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NGE IP FOCUS: Advertising & Social Media

IN THIS ISSUE

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As life seems to move faster, and attention spans seem to get shorter, the competition for consumer attention – and advertising dollars – has ramped up. In today’s marketing landscape, creative teams are being asked to do more with less, and faster than ever before, and fractured consumer attention means they need to reach more platforms in order to reach the same number of viewers. This leaves less time for a thoughtful, thorough review of marketing decisions, and increased risk on a variety of fronts. This issue of NGE IP Focus highlights a few recent decisions that showcase the diversity of legal issues at play.

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The rise of social media and, with it, the power and importance of social media influencers continue to have ripple effects. Most brands and influencers at this stage are at least aware of their shared obligation to ensure that their relationship (or, in the words of the FTC Act, their “material connection”) is properly disclosed. Nonetheless, the FTC continues to find – and take action against – those who flout the law.

Specifically, in the first article, a subscription-based food company agreed to a $100,000 settlement with the FTC over claims that it failed to disclose compensation exchanged for reviews. The Urthbox incentive program sent customers free product in exchange for reviews on the Better Business Bureau’s website and other sites like TrustPilot.com, even though the BBB website requires customers to certify that they have not been offered any incentives. In addition to the monetary fines, Urthbox and its principal agreed to disclose compensation to reviewers and take steps to remove reviews without proper disclosures.

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In Touch with Kate Dennis Nye

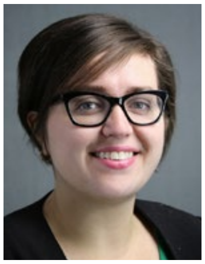
Kate is a strategic intellectual property advisor whose practice encompasses a broad range of intellectual property and advertising matters. She counsels clients on trademark clearance and strategy, including assisting them with filing new trademark applications and maintaining their trademark portfolios worldwide. She also manages intellectual property policing and enforcement matters for numerous clients at all stages of such disputes. Her litigation experience includes both federal court and Trademark Trial and Appeal Board proceedings. Kate has extensive experience with internet-related issues, such as social media account disputes, Digital Millennium Copyright Act (DMCA) claims, and domain name disputes, including Uniform Domain-Name Dispute-Resolution (UDRP) actions.

Additionally, Kate provides legal and business assistance to clients regarding their branding and marketing needs. Kate regularly works with clients to review and vet marketing and promotional material, including clearing promotional taglines and ensuring compliance with the rules, regulations, and best practices governing advertisements. She also helps clients appropriately structure promotions, such as sales, coupons, rebates, sweepstakes, and contest campaigns. Kate has also assisted clients in responding to inquiries from the Federal Trade Commission regarding advertisements and in assessing competitor claims of false advertising under the Lanham Act. She additionally negotiates and drafts agreements relating to client promotional needs, including agency agreements, product placement agreements, talent appearance agreements, and trademark, copyright, and right of publicity licenses.

For a number of years, Kate spent approximately half her time in the offices of a client, embedded with its marketing and intellectual property legal team. In that role, she reviewed countless pieces of marketing collateral and counseled business clients and vendor partners regarding specific promotions. Kate continues to work closely with the client team in her capacity as outside counsel.

Kate is currently chair of the Programming Subcommittee of the International Trademark Association (INTA) Young Practitioner's Committee. She has served on that Committee since 2016, previously serving as a member of the INTA Internet Committee from 2012–2016. She also served as Co-Chair of the Women in IP Committee for the Intellectual Property Association of Chicago (IPLAC) from 2013–2018, and as a member of the IPLAC Board of Managers from 2016–2018. She remains active with IPLAC and its Women in IP Committee.

While in law school, Kate represented children, parents, and foster parents in juvenile court child protection proceedings through her participation in the Child Advocacy Legal Clinic. She continues to represent children in contested guardianship proceedings as a pro bono guardian *ad litem*, and serves on the Chicago Volunteer Legal Services Board of Directors.



