

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,)
)
Respondent)
_____)

DOCKET NO. 9372

COMPLAINT COUNSEL'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS

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Dated: November 17, 2016

COMPLAINT COUNSEL’S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that, pursuant to Federal Trade Commission Rule of Practice 3.38(a), Complaint Counsel hereby respectfully requests an order compelling Respondent to conduct a reasonable search for, and produce in timely fashion, documents responsive to Complaint Counsel’s Requests for Production (“RFPs”) 1, 7, 11, 13, 16, and 20. For the reasons set forth in the accompanying Memorandum, this motion should be granted.

This Motion is supported by the accompanying Memorandum and the authorities cited therein. A Proposed Order is attached.

Respectfully submitted,

/s/ Dan Matheson

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Dated: November 17, 2016

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

In the Matter of)	
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1-800 CONTACTS, INC.,)	
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COMPLAINT COUNSEL’S MEMORANDUM IN SUPPORT OF ITS MOTION TO
COMPEL PRODUCTION OF DOCUMENTS

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Dated: November 17, 2016

Complaint Counsel respectfully requests that this Court, pursuant to Rule 3.38(a), order Respondent to conduct a reasonable search for, and produce in a timely fashion, documents responsive to Complaint Counsel's Requests for Production ("RFPs") 1, 7, 11, 13, 16, and 20. The principal question presented by this Motion is whether Respondent should conduct an electronic collection and review of the files of **five** key executives, employing narrow search terms. Respondent refuses to perform even this narrowly targeted electronic collection and review, insisting that it need not conduct a traditional electronic review of documents generated by its executives subsequent to the 2015 document collection Respondent performed during the Part 2 investigation of this case. Respondent's novel suggested approach is not the law, and it would be a terrible precedent for future Part 3 cases.

I. FACTUAL BACKGROUND

Complaint Counsel served the RFPs at issue on September 8, 2016, the day after the Scheduling Conference in this matter. *See* Ex. A. Thirty-three days later, Respondent provided its Responses.¹ Complaint Counsel promptly asked Respondent to specify how it intended to search for responsive documents.² On October 21, the parties met and conferred.³ Respondent took the position that it is entitled to limit all electronic searches to files collected during the Part 2 investigation, the date of which collection "differs by custodian but generally continues into at

¹ Respondent provided basically identical boilerplate objections to the RFPs at issue. *See* Ex. B at 5 (RFP 1); 9 (RFP 7); 12 (RFP 11); 15 (RFP 13); 21 (RFP 20).

² Ex. C ([REDACTED]) at 2 ([REDACTED])

³ The parties met and conferred on October 17, but Respondent was unprepared to discuss either custodians or search terms. *See* Ex. D at ([REDACTED]) at 2-3. On October 19, Respondent identified the custodians whose files were collected during the pre-Complaint investigation. *See* Ex. E (Oct. 19 G. Vincent email to Matheson).

least 2015.”⁴ Thus, while Respondent proposed to update its production by providing certain data, and by conducting manual searches for certain reports and analyses, Respondent refused to collect and review emails and electronic documents that post-date its Part 2 collection.

On October 26, Complaint Counsel accepted many of the limitations Respondent requested. But for certain RFPs, Complaint Counsel insisted that Respondent search the documents of five critical custodians – Respondent’s Chief Executive Officer, Chief Marketing Officer, and the three individuals most directly involved in the management of the search advertising activities at the heart of this case.⁵ Respondent provided no response to Complaint Counsel’s proposals or questions for 14 days, even though Complaint Counsel followed up requesting a timely response.⁶ Finally, the parties met and conferred on November 9, 2016. Respondent insisted that it would only conduct electronic searches of files collected during the Part 2 investigation. Ex. I. at 6.

II. ARGUMENT

Respondent provides neither authority nor reasoned argument supporting its refusal to collect and search electronic files post-dating Respondent’s 2015 collection in the Part 2 investigation. Respondent’s position amounts to simply cutting off discovery at an arbitrary date, as the restraints at issue have remained in place since Respondent performed its 2015

⁴ Ex. I (Nov. 9 G. Vincent Ltr. to Matheson).

⁵ See Ex. F (Oct. 26 K. Clair Ltr. to G. Vincent) at 2 (“We believe it is also appropriate for 1-800 to refresh its collections to the present for the following five custodians: Brian Bethers, Tim Roush, Laura Schmidt, Brady Roundy, and Kevin Hutchings . . . we are not asking you to refresh the collections for other current employees . . . or for departmental custodians.”); Ex. G at -001 ([REDACTED]); *id.* at -002 ([REDACTED]).

⁶ See Ex. H (Nov. 3 K. Clair email to G. Vincent).

collection. *Cf. Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 135 at *5-6 (Aug. 23, 200) (granting motion to compel where Respondent provided no reasonable basis for cutting off its search for responsive documents at an arbitrary date). This would be a terrible policy, which, to Complaint Counsel’s knowledge, is unprecedented in Part 3 litigation. First, it would deny Complaint Counsel emails and documents created in the last year that are highly relevant to the ongoing impact of the challenged restraints and critical for upcoming depositions. Moreover, Respondent’s approach would unavoidably force Complaint Counsel to insist that targets of future investigations (i) broadly collect *all* documents that might be relevant to *any* claims Complaint Counsel might contemplate, and (ii) continuously update their collections throughout the investigation. This would impose severe burdens on investigative targets even before the Commission has determined that there is reason to believe that a violation exists and a complaint should be filed. And collapsing the materials sought in a Part 2 investigation and the discovery available in Part 3 would flout the long-recognized “clear distinction” “between adjudicative proceedings and investigative proceedings.” *Hannah v. Larche*, 363 U.S. 420, 446 (1960).⁷

As explained below, each RFP at issue seeks information that “may be reasonably expected to yield information 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). Respondent does not seriously dispute this. The search and production that Complaint Counsel seeks in response to these RFPs is also eminently reasonable in scope.

⁷ As the Supreme Court explained in *Oklahoma Press Publishing Co. v. Walling*, the purpose of a government investigation “is to discover and procure evidence not to prove a pending charge or complaint, but upon which to make one if, in the [agency’s] judgment, the facts thus discovered should justify doing so.” 327 U.S. 186, 201 (1943). *See also Genuine Parts Company v. FTC*, 445 F.2d 1382, 1387 (5th Cir. 1971) (“investigative proceedings and adjudicative proceedings . . . have long been recognized as separate and distinct proceedings serving different functions”).

