seller that would regulate or limit truthful, non-deceptive, and non-infringing advertising or promotion. Final Order II.C. In addition, the Final Order requires 1-800 Contacts to cease and desist from enforcing provisions of existing agreements or court orders that impose conditions inconsistent with the requirements described above. Final Order III.A. The Final Order further requires 1-800 Contacts to take whatever action is necessary to vacate or nullify such provisions within 60 days. Final Order III.B.

1-800 Contacts must provide notice of the Final Order to persons with whom it communicated regarding any trademark infringement claim or with whom it entered into a prohibited agreement, and it must provide such notice in future communications for five years going forward. Final Order IV.A., IV.B.2. In addition, for five years from the Final Order, 1-800 Contacts must provide to the Commission any communication with any person regarding that person's suspected trademark infringement, a copy of any agreement with any Seller relating to search advertising, and a copy of any proposed stipulated settlement order limiting search advertising or the Seller's ability to participate in a search advertising auction. Final Order IV.B.

Pursuant to Section 5(g) of the FTC Act, the Final Order was to become effective on January 25, 2019, the sixtieth day after it was served. 15 U.S.C. § 45(g)(2). By order dated January 31, 2019, the Commission stayed the effective date until March 1, 2019, because a government shutdown had slowed the Commission's review of Respondent's stay application.

Respondent has filed a petition for review of the Commission's Opinion and Final Order in the United States Court of Appeals for the Second Circuit. Respondent asks us to stay the Final Order pending appeal "except to the extent it requires 1-800 to (1) cease enforcing the challenged search advertising provisions in the fourteen agreements targeted in this case, and notify the counterparties to those fourteen agreements of the Commission's decision." App. at i.

Under Commission Rule 3.56(c), an application for stay must address (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm absent a stay; (3) the degree of injury to other parties if a stay is granted; and (4) whether the stay is in the public interest. 16 C.F.R. § 3.56(c). We find that these factors support denying a stay except with respect to certain provisions regarding nullification of existing orders and agreements and notification of third parties. We first discuss the reasons for partial denial of 1-800's stay application and then separately address the nullification and notification provisions.

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A. Likelihood of Success on Appeal

“[T]ribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.” *Cal. Dental Ass’n*, 1996 FTC LEXIS 277, at *10 (May 22, 1996) (quoting *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977)). The degree of the likelihood of success on appeal that must be shown to justify a stay depends on the extent to which the other three Rule 3.56(c) factors support the stay. *Id.* For example, the probability of success that must be demonstrated is inversely proportional to the irreparable harm that would be incurred in the absence of a stay. *McWane, Inc.*, 2014 WL 1630460, at *1 (F.T.C. Apr. 11, 2014).

Respondent asserts that the Commission’s analysis of the merits of the case is “vulnerable on appeal.” App. at 7. Quoting extensively from Commissioner Phillips’ dissenting opinion, Respondent reprises the same arguments the majority has already discussed at length and rejected. “[R]epetition of the dissent’s arguments,” however, “neither changes the Commission’s conclusion that [Respondent] engaged in [anticompetitive practices] nor establishes a likelihood of success on appeal.” *McWane*, 2014 WL 1630460, at *2; *see also Realcomp II, Ltd.*, 2010 WL 5576189, at *2 (F.T.C. Jan. 7, 2010) (“Respondent’s mere disagreement with our decision does not establish serious and substantial questions going to the merits.”); *Toys “R” Us, Inc.*, 126 F.T.C. 695, 697 (1998) (emphasizing that renewal of previously rejected arguments alone cannot justify a stay).

Nor do the differences between the decisions of the Commission and the ALJ suggest a likelihood of reversal. The ALJ and the Commission both found that 1-800 Contacts’ agreements violated Section 5 of the FTC Act. Like the ALJ, the Commission found evidence that the challenged agreements harmed competition for the online sale of contact lenses, but the Commission also found that the agreements could be condemned as inherently suspect and that the agreements harmed search engines. The fact that the Commission found liability on these additional grounds does not indicate serious and substantial questions on the merits. On the contrary, that multiple legal theories support liability increases the likelihood that a federal appellate court will find the restrictions at issue impermissible.³

Respondent also appears to argue that the likelihood-of-success factor is met here because the administrative trial lasted 19 days and involved numerous witnesses and exhibits. App. at 6. The likelihood of success on appeal, however, does not hinge on the volume of evidence presented at trial.

In all, although we were not unanimous in our finding of liability, Respondent has not established a high likelihood of success on appeal. A stay may still be appropriate, however,

³ Even if the Commission had rejected the ALJ’s conclusions, we have previously declined to adopt the “unsupported position that [] rejection of the conclusions of the Administrative Law Judge means that serious and substantial issues exist on appeal.” *Realcomp II*, 2010 WL 5576189, at *3.

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if 1-800 Contacts makes a compelling case in support of a stay based on the other Rule 3.56(c) factors.