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About *NGE Focus*

NGE Focus seeks to inform clients of key trends and critical issues that arise in Intellectual Property practice. Authored in conjunction with the editors of Wolters Kluwer Legal & Regulatory, U.S., *Antitrust Law Daily and IP Law Daily*, the publication is not intended as legal advice; rather, it serves as a general overview of the key legal issues in this area of practice. We encourage you to consult with your Neal Gerber Eisenberg attorney about specific legal matters or if you have additional questions about the content provided here.

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Similarly, in the second article, a public relations firm and the publisher of *Inside Gymnastics* teamed up to post advertisements for bug repellent in the wake of the Zika virus outbreak and leading up to the Olympic Games in Rio in 2016 using athlete endorsers, including two gymnastics gold medalists. The FTC alleged that the gymnasts' social media posts did not adequately disclose the relationship, and that the respondents reimbursed their employees for purchasing the product and posting favorable reviews online (without disclosing the connection). The FTC also alleged that publisher disguised paid advertisements as impartial feature articles. Both the publisher and the PR firm entered into a consent order which bars them from making further misrepresentations about their endorsers. These cases underscore the importance of having a robust program in place to train employees, PR and marketing firms, as well as any influencers with which the company is doing business on compliance with the FTC requirements for endorsement.

… keeping abreast of changes in the online advertising legal landscape is tricky but necessary to effectively avoid risk in this rapidly evolving space.

The need for additional content and alleged desire to capitalize on influencers' social media cachet has additionally landed media company POPSUGAR in hot water, as detailed in the third article. Influencer Nita Batra beat POPSUGAR's motion to dismiss her complaint, which the court held plausibly alleged claims for copyright infringement, false endorsement, violation of the Digital Millennium Copyright Act (DMCA), as well as related California state law claims. Batra asserted claims on behalf of herself and the class of influencers, alleging that POPSUGAR copied influencers' images, removed links in the original pages that allow the influencers to monetize their followings, and reposted the images with links that provided compensation to POPSUGAR itself.

More traditional online keyword advertising, *i.e.*, advertising that appears in search engines based on the search terms entered by the user, has also recently caused several companies legal trouble, as shown in the fourth and fifth articles here. In the fourth article, a federal district court denied a motion to dismiss a suit alleging that five hotel chains violated antitrust law through an agreement not to bid on one another's brand names as search terms and to incorporate provision into their agreements with online travel agencies (OTAs) like Expedia not to bid on their brand names. The court held that the plaintiff adequately alleged that such an agreement existed and that it caused her an antitrust injury by causing search results to yield fewer competitive options and more often steer her to the hotels' own websites.

Likewise, in our fifth article, the FTC determined that 1-800 Contacts violated antitrust laws and the FTC Act. Specifically, 1-800 Contacts entered into settlement agreements with numerous other sellers of contacts which all contained provisions that prohibit the parties from using one another's trademarks as search advertising keywords, and in some cases to use "negative keywords," *i.e.*, prevent their advertisements from displaying when a search contained the other's mark. The FTC found that these agreements were "unusual" and effectively shut off an entire channel of advertising.

As all of these articles show, keeping abreast of changes in the online advertising legal landscape is tricky but necessary to effectively avoid risk in this rapidly evolving space. We hope that the articles that follow prove useful in helping you determine (and, ideally, avoid) some potential pitfalls. ■

FTC unearths undisclosed incentivized reviews from UrthBox; $100K settlement reached

A subscription-based health food delivery company and its principal agreed to a $100,000 settlement with the FTC for allegations that the company misrepresented its customer reviews as independent, when in fact, the reviewers were provided incentives, including free products, for posting positive reviews, the FTC announced. The company also failed to disclose many key terms involving its "free trial" automatic renewal program. The Commission unanimously approved the consent order on May 14, 2019 (*In the Matter of UrthBox, Inc.*, FTC File No. 172 3028).

"People should be able to trust that good customer reviews aren't the result of companies secretly paying the reviewers," said Andrew Smith, Director of the FTC's Bureau of Consumer Protection.