A. RFP Nos. 1, 7, and 11

RFP 1 seeks “All Documents Relating to correspondence between 1-800 Contacts and any other Person related to Negative Keywords.” Ex. A.

RFP 7 seeks “All documents related to correspondence between any employee, agent, or representative of 1-800 Contacts and any employee, agent, or representative of any other seller of contact lenses regarding: trademarks, litigation, advertising (including but not limited to search advertising), or a contractual relationship between 1-800 Contacts and any other seller of contact lenses (including but not limited to actual, potential, or claimed breaches of existing contracts).” *Id.*

RFP 11 seeks “All documents analyzing the effect of increased price visibility on 1-800 Contacts’ sales, pricing, or profitability.” *Id.*

These three RFPs all present the same discovery issue. For each RFP, the parties agree on the custodians whose files will be searched. For each RFP, the parties have agreed on the search terms to be applied.⁸ The only significant dispute⁹ is whether Respondent should update its collection for the five key custodians identified by Complaint Counsel by collecting, electronically searching, and including in its review these custodians’ electronic files for the time

⁸ See Ex. I at 2 (agreeing to utilize three specified search terms to identify documents potentially responsive to RFP 1 – “negative keywords,” “negative keyword” and “NKW”); *id.* at 3 (to satisfy RFP 7, agreeing to utilize as search terms the domain names of “relevant sellers of contact lenses” and the “search terms listed in [Complaint Counsel’s] October 26, 2016 letter”); *id.* at 4 (agreeing to utilize the search term “Price w/3 visibility” to identify documents potentially responsive to RFP 11).

⁹ One minor additional dispute exists regarding RFP 1. Complaint Counsel seeks documents “relating to” the relevant correspondence but Respondent agrees to produce only documents that “constitute” such correspondence. *Compare* Ex. A at 1 with Ex. I at 2. Respondent should produce not only the actual correspondence with competitors and search engines, but also its internal discussions about such correspondence. Respondent’s information is clearly relevant to the effect of the restrictions and negative keywords and can easily do so based on the same search terms already agreed to for this request.

period since Respondent's 2015 collection. As discussed above, Respondent provides no authority supporting its refusal to update its collection and insistence upon cutting off discovery at an arbitrary date.

Complaint Counsel's Motion should be granted with respect to each of these RFPs, because each RFP seeks documents clearly relevant to the Complaint's allegations and Respondent's defenses. *See* 16 C.F.R. § 3.31(c)(1). The Complaint alleges that Respondent used its purported trademark rights to negotiate anticompetitive agreements regarding search advertising that (among other things) required the use of negative keywords, that Respondent aggressively enforced the anticompetitive agreements in communications to its competitors, and that Respondent thereby restricted the information available to consumers about contact lenses and caused them to pay higher prices. *See, e.g.*, Compl. ¶¶ 18, 25, 31(e)-(f). These RFPs are centrally relevant to these allegations, as they seek documents concerning Respondent's communications with counterparties or search engines about negative keywords (RFP 1); communications between the parties to the agreements about search advertising and trademark usage (RFP 7); and analyses of how consumers' visibility into contact lens prices affected their purchasing behavior and thus Respondent's business (RFP 11). There can be no doubt that these RFPs seek relevant information at the heart of this case.

Given this relevance, Complaint Counsel's narrowly tailored requests impose a minimal burden on Respondent, in light of the small number of custodians (five), the brief time period at issue (2015-present), and the narrow set of search terms already agreed to for these requests.¹⁰ Moreover, as reflected in the Proposed Order submitted with this Motion, Complaint Counsel

¹⁰ *See supra* note 8.

has offered to accept an updated collection limited to electronic files—which often can be done remotely and with little-to-no impact on the executives themselves.

The discovery sought cannot possibly be cumulative or duplicative, because no other custodians' files have been searched for responsive materials from 2015-present. *See* 16 C.F.R. § 3.31(c)(2)(i)-(iii). Nor can Respondent seriously contend that these RFPs are overbroad or lack reasonable particularity to the extent they seek all documents “relating to” or “concerning” specified topics. *Cf. In re OSF Healthcare Sys.*, 2012 FTC LEXIS 31, 3-5 (F.T.C. Feb. 14, 2012) (citing *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 19, *12 (Feb. 4, 2004)). Any such concern would be inapposite because the agreed-upon electronic search terms will necessarily ensure that the documents reviewed in response to each RFP will refer to the relevant topic on the face of the document. This is precisely the approach that this Court approved in *In re North Texas Specialty Physicians* when it denied a motion to quash with respect to “documents that specifically mention or reference” the respondent in that matter. 2004 FTC LEXIS 19, *12. Complaint Counsel’s proposal to run reasonable search terms, restricted to the electronic files of five specified custodians, for the narrow time period 2015-present, distinguishes this discovery request from those requests that courts find overbroad and insufficiently particular. *Cf. Docket No. 9372, Order on Respondent’s Motion for a Rule 3.36 Subpoena* (Oct. 28, 2016) at 6.

B. RFP Nos. 13(d)(iii) and 20

RFP 13(d)(iii) seeks “Documents Sufficient to Show . . . any actual or considered modifications in advertising policies related to [Respondent’s] Price Match Policy, and the reasons therefor.” Ex. A. RFP 20 seeks “All documents Relating to communications or reports received from [Hitwise, a third party provider of data regarding internet search traffic].” *Id.*

These RFPs clearly seek relevant information. RFP 13(d)(iii) seeks documents that will show when and why Respondent considered and/or made modifications to its policy of matching or at times beating competitors' prices. These documents are relevant to market definition and competitive effects because they will reveal Respondent's assessment of which retailers represent its closest rivals, and its efforts to compete with these rivals. The Hitwise reports referenced in RFP 20 are third-party reports that track visitors entering and leaving Respondent's website, and provide metrics regarding the shares of internet traffic enjoyed by Respondent and its rivals. Respondent's analyses and discussions of such reports are relevant to the impact of the challenged agreements on Respondent's online rivals, and on Respondent's own market position.

Respondents, recognizing the relevance of the materials sought, have agreed to conduct "a reasonable search" for materials responsive to each request, *see* Ex. I, but the parties disagree regarding: (1) what a reasonable search consists of; (2) whether a reasonable search should include an updated collection from the five custodians discussed above; and (3) whether Respondent must produce "documents Relating to" Hitwise reports, such as internal company emails discussing the reports. Respondent refuses to conduct an electronic review utilizing search terms, which would capture informal emails and other discussions. Complaint Counsel respectfully asks this Court to order a standard electronic review, employing extremely limited search terms, namely: "price match" and "Hitwise." *See* Proposed Order. And, just as for RFPs 1, 7, and 11, this Court should order Respondent to collect and search the files of the five identified executives from 2015 to the present.