B. Likelihood of Irreparable Harm

In addition to showing a likelihood of success on appeal, to justify a stay, Respondent “bears the burden of demonstrating that denial of a stay will cause irreparable harm.” *Cal. Dental*, 1996 FTC LEXIS 277, at *6. “Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice.” *Id.* “A party seeking a stay must show, with particularity, that the alleged irreparable injury is substantial and likely to occur absent a stay.” *Id.*

Respondent claims harm from the requirements that it notify the Commission of its third-party communications and settlements. Respondent alleges that providing notice to the Commission of communications with third parties regarding trademark infringement would impose enormous costs, including fees for outside counsel who would have to produce the communications and address confidentiality and protective order issues. App. Montclair Decl. ¶ 16. We are not persuaded that this requirement would impose a significant burden. Presumably, 1-800 Contacts would have to involve its counsel in communications with third parties about trademark infringement anyway, and it is not clear why copying the Commission on such communications would materially increase 1-800 Contacts’ costs. Respondent also claims, without explanation, that providing the Commission with notice of trademark infringement communications would “raise serious questions of confidentiality.” App. at 12. However, communications provided to the Commission would be subject to the Commission’s statutory confidentiality protections. *See* 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10. Respondent’s vague statements about confidentiality concerns do not demonstrate a likelihood of substantial and irreparable injury, let alone “with particularity.” *Cal. Dental*, 1996 FTC LEXIS 277, at *6.

Respondent also voices a variety of concerns about the breadth of different provisions of the Final Order. App. at 1-4. Respondent argues that the definitions are overinclusive,⁴ the prohibitions are overbroad, and the notice requirements are ambiguous, lacking clarity about which parties must be notified and which communications produced to the FTC. *Id.* at 11-13. Such objections to the Final Order’s scope and applicability – which Respondent should have raised on appeal, as its arguments concern provisions that also appeared in the ALJ’s proposed order – are not proper subjects for a stay application and do not provide a basis to delay implementation of the Final Order.

C. Harm to Third Parties and the Public Interest

The third and fourth factors – the degree of injury to other parties if a stay is granted and whether the stay is in the public interest – are often assessed together because, in enforcing

⁴ For example, Respondent asserts that the definition of “Seller” can include parties with whom 1-800 Contacts has upstream and downstream vertical relationships. *Id.* at 4. It also claims that the term “truthful, non-deceptive, and non-infringing,” which is not specifically defined, is “left to second-guessing.” *Id.*

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the law, Complaint Counsel is responsible for representing the public interest. *Toys “R” Us*, 126 F.T.C. at 699-700; *McWane*, 2014 WL 1630460, at *4; *Cal. Dental*, 1996 FTC LEXIS 277, at *8.

Respondent argues that, because it does not seek to stay the provisions of the Final Order that would prohibit it from enforcing the anticompetitive portions of the fourteen challenged agreements, a stay would not cause harm. App. at 14-15. Respondent asserts that, as in *California Dental*, if the Commission were to grant its application, the “core” provisions of the Final Order would remain in force. App. at 9; *Cal. Dental*, 1996 FTC LEXIS 277, at 5, 8. But if Respondent’s stay application were granted, it could continue to enter into anticompetitive agreements exactly like those that have been found to be unlawful. On this point, *California Dental* is distinguishable. In that case, the “core provisions” of the order left intact prohibited continuation of the restraints found to be unlawful *and* imposed new requisite standards going forward. *Cal. Dental*, 1996 FTC LEXIS 277, at 5-6, 11-12.⁵ Respondent asserts that it does not intend to enter into new agreements containing trademark bidding restrictions with its rivals, Reply at 4-5, yet it asks us to stay the provisions that would prohibit it from doing exactly that.

With respect to the provisions requiring 1-800 Contacts to submit to the Commission its communications and agreements with third parties, we note that it is important for the FTC to be kept abreast of such communications and agreements to ensure that 1-800 Contacts does not engage in anticompetitive conduct in the future. *See FTC v. Nat’l Lead Co.*, 352 U.S. 419, 431 (1957) (“[T]hose caught violating the [FTC] Act must expect some fencing in.”). A stay of these provisions would therefore harm third parties and the public interest.

Respondent argues that a stay would be in the public interest because it would give 1-800 Contacts greater flexibility to resolve trademark disputes and preserve its ability to enter into common vertical supply and marketing arrangements. App. at 15. This argument is without merit, as the Final Order focuses on anticompetitive agreements that unlawfully restrain search advertising and search advertising auctions. To the extent Respondent is concerned that the Final Order might unduly interfere with lawful vertical arrangements, an across-the-board stay is not the appropriate mechanism for addressing those concerns. Accordingly, we deny Respondent’s application for a stay except to the extent discussed below.⁶

⁵ Moreover, while the stay in *California Dental* did not affect the prohibition on interfering with truthful, nondeceptive promotional activities, *Cal. Dental*, 1996 FTC LEXIS 277, at *5-6, Respondent seeks to stay an analogous provision in the Final Order here. App. at 12.