UrthBox is a San Francisco company that delivers healthy snacks and beverages to customers using a subscription-based model. According to the FTC complaint, UrthBox violated the FTC Act by misrepresenting that positive reviews posted on the Better Business Bureau's website and other websites were independent reviews of impartial customers.

In 2017, UrthBox had an incentive program that would often send customers a free snack box if they posted a positive review on the BBB's website, even though the BBB requires customers who post reviews to certify that they have not been offered an incentive. UrthBox also encouraged customers to post positive reviews on other sites, like TrustPilot.com. Between 2014 and 2017, UrthBox in return offered store credit and/or free snack boxes for customers to post positive reviews on social media. The FTC alleged that UrthBox failed to adequately disclose that some customers received compensation and incentives to post the positive reviews.

The complaint also alleged that UrthBox failed to adequately disclose key terms of its "free trial" automatic renewal programs in violation of the Restore Online Shoppers Confidence Act (ROSAC). It was alleged that the company failed to get consumers' informed consent before charging them for the ongoing negative option subscription, the practice of giving customers a service that was not previously provided, then charging them for the service unless they specifically declined it. In addition to ROSCA violations, the complaint also alleged a violation of the FTC Act for failing to disclose key terms of the company's "free" snack box offer, specifically that it failed to adequately disclose that when a free trial plan expired, the company would automatically enroll customers in a six-month negative option subscription plan.

Consent agreement. In addition to the $1000,000 payment to the Commission, the final settlement bars UrthBox and its principal, Behnam Behrouzi, from making future misrepresentations related to the marketing or sale of any goods or service with a negative option feature, and requires them to make certain disclosures relating to the negative option feature. The company is also prohibited from using customer billing information to charge a negative option subscription without first obtaining the customer's express informed consent.

Additionally, the order prohibits the company from misrepresenting that a review or endorsement is an independent user if that reviewer received something in exchange for the review. Disclosure of any material connection with a consumer or reviewer is also required. The company must also make every effort to remove any review or endorsement with which it has a material connection from review websites unless the disclosure requirements are met. Lastly, the company must provide consumers with a simple way they can avoid charges for products with a negative option feature.

"People should be able to trust that good customer reviews aren't the result of companies secretly paying the reviewers," said Andrew Smith, Director of the FTC's Bureau of Consumer Protection. "As this case shows, we hold companies accountable for this kind of deceptive marketing." ■

The case is FTC File No. 172 3028.

FTC takes action over promotion of insect repellent by paid endorsers

A Georgia-based public relations firm and a publisher have reached a settlement with the FTC over allegations that the companies failed to properly disclose that while promoting a new insect repellent during the 2016 Zika virus outbreak, they deceptively advertised their paid celebrity endorsements as independent consumer opinions in violation of the FTC Act. Under the terms of the final consent orders, the companies are prohibited from engaging in misrepresentations, and they must disclose any material connections with paid endorsers (*In re Creaxion Corp.*, FTC File Nos. 172-3066 and 172-3067).

Creaxion, Inside Publications, and their respective principals misrepresented that paid endorsements were independent consumer opinions and that commercial advertising was independent journalistic content, according to the FTC.

Complaint. According to the complaint, PR firm Creaxion Corporation launched and promoted its client's new mosquito repellent using a media campaign tied to the mosquito-borne Zika virus and the 2016 Summer Olympics in Brazil. Creaxion then partnered with Inside Publications, LLC, publisher of *Inside Gymnastics* magazine, to obtain athlete endorsers and otherwise promote the product. Two gymnastic gold medalists were hired to promote the product by posting a series of social media endorsements. It was not revealed that they had been paid for these activities. The FTC also alleged that paid advertisements were disguised as features or other articles of interest to its readers, and the PR firm reimbursed its employees for buying the product and posting favorable reviews online.