An electronic review employing the narrow search terms Complaint Counsel proposes is not unduly burdensome, nor cumulative, nor duplicative. Moreover, the search terms requested

will ensure that all documents reviewed will refer to the relevant topic on the face of the document. *See supra* at 7.

C. RFP No. 16

RFP 16 seeks transactional data sufficient to show certain information regarding Respondent's sales, prices, margins, and promotional discounts offered. Ex. A 4. Respondent has confirmed that the data is available for the entire time period sought by Complaint Counsel, and the parties have agreed on the format in which the data shall be provided. *See* Ex. F at 7. The only dispute is that Respondent has committed to provide the data only "for the past five years," Ex. I at 5, while Complaint Counsel has requested the data "on a rolling basis, with the last five years of data produced first, followed by productions from earlier time periods." Ex. F at 7. Data from the earlier time period is just as relevant as data from the last five years, as the challenged restraints began no later than 2004. Compl. ¶ 4.

This data is clearly relevant to allegations that Respondent has higher prices than its online rivals, as well as to allegations regarding market shares. Compl. ¶¶ 14-16. Respondent has not suggested that RFP 16 is cumulative, overbroad, or that it seeks data that is not reasonably available.

CONCLUSION

For these reasons, Complaint Counsel's Motion should be granted.

Dated: November 17, 2016

Respectfully submitted,

/s/ Dan Matheson

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STATEMENT CONCERNING MEET AND CONFER

The undersigned counsel certifies that Complaint Counsel conferred with Respondent's counsel in a good faith effort to resolve by agreement the issues raised by Respondent's Objections and Responses to Complaint Counsel's Requests for Production. On October 12, October 19, October 26, November 3, and November 9, 2016, Complaint Counsel (Dan Matheson and Kathleen Clair) and Respondent's Counsel (Gregory Stone, Gregory Sergi, and/or Garth Vincent) communicated by email about the issues that gave rise to these motions. On October 17 Complaint Counsel (Dan Matheson and Kathleen Clair) and Respondent's Counsel (Gregory Stone and Gregory Sergi) communicated by telephone. On October 19 Complaint Counsel (Dan Matheson) and Respondent's Counsel (Garth Vincent) communicated by telephone. On October 21 Complaint Counsel (Dan Matheson and Kathleen Clair) and Respondent's Counsel (Gregory Sergi and Garth Vincent) communicated by telephone. On November 9, 2016 Complaint Counsel (Dan Matheson and Kathleen Clair) and Respondent's Counsel (Gregory Sergi and Garth Vincent) communicated by telephone. The parties have been unable to reach an agreement on the issues raised in the attached motion.

Dated: November 17, 2016

Respectfully submitted,

/s/ Daniel Matheson

Daniel Matheson
Federal Trade Commission
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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of)

1-800 CONTACTS, INC.,)
a corporation,)

Respondent)

DOCKET NO. 9372

[PROPOSED] ORDER

Having carefully considered Complaint Counsel’s Motion to Compel Production of Documents, Respondent 1-800 Contacts, Inc.’s Opposition thereto, and all supporting and opposing declarations and other evidence, and the applicable law, it is hereby ORDERED that Complaint Counsel’s Motion to Compel Production of Documents is GRANTED and it is hereby ORDERED that:

- 1) For purposes of this order:
 - a. “Prior Collection” shall refer to the documents that Respondent collected but did not produce in connection with FTC investigation number 141-0200, from the twenty (20) individual custodians and three (3) departmental custodians identified in the October 19, 2016 email from Garth Vincent to Daniel Matheson titled “1-800 Contacts custodial searches,” for the period from January 1, 2004 through the date that each individual or departmental custodian’s files were collected; and
 - b. “Updated Collection” shall refer to the e-mail and other electronic documents within the custodial files of each Brian Bethers, Tim Roush, Laura Schmidt,

Brady Roundy, and Kevin Hutchings that were sent, received, created, or last modified between the date that the custodian's files were collected in connection with Respondent's document production in response to FTC investigation number 141-0200 and the date of this Order.

- 2) Within 10 days of the date of this Order, Respondent shall:
 - a. Collect the e-mail and other electronic documents within the custodial files of each Brian Bethers, Tim Roush, Laura Schmidt, Brady Roundy, and Kevin Hutchings that were sent, received, created, or last modified between the date that the custodian's files were collected in connection with Respondent's document production in response to FTC investigation number 141-0200 and the date of this Order;
 - b. In response to Complaint Counsel's Request for Production ("RFP") No. 1 (in addition to taking all other steps that Respondent has already agreed to take to respond to this request), apply the search terms "negative keyword," "negative keywords," and "NKW" to both the Updated Collection and the Prior Collection (except that Respondent need not include any files dated January 1, 2006 through December 31, 2012 in its search and review in response to RFP 1); review all resulting documents containing one or more of those search terms; and produce all non-privileged documents related to correspondence between 1-800 Contacts and any other Person related to Negative Keywords including but not limited to non-privileged documents that constitute correspondence between 1-800 Contacts and any other Person related to Negative Keywords;

- c. In response to RFP No. 7 (in addition to taking all other steps that Respondent has already agreed to take to respond to this request), search the Updated Collection for the domain names used in the email addresses of any sellers of contact lenses listed on page 4 of the October 26, 2016 letter from Kathleen Clair to Garth Vincent and Greg Sergi, and within the results, apply the search terms identified on page 3 of the October 26, 2016 letter from Kathleen Clair to Garth Vincent and Greg Sergi; review all resulting documents containing one or more of those search terms; and produce all correspondence between any employee, agent, or representative of 1-800 Contacts and any employee, agent, or representative of any other seller of contact lenses regarding search advertising or trademark usage;
- d. In response to RFP No. 11 (in addition to taking all other steps that Respondent has already agreed to take to respond to this request), perform a search within the Updated Collection to identify any document in which the word “price” appears within three words of the word “visibility”; review all documents that respond to that search; and produce all non-privileged documents that analyze the effect of increased price visibility on 1-800 Contacts’ sales, pricing, or profitability;
- e. In response to RFP No. 13(d)(iii), search both the Prior Collection and the Updated Collection for the term “price match”; review all resulting documents that contain that term; and produce all non-privileged documents that concern any actual or considered modifications in advertising policies related to the Price Match Policy and the reasons therefor;