⁶ By virtue of the breadth of Respondent’s stay application, which seeks a stay of the entire Final Order except for two specific requirements, the stay request encompasses numerous provisions that 1-800 has not addressed, such as the requirements to provide periodic compliance reports or to distribute copies of the Final Order to all of its executives and to courts assessing 1-800 Contacts’ settlement agreements. Final Order IV.B.5-6, V. Since Respondent has not provided any basis to stay those portions of the Final Order, its stay application is denied as to those provisions as well.

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D. Nullification and Third-Party Notification Requirements**1. Paragraph III.B.**

Paragraph III.B. of the Final Order requires 1-800 Contacts to take whatever action is necessary to vacate or nullify the provisions, terms, or requirements in any court order or agreement that impose a prohibited condition. Although Respondent is unlikely to succeed on appeal, this nullification requirement could result in an irreversible change in circumstances because reinstatement of any nullified provision may require judicial or other third-party consent. Further, the public-interest harm from a delay of nullification of the anticompetitive provisions would be tempered by the fact that the company would still be prohibited from enforcing those provisions. *See* Final Order III.A. Accordingly, we will stay paragraph III.B. of the Final Order pending appeal.

2. Paragraphs IV.A.2.(a) and IV.B.2.

We also grant the stay request as to paragraphs IV.A.2.(a) and IV.B.2., which require 1-800 Contacts to provide notice of the Final Order to persons with whom it communicates or has previously communicated regarding trademark infringement. Whether a stay of these provisions is appropriate is a close question. On the one hand, Respondent asserts that it has not kept records or lists of persons with whom it communicated regarding trademark infringement and that it would be costly to have to compile such a list. App. at 14; Montclair Decl. ¶¶ 13-14. Moreover, in the unlikely event the Commission's decision is reversed on appeal, 1-800 Contacts would have to send retraction letters, which could cause confusion and impose additional, unrecoverable costs. *N.C. Bd. of Dental Exam'rs*, 2012 WL 588756, at *3 (F.T.C. Feb. 10, 2012) (“[W]here compliance with an order could cause confusion or require costly notification if reversed on appeal, a party may be irreparably injured.”). On the other hand, consumers may be harmed if the notice provisions are stayed, because without notice of the Commission decision, 1-800 Contacts' competitors may be unaware of their rights and may unduly limit their advertising, thereby depriving consumers of information about lower-cost alternatives. Some of this harm to consumers and others, however, may be mitigated because 1-800 Contacts would still be required to provide notice of the Final Order to the fourteen competitors with whom it reached agreement. Final Order IV.A.2.(b).⁷ As for the other competitors, 1-800 Contacts would still need to submit to the Commission the company's future communications with its rivals about trademark infringement, as well as any agreements reached with those parties, so the Commission would be able to monitor for anticompetitive conduct going forward. *See* Final Order IV.B.1., 3., 4. Therefore, on balance, we find it is appropriate to grant a stay of the specified third-party notification provisions pending appeal to federal court.

⁷ 1-800 Contacts does not seek to stay this provision. *See* App. at i.

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Accordingly,

IT IS ORDERED THAT enforcement of and Respondent's obligation to comply with Paragraphs III.B., IV.A.2.(a), and IV.B.2. of the Final Order issued by the Commission in this proceeding on November 7, 2018, are hereby stayed until the United States Court of Appeals for the Second Circuit issues a ruling disposing of the petition for review filed by Respondent; and

IT IS FURTHER ORDERED THAT Respondent 1-800 Contacts, Inc.' s Application for a Stay Pending Review by a United States Court of Appeals is **DENIED** in all other respects.

By the Commission, Commissioner Phillips dissenting and Commissioner Wilson not participating.

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IN THE MATTER OF
KONINKLIJKE AHOLD, N.V.
AND
DELHAIZE GROUP NV/SA

Docket No. C-4588. Order, February 15, 2019

Letter approving the petition of Supervalu to divest certain gases assets to to Giant Food Stores LLC.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Elaine Ewing, Esquire
Cleary Gottlieb Steen & Hamilton LLP

Re: *In the Matter of Koninklijke Ahold N.V./Delhaize Group NV/SA*,
Docket No. C-4588.

Dear Ms. Ewing:

This letter responds to the Application for Approval of Proposed Sale of Certain Supervalu Assets to Giant (“Application”), filed by Supervalu on November 8, 2018. The Application requests that the Federal Trade Commission approve, pursuant to Paragraph VI of the Order in this matter, Supervalu’s proposed sale of Shop ‘n Save #2871 located in Berryville, Virginia, and Shop ‘n Save #2881 located in Martinsburg, West Virginia, to Giant Food Stores LLC (“Giant”), a company of Ahold Delhaize USA, Inc. The Application was placed on the public record for comments until December 27, 2018, and two comments were received.

After consideration of Supervalu’s Application and other available information, the Commission has determined to approve the proposed sale of these two stores to Giant. In according its approval, the Commission has relied upon the information submitted and the representations made in connection with Supervalu’s Application, and has assumed them accurate and complete.

By direction of the Commission.