Creaxion, Inside Publications, and their respective principals misrepresented that paid endorsements were independent consumer opinions and that commercial advertising was independent journalistic content, according to the FTC. Specifically, the companies violated the FTC Act by:

1. falsely representing that endorsements reflected the independent opinions and experience of impartial users;
2. failing to disclose material connections between the endorsers and the marketer of the product, specifically that certain endorsers were paid or reimbursed by, or employees of, the PR firm promoting the product; and
3. falsely representing that paid ads were the independent statements and opinions of impartial publications.

Final consent orders. Under the terms of the Creaxion consent order and the Inside Publications consent order—both unanimously approved by the Commission on January 31, 2019—the respondents are prohibited from making specific misrepresentations, are mandated to make specific disclosures, and are subject to recordkeeping requirements and compliance monitoring. Specifically, the respondents are prohibited from making (1) "any misrepresentation, expressly or by implication, about the status of any endorser or person providing a review of the product or service, including a misrepresentation that the endorser or reviewer is an independent user or ordinary consumer of the product or service"; and (2) "any misrepresentation, in any manner, expressly or by implication, that paid commercial advertising is a statement or opinion from an independent or objective publisher or source."

In addition, the consent orders prohibit the companies from making any representation about any endorser without clearly and conspicuously disclosing in the endorsement any material connection between the endorser and anyone affiliated with the product or service. Finally, the companies must take steps to ensure that paid endorsers comply with necessary guidelines by notifying them of their responsibilities, creating a monitoring system to review the endorsements, and terminating endorsers who fail to comply with these restrictions. Both consent orders will remain in effect for 20 years. ■

The cases are FTC File Nos. 172-3066 and 172-3067.

'Influencer' stated class action claims against shopping platform operator for misappropriating her Instagram content

An Instagram "influencer" adequately pleaded claims for copyright infringement, Lanham Act false endorsement, and violation of the Digital Millennium Copyright Act (DMCA) against media company and online shopping platform operator POPSUGAR, Inc., for allegedly misappropriating her copyrighted photographs from her Instagram page and removing the links that allowed her to monetize her social media presence, the federal district court in Oakland has decided. Filing suit on behalf of herself individually and a purported class of similarly situated persons, Los Angeles-based influencer Nita Batra plausibly alleged that POPSUGAR infringed images for which she had applied for copyright registrations, removed copyright management information (CMI) from the images in violation of the DMCA, and falsely implied that she endorsed or was affiliated with POPSUGAR's online shopping services when it displayed her images on its website along with her name and other identifying information. In addition, Batra's state-law claims for violation of the right of publicity, contract interference, and unfair competition were not preempted by the Copyright Act (*Batra v. POPSUGAR, Inc.,* February 7, 2019, Gilliam, H.).

Batra asserted class action claims on behalf of "persons with large numbers of followers on social media," known as "influencers." POPSUGAR allegedly copied thousands of influencers' Instagram images, removed the links in the original pages that allowed the influencers to monetize their following, and reposted the images on its own website without authorization with links that allowed POPSUGAR to profit when users clicked through and purchased items. POPSUGAR moved to dismiss the complaint.

DMCA. According to Batra, POPSUGAR violated the DMCA, 17 U.S.C. §1202(b), by intentionally removing CMI from the images, knowing that doing so would induce, enable, facilitate, or conceal copyright infringement. POPSUGAR contended that Batra failed to plead that it had the requisite mental state to violate Section 1202(b) and failed to identify the CMI that it removed. The court disagreed, ruling that Batra sufficiently alleged a violation of Section 1202(b). The complaint alleged that the class members' Instagram posts typically showed a photo on the left side of the screen and sidebar text on the right side. The sidebar featured identifying information about the author of the photo, including his or her name, as well as a link to personal or social media sites. The information in the sidebar could plausibly constitute CMI, the court said. Also, it was plausible that POPSUGAR removed the CMI from Batra's Instagram posts knowing that removing the CMI would help to conceal the alleged infringement of Batra's images.