- f. In response to RFP 20, search both the Prior Collection and the Updated Collection for the term “Hitwise”; review all resulting documents that contain that term; and produce all non-privileged documents analyzing, discussing, or otherwise relating to Hitwise reports;
- g. In response to RFP 16, produce transactional data as described on page 5 of Garth Vincent’s November 9, 2016 letter to Daniel Matheson (that is, with personally identifiable information such as customer names and addresses removed, and at the product code level rather than the UPC level), for the period from January 1, 2004 through present.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

Exhibit A

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

In the Matter of

**1-800 CONTACTS, INC.,
a corporation**

Docket No. 9372

**COMPLAINT COUNSEL'S FIRST SET OF REQUESTS
FOR PRODUCTION TO RESPONDENT 1-800 CONTACTS, INC.**

Pursuant to the Federal Trade Commission's Rule of Practice, 16 C.F.R. § 3.37, and the Definitions and Instructions set forth below, Complaint Counsel hereby requests that Respondent 1-800 Contacts, Inc. ("1-800 Contacts") produce within 30 days all documents, electronically stored information, and other things in its possession, custody, or control responsive to the following requests:

1. All Documents Relating to correspondence between 1-800 Contacts and any other Person related to Negative Keywords. *See, e.g.*, 1-800F_00033564 (referring to a "recommended list" of negative keywords provided in 2011 to Ciba and Vistakon).
2. For each Negative Keyword 1-800 Contacts has implemented during the Relevant Period, Documents Sufficient to Show the first date on which 1-800 Contacts instructed a Search Engine to implement such a Negative Keyword.
3. For each Negative Keyword 1-800 Contacts has implemented during the Relevant Period, Documents Sufficient to Show any dates on which 1-800 Contacts instructed a Search Engine to cease implementing such a Negative Keyword.
4. All documents submitted to the Federal Trade Commission and/or the Department of Justice in connection with any filing made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 relating to a transaction to which 1-800 Contacts was a party. This request includes documents submitted by 1-800 Contacts, as well as documents submitted by any other person who made a filing relating to a transaction to which 1-800 Contacts was a party.
5. All documents submitted to the Federal Trade Commission and/or the Department of Justice in connection with any Request for Additional Information made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 relating to a transaction to which 1-800 Contacts was a party.

6. All Documents Relating to any Unilateral Pricing Policy adopted by a manufacturer of contact lenses, such as the Unilateral Pricing Policies adopted by Johnson & Johnson Vision Care, Alcon, Bausch + Lomb, and CooperVision, beginning on or about July 2014, including but not limited to: (a) Documents discussing the impact of a Unilateral Pricing Policy on 1-800 Contacts; and (b) Documents discussing the impact of a Unilateral Pricing Policy on any Competitor, Affiliate, or group of Competitors or Affiliates of 1-800 Contacts.

7. All documents related to correspondence between any employee, agent, or representative of 1-800 Contacts and any employee, agent, or representative of any other seller of contact lenses regarding: trademarks, litigation, advertising (including but not limited to search advertising), or a contractual relationship between 1-800 Contacts and any other seller of contact lenses (including but not limited to actual, potential, or claimed breaches of existing contracts).

8. All Documents Relating to contact lens purchases by customers or former customers of 1-800 Contacts from any retailer seller of contact lenses other than 1-800 Contacts, including documents analyzing switching by 1-800 Contacts' customers and former customers and/or switching by customers of other contact lens retailers.

9. All data used, presented, or summarized by Bain and Company in connection with due diligence or competitive analysis of Vision Direct on behalf of 1-800 Contacts, including but not limited to responses to surveys of contact lens consumers such as the data summarized in the draft presentation "Vision Direct Competitive Positioning," dated May 2015. *See* Bates number 1-800F_00056323.

10. All analyses comparing 1-800 Contacts' prices to the prices of a Competitor.

11. All documents analyzing the effect of increased price visibility on 1-800 Contacts' sales, pricing, or profitability. This request includes, but is not limited to, all documents created in response to Tim Roush's request for analysis in 1-800F_00055885. The term "price visibility" has the same meaning as in 1-800F_00055885.

12. All documents, except for documents which have already been produced to the Federal Trade Commission, responsive to Specifications 1, 4, 5, 6, 11, 12, 13, and 15 of the Civil Investigative Demand issued to 1-800 Contacts on January 20, 2015, in connection with the Commission investigation of 1-800 Contacts, FTC No. 141-0200, found in the following locations:

- a. the files of former 1-800 Contacts employee Josh Aston, including but not limited to shared file locations Mr. Aston accessed in the ordinary course of business; and
- b. backup tapes which were restored in connection with the Civil Investigative Demand issued to 1-800 Contacts on January 20, 2015 or in connection with the Commission investigation of 1-800 Contacts, FTC No. 141-0200.

13. All documents relating to the existence, terms, scope, or implementation of any Price Match Policy including but not limited to:

- a. Documents distributed to 1-800 Contacts employees with responsibility for speaking with customers or potential customers, including but not limited to scripts or other guidance provided to employees working within a call center;
- b. Documents created to inform any customer or potential customer about the existence or terms of any Price Match Policy, including but not limited to copies of all advertising relating to any Price Match Policy;
- c. Documents tracking, analyzing, or discussing the implementation, use, or effectiveness of any Price Match Policy, including, but not limited to, any log(s) that record price-match requests and fulfillment; and
- d. Documents Sufficient to Show the following information relating to 1-800's Price-Match Policies: (i) the inception date and reasons for implementing each Price Match Policy; (ii) any periods of time during which any Price Match Policy was terminated, suspended, paused, not honored, or otherwise not in effect; (iii) any actual or considered modifications in advertising policies related to the Price Match Policy, and the reasons therefor, (iv) the process required for consumers to take advantage of each Price Match Policy; and (v) the identity of the contact lens sellers whose prices were matched each time a 1-800 Contacts customer paid a price pursuant to any Price Match Policy.
- e. Documents Sufficient to Show the following information for each sale made since January 1, 2004 pursuant to any Price Match Policy: (1) SKU or UPC of product; (2) shipped date; (3) type of Competitor;¹ (4) discount provided due to price match; (5) order revenues after price match; (6) identity of Competitor; (7) whether Competitor was an internet seller; (8) customer ID number; (9) Order Number.

14. Documents Sufficient to Show the Company's quarterly and annual sales revenue for contact lenses in total, and separately, for each of the following consumer channels:

- a. Online;
- b. Telephone mail-order;
- c. In-store; and
- d. Other (identify "Other" channels).