Lanham Act. Batra alleged that POPSUGAR engaged in false endorsement in violation of Section 43(a)(1)(A) of the Lanham Act, 15 U.S.C. §1125(a)(1)(A). According to the complaint, POPSUGAR's use of Batra's and the class members' names falsely implied that they sponsored, endorsed, or were affiliated with POPSUGAR's goods and services. POPSUGAR argued that Batra failed to plead a Lanham Act claim because she did not allege a misleading representation as to the end products sold to the consumer. POPSUGAR contended that the only relevant goods or services with respect to the Lanham Act claim were the products actually purchased by users after clicking on the links on the website. However, the court explained, this was not a case in which the parties were themselves retailers of the featured products. Instead, both Batra and POPSUGAR provided an online platform for users to shop for apparel and accessories through other affiliated programs, by posting "shoppable" images of influencers and products. Batra alleged a likelihood of consumer confusion regarding

POPSUGAR's service of providing those "shoppable" images, and this was the relevant likelihood of confusion under Batra's theory of Lanham Act liability, the court said, as opposed to confusion as to the source of the featured goods that a user might actually purchase. The allegations were sufficient to state a Lanham Act claim, the court decided.

Copyright Act preemption. POPSUGAR moved to dismiss Batra's state-law claims for violation of the right of publicity, contract interference, and unfair competition on the grounds that they were preempted by the Copyright Act. According to POPSUGAR, the basis of these claims was its alleged misappropriation of Batra's photographs, which was the subject of her copyright infringement claim. However, the court pointed out that the publicity rights claim did not merely involve Batra's photos but also relied on information outside of the photos, including Batra's name and other identifying information associated with her identity. Batra alleged that POPSUGAR unlawfully used her likeness for advertising purposes; she asserted rights that were not equivalent to the rights of copyright holders. In addition, the contract interference claim was not limited to the use of Batra's copyrighted images; it also relied on the unauthorized removal of monetized links that were associated with the images, pursuant to a contract between Batra and "influencer shopping channel" and consumer media platform LIKEtoKNOW.it. Finally, Batra's unfair competition claim involved rights that were separate from the infringement of Batra's copyrighted photos, because Batra alleged that POPSUGAR interfered with her ability to profit from her contractual arrangement with LIKEtoKNOW.it. Accordingly, the state-law claims were not preempted, the court concluded.

According to the complaint, POPSUGAR's use of Batra's and the class members' names falsely implied that they sponsored, endorsed, or were affiliated with POPSUGAR's goods and services.

Copyright infringement. POPSUGAR asserted that Batra could not seek statutory damages for the alleged copyright infringement because she failed to identify the specific photos that POPSUGAR publicly displayed without her permission, and she failed to allege that she submitted a complete application for their registration with the Copyright Office prior to filing suit. In the court's view, Batra's allegations raised the plausible inference that her copyright registration satisfied the requirements of Section 412 of the Copyright Act, which makes registration a prerequisite for seeking statutory damages. Batra alleged that POPSUGAR's use of her images and images owned by other class members took place between the summer of 2017 and April 2018. She also alleged that she and the class members either held a registration certificate for the infringed images or had applied to register the works. At the pleadings stage, this was sufficient to state a claim, the court said, although Batra would have to provide more specific information to survive summary judgment on her individual claim for statutory damages and to serve as a class representative under Federal Rule of Civil Procedure 23(a).

Accordingly, the court denied POPSUGAR's motion to dismiss in its entirety. ■

This case is No. 4:18-cv-03752-HSG.

Wyndham, Marriott, Hilton, others may have breached antitrust laws through keyword search pact

Five major international hotel chains—Wyndham, Marriott, InterContinental, Hilton, and Hyatt—may have violated federal antitrust law by allegedly agreeing to stop using certain forms of branded keyword search advertising on the Internet in order to shift booking traffic away from commission-based online travel agencies (OTAs) like Expedia and Priceline and toward the hotels' own websites, the federal district court in Chicago has ruled. The plaintiff, asserting claims on behalf of a putative class of similarly situated consumers, adequately alleged that five hotel chains controlling a substantial percentage of the U.S. market violated federal antitrust law through bid rigging or group boycott of branded keyword search advertisements. The plaintiff presented sufficient factual allegations to support a finding that the conspiracy, which she purported increased the costs of searching for and booking hotel rooms online, constituted either a per se violation of Section 1 of the Sherman Act, or, in the alternative, an unreasonable restraint of trade under Section 1, the court found. Therefore, the defendants' motion to dismiss was denied (*Tichy v. Hyatt Corp.,* March 22, 2019 (amended), Pallmeyer, R.).