15. Documents Sufficient to Show on a quarterly and annual basis, for contact lens sales both in total, and for each channel listed in Specification 14:

- a. Contribution Margins (defined as selling price minus variable cost);
- b. Net revenue (defined as revenue net of discounts and returns);

¹ This Request seeks the most precise available information regarding the Competitor's line of business (e.g., internet seller, Eye Care Professional, mass market retailer, club store).

- c. Cost of goods sold;
- d. Credit card fees;
- e. Variable selling, general and administrative costs.

16. Documents Sufficient to Show, either by transaction or on a weekly basis, for each UPC or SKU number sold by 1-800 Contacts:

- a. Date of sale;
- b. UPC or SKU number;
- c. Description of the product;
- d. All classification variables and product descriptors;
- e. Package size;
- f. Sales revenue;
- g. Total promotional discount;
- h. Unit sales (i.e., quantity of each item sold);
- i. Acquisition cost of the product; and
- j. The distributor from which the item was acquired.

17. Documents Sufficient to Show, on a weekly, quarterly, and annual basis, the number of orders and dollar volume of sales that 1-800 Contacts attributes to each of the following advertising channels:

- a. Paid search advertising attributable to search terms on which 1-800 claims trademark protection;
- b. Paid search advertising attributable to search terms on which 1-800 does **not** claim trademark protection;
- c. Other online advertising (and identify other online channels);
- d. Television;
- e. Print;
- f. Radio;
- g. In-store advertising;
- h. Other advertising.

18. For each Ad Group 1-800 Contacts has used on any Search Engine, provide Documents Sufficient to Show: the Campaign associated with the Ad Group, each Keyword used in the Ad Group, and for each Keyword, the following data, on a daily basis:

- a. Impressions;
- b. Clicks;
- c. Clickthrough Rate (CTR);
- d. Maximum Cost Per Click Bid;
- e. Keyword Matching Option (e.g., exact match, phrase match, or broad match);
- f. Cost Per Click;
- g. Cost Per Action;
- h. Cost Per Impression;

- i. Cost USD;
- j. Average Ad Rank;
- k. Conversion Rate; and
- l. Conversion Value.

19. All documents Relating to surveys conducted of customers and potential customers, and comments provided by customers or potential customers. *See, e.g.*, 1-800F_00075522; 1-800F_00075523; 1-800F_00075524; 1-800F_00075525.

20. All documents Relating to communications or reports received from Hitwise Pty. Ltd., Experian Hitwise, or any entity referred to as Hitwise in the ordinary course of Your business. *See, e.g.*, 1-800F_00072892; 1-800F_00072921.

For the purpose of these Requests, the following definitions and instructions apply without regard to whether the defined terms used herein are capitalized or lowercase and without regard to whether they are used in the plural or singular forms:

DEFINITIONS

1. The terms “1-800 Contacts,” “1-800,” “Company” or “Respondent” mean Respondent 1-800 Contacts, Inc., its directors, officers, trustees, employees, attorneys, agents, accountants, consultants, and representatives, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, consultants, and representatives of its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, and partnerships and joint ventures.
2. The term “Ad Group” has the same meaning set forth by Google in connection with its AdWords product: a collection of advertisements that “contains one or more ads which target a shared set of keywords.” See <https://support.google.com/adwords/answer/6298>.
3. The term “Ad Rank” has the same meaning set forth by Google in connection with its AdWords product: “A value that’s used to determine [an advertiser’s] ad position (where ads are shown on a page) and whether [an advertiser’s] ads will show at all.” See <https://support.google.com/adwords/answer/1752122?hl=en>.
4. The term “Affiliate” means any Person other than 1-800 Contacts which attempts to generate online sales for 1-800 Contacts in exchange for a commission on such online sales.
5. The terms “and” and “or” have both conjunctive and disjunctive meanings.
6. The term “Campaign” has the same meaning set forth by Google in connection with its AdWords product: “[a] set of ad groups (ads, keywords, and bids) that share a budget, location targeting, and other settings.” See <https://support.google.com/adwords/answer/6304?hl=en>.
7. The term “Click” has the same meaning set forth by Google in connection with its AdWords product. See <https://support.google.com/adwords/answer/31799?hl=en>.
8. The term “Clickthrough rate” (CTR) has the same meaning set forth by Google in connection with its AdWords product: “the number of clicks [an] ad receives divided by the number of times [the] ad is shown.” See <https://support.google.com/adwords/answer/2615875?hl=en>.
9. The term “Competitor” means any person other than 1-800 Contacts engaged in the business of selling contact lenses to consumers.
10. The term “Computer Files” includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Respondent should produce Documents that exist in machine-readable form, including Documents stored in personal

computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off company premises. If the Respondent believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with Complaint Counsel's need for Documents and information, you are encouraged to discuss a possible modification to this instruction with the Complaint Counsel identified on the last page of this request. Complaint Counsel will consider modifying this instruction to:

- a. exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Respondent;
 - b. limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain specifications identified by Complaint Counsel; or
 - c. include other proposals consistent with Commission policy and the facts of the case.
11. The term "Containing" means containing, describing, or interpreting in whole or in part.
 12. The terms "Conversion Rate" and "Conversion Value" have the same meanings set forth by Google in connection with its AdWords product. *See* <https://support.google.com/adwords/answer/2684489?hl=en>; <https://support.google.com/adwords/answer/6095947?hl=en>.
 13. The terms "Cost per Click", "Cost Per Action," "Cost Per Impression," and "Cost USD" has the same meaning set forth by Google in connection with its AdWords product.
 14. The terms "Discuss" or "Discussing" mean in whole or in part constituting, Containing, describing, analyzing, explaining, or addressing the designated subject matter, regardless of the length of the treatment or detail of analysis of the subject matter, but not merely referring to the designated subject matter without elaboration. A document that "Discusses" another document includes the other document itself.
 15. The term "Documents" means all Computer Files and written, recorded, and graphic materials of every kind in the possession, custody, or control of the Respondent. The term "Documents" includes, without limitation: electronic mail messages; electronic correspondence and drafts of documents; metadata and other bibliographic or historical data describing or Relating to documents created, revised, or distributed on computer systems; copies of documents that are not identical duplicates of the originals in that Person's files; and copies of documents the originals of which are not in the possession, custody, or control of the Respondent.

Unless otherwise specified, the term "Documents" excludes (a) bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely

transactional nature; (b) architectural Plans and engineering blueprints; and (c) documents solely Relating to environmental, tax, human resources, OSHA, or ERISA issues.