The defendants represent five of the world's 15 largest hotel chains. With more than 8,300 hotels worldwide, Wyndham is the world's largest hotel company. Defendant Marriott, which has over 6,000 hotels in 122 countries, is third-largest, while the parent entities of defendants Six Continents (InterContinental Hotels Group PLC) and Hilton Domestic Operating Company Inc. (Hilton) rank fourth and fifth. Even the smallest of the five defendants, Hyatt, holds 739 properties in 57 countries among its 13 brands.

According to the plaintiff, the defendants agreed to prevent branded keyword search advertising following an industry conference in November 2014 at which the topics discussed included the downward pricing pressure posed by OTAs and the competition for the purchase of branded keywords from Internet search engines. They allegedly aimed to achieve this by three means and agreements. First, the plaintiff claimed, the defendants "agreed with each other to stop bidding for each other's branded keywords." Next, they allegedly agreed to incorporate provisions into their OTA lodging agreements that prohibited OTAs from bidding on their branded keywords and required OTAs to attempt to prohibit affiliated OTAs from doing the same. Finally, each defendant revised its written lodging agreements with OTAs Expedia and Priceline, who, along with their affiliates, make more than 90 percent of all OTA bookings. The OTAs, the plaintiff notes, "are responsible for as much as 50% of" the defendants' online bookings.

The complaint charges that the defendants did in fact stop bidding on each other's keywords in 2015 and also began sending cease-and-desist letters to "affiliate OTAs" seeking to prevent them from bidding on them either. While the plaintiff did not allege that the defendants' conspiracy affected all search results, only that it caused their websites to appear at the top of the search-results page, she averred that this manipulation of content harmed competition.

The plaintiff claimed that between 2015 and 2017, when she often used branded keywords to search for hotel rooms on Google.com, as search results yielded fewer competitive options, she increasingly navigated straight to the websites of Marriott and other defendants to search for, reserve, and purchase hotel rooms. She and the putative class paid more for these rooms—in terms of money, time, and effort—than they would have in the absence of the conspiracy, she contends.

Circumstantial evidence. Although the plaintiff's allegations did not comprise direct evidence of a bid rigging or group boycott agreement, in the court's view, the allegations appeared to make a threshold showing of parallel conduct that could have resulted from a conspiratorial agreement rather than chance. Rejecting the plaintiffs' contention that a conspiracy among the defendants could be inferred from their "motive and incentive to collude to steer customers away from OTA websites," the court found more persuasive their argument that any defendants' unilateral choice to stop the practice would be contrary to its economic self-interest. Viewed in the light most favorable to the complaining consumer, the factual allegations reasonably suggested that the practice of bidding on competitors' keywords benefitted each defendant, the court said.

Similar inferences could reasonably be drawn regarding the defendant-OTA bidding practices.

The court was unpersuaded by the defendants' alternative explanations for their alleged bidding conduct. The defendants' examination of each form of keyword advertising in isolation ignored how any defendant's unilateral choice to restrict only one form would leave it more vulnerable to competition from the other defendants. In addition, the defendants "overemphasize consumers' brand loyalty," the court remarked. Even if the defendants' explanations were plausible, though, they "[did] not negate the plausibility of the plaintiffs' competing explanation," the court concluded.

The plaintiff, asserting claims on behalf of a putative class of similarly situated consumers, adequately alleged that five hotel chains controlling a substantial percentage of the U.S. market violated federal antitrust law through bid rigging or group boycott of branded keyword search advertisements.