16. The term “Documents Sufficient to Show” means both documents that are necessary and documents that are sufficient to provide the specified information. If summaries, compilations, lists, or synopses are available that provide the information being requested, these may be provided in lieu of the underlying documents.
17. The terms “each,” “any,” and “all” mean “each and every.”
18. The term “Impression” has the same meaning set forth by Google in connection with its AdWords product. *See* <https://support.google.com/adwords/answer/6320?hl=en>.
19. The term “Keyword” has the same meaning set forth by Google in connection with its AdWords product: “[w]ords or phrases describing [an advertiser’s] product that [the advertiser] choose[s] to help determine when and where [the advertiser’s] ad can appear” in response to an internet search by an end user. *See* <https://support.google.com/adwords/answer/6323?hl=en>.
20. The term “Keyword Matching Option” has the same meaning set forth by Google in connection with its AdWords product. *See* <https://support.google.com/adwords/answer/2497836?hl=en>.
21. The term “Maximum Cost Per Click Bid” has the same meaning set forth by Google in connection with its AdWords product. *See* <https://support.google.com/adwords/answer/6326?hl=en>
22. The term “Negative Keyword” has the same meaning set forth by Google in connection with its AdWords product: “[a] type of keyword that prevents [and advertiser’s] ad from being triggered by certain words or phrases.” *See* <https://support.google.com/adwords/answer/105671?hl=en>.
23. The term “Person” includes the Company, and means any natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or any other organization or entity engaged in commerce.
24. The terms “Plan” or “Plans” mean proposals, strategies, recommendations, analyses, reports, or considerations, whether or not tentative, preliminary, precisely formulated, finalized, authorized, or adopted.
25. The term “Price Match Policy” means any 1-800 Contacts Plan, policy, or strategy involving offering customers the opportunity to pay a discounted price determined by the price that a Competitor offers for the same product.
26. The terms “Relate” or “Relating to” mean in whole or in part Discussing, constituting, commenting, Containing, concerning, embodying, summarizing, reflecting, explaining,

describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to.

27. “Search Engine” means a computer program, available to the public without charge, to search for and identify websites on the World Wide Web based on a User Query.
28. “Search Engine Results Page” means a webpage displayed by a Search Engine in response to a User Query.
29. The term “Technology Assisted Review” means any process that utilizes a computer algorithm to limit the number of potentially responsive documents subject to a manual review. A keyword search of documents with no further automated processing is not a Technology Assisted Review.
30. The term “Unilateral Pricing Policy” means any policy, practice, or announcement by a manufacturer of contact lenses relating to the price at which retailers sell contact lenses to consumers, in particular the policies adopted by Johnson & Johnson Vision Care, Alcon, Bausch + Lomb, and CooperVision, beginning on or about July 2014. *See, e.g., Contact Lens Makers and Discounters Tussle Over Price Setting, New York Times* (March 26, 2015), available at http://www.nytimes.com/2015/03/27/business/contact-lens-makers-and-discounters-tussle-over-price-setting.html?_r=0 (“[O]pponents [of unilateral pricing policies], which include big discounters such as Costco and 1-800 Contacts as well as the nonprofit group Consumers Union, say the policies amount to illegal price-fixing and are restricting consumer choice in an industry that has long been accused of anticompetitive practices.”), *Debate about contact-lens prices revives Florida’s eye wars, Tampa Bay Times* (March 24, 2015) (“Influential Tallahassee lobbyist Marc Reichelderfer, a GOP strategist representing 1-800-CONTACTS, is leading the effort to do away with the pricing policies.”), available at <http://www.tampabay.com/news/politics/stateroundup/debate-about-contact-lens-prices-revives-floridas-eye-wars/2222578>.
31. “User Query” means data entered into a computer by an end user of a Search Engine for the purpose of operating the Search Engine.

INSTRUCTIONS

1. Unless otherwise indicated, each request covers documents and information dated, generated, received, or in effect from January 1, 2002, to the present.
2. Respondent need not produce responsive documents that Respondent has previously produced to the Commission in relation to the prior investigation, FTC No. 141-0200. **Respondent must produce all other responsive documents, including any otherwise responsive documents that may have been produced by Respondent to the Commission in relation to any other investigation conducted by the Commission.**
3. This request for documents shall be deemed continuing in nature so as to require production of all documents responsive to any specification included in this request produced or obtained by the Respondents up to fifteen (15) calendar days prior to the date of the Company's full compliance with this request.
4. Except for privileged material, the Company will produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. The Company should submit any appendix, table, or other attachment by either attaching it to the responsive document or clearly marking it to indicate the responsive document to which it corresponds. Except for privileged material, the Company will not redact, mask, cut, expunge, edit, or delete any responsive document or portion thereof in any manner.
5. Unless modified by agreement with Complaint Counsel, these Requests require a search of all documents in the possession, custody, or control of the Company including, without limitation, those documents held by any of the Company's officers, directors, employees, agents, representatives, or legal counsel, whether or not such documents are on the premises of the Company. If any person is unwilling to have his or her files searched, or is unwilling to produce responsive documents, the Company must provide the Complaint Counsel with the following information as to each such person: his or her name, address, telephone number, and relationship to the Company. In addition to hard copy documents, the search must include all of the Company's Electronically Stored Information.
6. Form of Production. The Company shall submit all documents as instructed below absent written consent signed by Complaint Counsel.
 - a. Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original documents:
 - i. Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and applicable metadata and information as described in subparts (a)(iii) and (a)(iv).
 - ii. Submit emails in image format with extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.
To	Recipient(s) of the email.
From	The person who authored the email.
CC	Person(s) copied on the email.
BCC	Person(s) blind copied on the email.
Subject	Subject line of the email.
Date Sent	Date the email was sent.
Time Sent	Time the email was sent.
Date Received	Date the email was received.
Time Received	Time the email was received.
Attachments	The Document ID of attachment(s).
Mail Folder Path	Location of email in personal folders, subfolders, deleted items or sent items.
Message ID	Microsoft Outlook Message ID or similar value in other message systems.

- iii. Submit email attachments in image format, or native format if the file is one of the types identified in subpart (a)(i), with extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.
Parent ID	The Document ID of the parent email.

Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

- iv. Submit all other electronic documents in image format, or native format if the file is one of the types identified in subpart (a)(i), accompanied by extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Originating Path	File path of the file as it resided in its original environment.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.