The plaintiff's averment of an abrupt shift in Internet search results was an additional factual circumstance plausibly suggesting an illegal agreement, the court added, satisfied that the alleged "visible change" supported an inference that the defendants agreed to adopt the restrictions. Moreover, the court observed, the plaintiff identified other circumstances indicative of an opportunity to conspire, including the presentations at the 2014 industry conference and the defendants' membership on and involvement with the board of the American Hotel Lodging Association.

Standing/injury. The court rejected a contention by the defendants that the complaint failed for lack of antitrust standing. The plaintiff sufficiently pleaded both requisite elements: antitrust injury and proximate causation.

The plaintiff plausibly alleged that she and the putative class members suffered losses stemming from anticompetitive acts that raised prices to consumers, the court decided, noting that the defendants evidently conceded that the alleged injuries were of the kind that the antitrust laws aim to prevent. Similar allegations presented in a case in a different district had been found sufficient to establish but-for causation, the court observed.

After an evaluation of the factors enumerated by the U.S. Supreme Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897 (1983), the court determined that the plaintiff adequately alleged proximate causation for antitrust standing. Rejected was a contention by the defendants that the plaintiff lacked sufficient connection to the harm because it was not a participant in the market where the harm occurred. However, consumers like the plaintiff who searched for and purchased hotel rooms online are undoubtedly participants in that market. Their alleged injuries were "distinct from, not derivative from, harm that online search engines may have suffered," the court explained. Further, the plaintiff and the putative class members, who directly participated in the allegedly restrained market by searching for and purchasing hotel rooms online, were in the best position to vindicate the antitrust infraction.

Also rejected was the defendants' assertion that the claims must fail because, contrary to the plaintiff's allegations, searches for a defendant's branded keywords do still return advertisements for competing defendants' hotels and OTAs. Accepting as true the plaintiff's allegations that pre-2015 searches would likely generate a much wider variety of competitive advertisements, including at the top of the page, newly submitted search results, along with those cited in the complaint, supported her theory that the defendants manipulated the results of searches for their branded keywords. To plead proximate causation, the plaintiff did not need to allege that the defendants' conspiracy eliminated all comparative information from the marketplace, the court added.

The case is No. 18 C 1959. ■

FTC orders 1-800 Contacts to halt restrictive Internet advertising agreements with competitors

In an Opinion of the Commission that largely affirms an earlier ruling by an administrative law judge (ALJ), a divided Federal Trade Commission has determined that litigation settlement agreements that 1-800 Contacts entered into with competitors to limit Internet search advertising and restrict bidding in Internet search auctions harmed competition and consumers in violation of Section 5 of the FTC Act. As a remedy, 1-800 Contacts is barred from enforcing the unlawful provisions in its existing agreements and from entering similar anticompetitive agreements in the future (In the Matter of 1-800-Contacts, Inc., FTC Dkt. No. 9372, File No. 141 0200).

According to the FTC, the agreements between 1-800 Contacts and its competitors resulted in anticompetitive effects in the online retail contact lens market and caused or would cause some consumers to pay higher prices for contact lenses.

The FTC filed an administrative complaint against 1-800 Contacts, the largest online seller of contact lenses in the United States, in August 2016. The FTC's complaint challenged a number of bilateral agreements between 1-800 Contacts and at least 14 competing online sellers of contact lenses that allegedly prevented the parties from competing against one another in certain online search advertising auctions. 1-800 Contacts allegedly coerced its competitors into signing the agreements in order to "settle" purported trademark infringement claims. Although the language of the agreements varied, each included provisions prohibiting use of the other party's trademarks, URLs, and variations of marks as search advertising keywords. Twelve of the agreements additionally required both parties to implement negative keywords to prevent their advertisements from appearing in response to searches for the other party's trademarked terms. According to the FTC, the agreements between 1-800 Contacts and its competitors resulted in anticompetitive effects in the online retail contact lens market and caused or would cause some consumers to pay higher prices for contact lenses.

In February 2017, the Commission determined that 1-800 Contacts' conduct was not immune under the *Noerr-Pennington* doctrine, and the reasonableness of 1-800 Contacts' trademark litigation was not an affirmative defense. In October 2017, Chief ALJ D. Michael Chappell issued an *Initial Decision* finding that 1-800 Contacts harmed consumers and competition by restricting advertisements for the sale of contact lenses in violation of Section 5 of the FTC Act. 1-800 Contacts appealed.

Final decision. On November 7, 2018, the Commission issued its final *decision and order*. The Commission concluded the challenged agreements are, in essence, agreements between horizontal competitors to restrict the information provided by advertising to consumers when they search for 1-800 Contacts' trademark terms and URL. The Commission found that Complaint Counsel established competitive harm in three ways: (1) by demonstrating the "inherently suspect" nature of the agreements as advertising restrictions that made it more difficult and costly for consumers to obtain relevant information; (2) by providing direct evidence that the agreements resulted in two actual anticompetitive effects—the restriction of truthful advertising and an increase in contact lens prices sold online; and (3) by showing harm to search engines—a third type of harm to competition not reached by the ALJ— because a reduction in the number of search-advertising auction participants reduces the revenue earned by search engines and decreases the quality of their products.

Although some of the procompetitive justifications (including the avoidance of litigation costs and trademark protection) raised in defense by 1-800 Contacts were plausible, the Commission found that none of them was valid when measured against less anticompetitive alternatives. In particular, 1-800 Contacts could have (1) barred the rival from using specific text alleged by 1-800 Contacts to cause confusion, including prohibiting the rival from using a name confusingly similar to its own; (2) required clear disclosure in each search advertisement of the identity of the rival seller; or (3) required the rival to refrain from using confusing or deceptive language in its search ads.

Remedy. To remedy the violation of Section 5, the Commission's final order bars 1-800 Contacts from agreeing with any contact lens seller to limit non-deceptive and non-infringing online advertising or to limit participation in online search advertising auctions (including restricting the use of keywords or requiring the use of negative keywords). The order also requires 1-800 Contacts to notify and provide the Commission with copies of communications with persons suspected of infringing 1-800 marks and copies of any proposed stipulated settlement orders pending before a court in order to enable the Commission to intervene and apprise the court of any potential anticompetitive harm arising from the proposed order. The Final Order, however, clarifies that 1-800 Contacts is not precluded from initiating a lawsuit or enforcing a court order, including an order approving a settlement.

In February 2019, the Commission stayed a couple of provisions in the final order pending 1-800 Contacts' appeal to the U.S. Court of Appeals for the Second Circuit. In particular, 1-800 Contacts is temporarily relieved from the requirement that it 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." 1-800 Contacts also is not required to provide notice of the Commission's final order to persons with whom it communicates or has previously communicated regarding trademark infringement.

Concurring and dissenting statements. Commissioner Rebecca Kelly Slaughter issued a concurring statement to emphasize that this case merited the Commission's attention because of the importance of competition in online search bidding both for consumers and for competitive entry by online sellers of goods and services. Commissioner Slaughter said that she would not have supported pursuing this case based on harm to search engines alone.

Commissioner Noah Joshua Phillips issued a lengthy dissenting statement to express his view that the bilateral agreements between 1-800 Contacts and its competitors resolved legitimate trademark infringement claims in a reasonable manner. "Treating the Trademark Settlements as 'inherently suspect' yields an unclear rule that, regardless of interpretation, will, I fear, create uncertainty, dilute trademark rights, and dampen inter-brand competition," Commissioner Phillips said. Among other things, Commissioner Phillips criticized the majority for establishing direct effects by looking only at advertising, while discounting 1-800 Contacts' procompetitive justifications. The majority also failed to establish actual harm in the search engine market. According to Commissioner Phillips, the Commission should have analyzed the agreements under the full rule of reason, giving appropriate weight to the trademarks at issue and the value they protect. ■

The case is FTC Dkt. No. 9372, File No. 141 0200.