Hash	The Secure Hash Algorithm (SHA) value for the original native file.
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- v. Submit documents stored in hard copy in image format accompanied by OCR with the following information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.

- vi. Submit redacted documents in image format accompanied by OCR with the metadata and information required by relevant document type in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above. Additionally, please provide a basis for each privilege claim as detailed in Instruction 6.
- b. Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats such as CSV files, with all underlying data un-redacted and all underlying formulas and algorithms intact.
- c. If the Company intends to utilize any electronic search terms, de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media, or if the Company's computer systems contain or utilize such software, the Company must contact Complaint Counsel to discuss whether and in what manner the Company may use such software or services when producing materials in response to this subpoena.
- d. Produce electronic file and image submissions as follows:
- i. For productions over 10 gigabytes, use IDE, EIDE, and SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure;
 - ii. For productions under 10 gigabytes, CD-R CD-ROM optical disks formatted to ISO 9660 specifications, DVD-ROM optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats; and

- iii. All documents produced in electronic format shall be scanned for and free of viruses prior to submission. Complaint Counsel will return any infected media for replacement, which may affect the timing of the Company's compliance with this subpoena.
 - iv. Encryption of productions using NIST FIPS-compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.¹
 - e. Each production shall be submitted with a transmittal letter that includes the FTC matter number; production volume name; encryption method/software used; passwords for any password protected files; list of custodians and document identification number range for each; total number of documents; and a list of load file fields in the order in which they are organized in the load file.
7. All documents responsive to these requests:
- a. Shall be produced in complete form, unredacted unless privileged, and in the order in which they appear in the Company's files;
 - b. Shall be marked on each page with corporate identification and consecutive document control numbers when produced in image format;
 - c. Shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black and white photocopying or conversion to TIFF format of any document (e.g., a chart or graph) makes any substantive information contained in the document unintelligible, the Company must submit the original document, a like-color photocopy, or a JPEG format image);
 - d. Shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original documents; and
 - e. Shall be accompanied by an index that identifies (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's documents. Complaint Counsel will provide a sample index upon request.
8. If any documents are withheld from production based on a claim of privilege, the Respondent shall provide, pursuant to 16 C.F.R. § 3.38A, a schedule which describes the nature of documents, communications, or tangible things not

¹ The National Institute of Standards and Technology (NIST) issued Federal Information Processing Standard (FIPS) Publications 140-1 and 140-2, which detail certified cryptographic modules for use by the U.S. Federal government and other regulated industries that collect, store, transfer, share, and disseminate sensitive but unclassified information. More information about FIPS 140-1 and 140-2 can be found at <http://csrc.nist.gov/publications/PubsFIPS.html>.

produced or disclosed, in a manner that will enable Complaint Counsel to assess the claim of privilege.

9. If the Respondent is unable to answer any question fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by the Respondent to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation “est.” If there is no reasonable way for the Respondent to make an estimate, provide an explanation.
10. If documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company’s document retention policy but the Respondent has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify Persons having knowledge of the content of such documents.
11. The Company must provide Complaint Counsel with a statement identifying the procedures used to collect and search for electronically stored documents and documents stored in paper format. The Company must also provide a statement identifying any electronic production tools or software packages utilized by the company in responding to this subpoena for: keyword searching, Technology Assisted Review, email threading, de-duplication, global de-duplication or near-de-duplication, and
 - a. if the company utilized keyword search terms to identify documents and information responsive to this subpoena, provide a list of the search terms used for each custodian;
 - b. if the company utilized Technology Assisted Review software;
 - i. describe the collection methodology, including: how the software was utilized to identify responsive documents; the process the company utilized to identify and validate the seed set documents subject to manual review; the total number of documents reviewed manually; the total number of documents determined nonresponsive without manual review; the process the company used to determine and validate the accuracy of the automatic determinations of responsiveness and nonresponsiveness; how the company handled exceptions (“uncategorized documents”); and if the company’s documents include foreign language documents, whether reviewed manually or by some technology-assisted method; and
 - ii. provide all statistical analyses utilized or generated by the company or its agents related to the precision, recall, accuracy,

validation, or quality of its document production in response to this subpoena; and identify the person(s) able to testify on behalf of the company about information known or reasonably available to the organization, relating to its response to this specification.

- c. if the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media in response to this subpoena, or if the Company's computer systems contain or utilize such software, the Company must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this subpoena

12. Any questions you have relating to the scope or meaning of anything in subpoena or suggestions for possible modifications thereto should be directed to Katie Clair at (202) 326-3435, kclair@ftc.gov. The response to the request shall be addressed to the attention of Katie Clair, Federal Trade Commission, 400 7th Street SW, Washington, D.C. 20024, and delivered between 8:30 a.m. and 5:00 p.m. on any business day.

Dated: September 8, 2016

Respectfully Submitted:

/s/ Dan Matheson
Dan Matheson
Katie Clair
Barbara Blank
Charlotte Slaiman
Gus Chiarello
Nathaniel Hopkin
Joshua Gray
Thomas Brock
Charles Loughlin
Geoffrey Green

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on SEPTEMBER 8, 2016 I served COMPLAINT COUNSEL'S FIRST SET OF REQUESTS FOR PRODUCTION via electronic mail on the following counsel for Respondents:

Steven Perry, Steven.Perry@mto.com
Justin Raphael, Justin.Raphael@mto.com
Stuart Senator, Stuart.Senator@mto.com
Gregoy Stone, Gregory.Stone@mto.com
Gregory Sergi, Gregory.Sergi@mto.com
Garth Vincent, Garth.Vincent@mto.com

Date: September 8, 2016

By: /s/Dan Matheson
Dan Matheson

Exhibit B

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

In the Matter of

**1-800 CONTACTS, INC.,
a corporation**

Docket No. 9372

**RESPONDENT 1-800 CONTACTS, INC.'S RESPONSES AND OBJECTIONS TO
COMPLAINT COUNSEL'S FIRST AND SECOND SETS OF REQUESTS FOR
PRODUCTION**

Pursuant to Section 3.37 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.37, Respondent 1-800 Contacts, Inc. ("1-800 Contacts") submits these Responses and Objections to Complaint Counsel's First and Second Sets of Requests for Production. The full text of each Request is set out below, followed by 1-800 Contacts' respective specific objections and responses. 1-800 Contacts' provision of a response to any Request shall not constitute a waiver of any applicable objection, privilege, or other right.

1-800 Contacts' agreement to produce documents in response to any Request means only that responsive documents will be produced if they exist, are in 1-800 Contacts' possession, custody, or control, can be located with reasonable diligence and without undue burden, and are not otherwise protected from disclosure.

1-800 Contacts reserves the right at any time to revise, amend, supplement, correct, clarify, or add to these Responses and Objections. 1-800 Contacts also reserves all objections as to the competency, relevance, materiality, privilege, and/or admissibility as evidence of any documents or information produced in response to any of the Requests for Productions. 1-800

Contacts reserves the right to use or rely on, at any time, subsequently discovered information or information omitted from any response to these Requests for Production as a result of mistake, error, oversight, or inadvertence.

GENERAL OBJECTIONS

The following General Objections, except as otherwise indicated, apply to each Request, are incorporated by reference into each response, and are in addition to specific objections as applicable. The assertion of the same, similar, or additional objections, or partial answers in response to an individual Request does not waive any of 1-800 Contacts' General Objections as to the other Requests.

1. 1-800 Contacts objects to the Requests, Definitions, and Instructions to the extent they seek to impose obligations on 1-800 Contacts that go beyond the obligations set forth in the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 3.31, 3.34, & 3.37.
2. 1-800 Contacts objects to the Requests to the extent that they seek information protected by the work product doctrine, the attorney-client privilege, or any other applicable protection. 1-800 Contacts claims all such protections and does not intend to produce such documents. To the extent that protected documents are produced, such production is inadvertent and 1-800 Contacts requests that Complaint Counsel return the documents.
3. 1-800 Contacts objects to Complaint Counsel's definition of the terms "1-800 Contacts," "1-800," "Company," or "Respondent" as overly broad, lacking in the reasonable specificity required by law, vague, ambiguous, and seeking to impose obligations on 1-800 Contacts in excess of the obligations imposed on 1-800 Contacts by the Federal Trade Commission's Rules of Practice. For purposes of responding to these Requests for Production, 1-800 Contacts interprets these terms to mean Respondent 1-800 Contacts,

- Inc., its directors, officers, and employees, and its subsidiaries, and their directors, officers, and employees.
4. 1-800 Contacts objects to Complaint Counsel's definition of the terms "Computer File" and "Documents" to the extent that those definitions purport to impose obligations on 1-800 Contacts that go beyond the obligations set forth in the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 3.31, 3.34, & 3.37, or otherwise set forth by applicable law.
 5. 1-800 Contacts objects to the Requests, Definitions, and Instructions to the extent that they purport to require a search of archived files (including computer back-up tapes) that would be unduly burdensome or would not be reasonably likely to yield non-duplicative, responsive material or information.
 6. 1-800 Contacts objects to the Requests to the extent that they seek the creation of document or data summaries or compilations that do not exist in the ordinary course of business.
 7. 1-800 Contacts objects to the Requests to the extent that they seek material or information that is already in the possession of Complaint Counsel, readily available to Complaint Counsel from sources other than 1-800 Contacts, or in the public domain.
 8. 1-800 Contacts objects to Complaint Counsel's definition of the terms "Plan" and "Plans" on the ground that the use of those terms renders any Request that incorporates either of these terms vague, ambiguous, and overbroad.
 9. 1-800 Contacts objects to Complaint Counsel's definition of the terms "Relate" and "Relating" on the ground that the use of those terms renders any Request that incorporates either of these terms vague, ambiguous, and overbroad.

10. 1-800 Contacts objects to Complaint Counsel’s definition of the term “Unilateral Pricing Policy” on the ground that the use of that terms renders any Request that incorporates it vague, ambiguous, and overbroad.
11. 1-800 Contacts objects to Paragraph 1 of the Instructions on the ground that the stated time period (“January 1, 2002, to the present”) is overbroad and not reasonably calculated to lead to the discovery of admissible evidence.
12. 1-800 Contacts objects to Paragraph 3 of the Instructions to the extent that it purports to impose “continuing” obligations on 1-800 Contacts beyond those set forth in the Federal Trade Commission’s Rules of Practice or otherwise set forth by applicable law.
13. 1-800 Contacts objects to Paragraph 5 of the Instructions on the ground that it purports to require 1-800 Contacts to engage in a search for documents that is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.
14. 1-800 Contacts objects to the Instructions to the extent that they purport to require 1-800 Contacts to produce documents in a form or format beyond the requirements set forth in the Federal Trade Commission’s Rules of Practice or otherwise set forth by applicable law. 1-800 Contacts is willing to meet and confer with Complaint Counsel to discuss the form and format for document productions by 1-800 Contacts.
15. 1-800 Contacts objects to the First and Second Sets of Requests for Production to the extent that those Requests, including all distinct subparts, exceed the limit of 50 allowed in Paragraph 11 of the September 7, 2016 Scheduling Order.

SPECIFIC RESPONSES AND OBJECTIONS

Subject to the foregoing General Objections, which are incorporated by reference in each of the specific responses set forth below, 1-800 Contacts responds to Complaint Counsel's First and Second Sets of Requests for Production as follows:

REQUEST FOR PRODUCTION NO. 1:

All Documents Relating to correspondence between 1-800 Contacts and any other Person related to Negative Keywords. *See, e.g.*, 1-800F_00033564 (referring to a "recommended list" of negative keywords provided in 2011 to Ciba and Vistakon).

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence. 1-800 Contacts further objects to this Request to the extent that it seeks correspondence other than that between 1-800 Contacts and a third-party who is likely to have advertised with the use of Keywords relating to 1-800 Contacts or contact lenses.

Subject to the foregoing objections, 1-800 Contacts will produce responsive, non-privileged documents, if any such documents exist, have not been produced already in the prior investigation (FTC No. 141-0200), and can be identified by a search of reasonable scope and particularity.

REQUEST FOR PRODUCTION NO. 2:

For each Negative Keyword 1-800 Contacts has implemented during the Relevant Period, Documents Sufficient to Show the first date on which 1-800 Contacts instructed a Search Engine to implement such a Negative Keyword.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, 1-800 Contacts will produce responsive, non-privileged documents sufficient to show when 1-800 Contacts instructed a Search Engine to implement each Negative Keyword to the extent such documents are reasonably available and can be identified by a search of reasonable scope and particularity.

REQUEST FOR PRODUCTION NO. 3:

For each Negative Keyword 1-800 Contacts has implemented during the Relevant Period, Documents Sufficient to Show any dates on which 1-800 Contacts instructed a Search Engine to cease implementing such a Negative Keyword.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, 1-800 Contacts will produce responsive, non-privileged documents sufficient to show when 1-800 Contacts instructed a Search Engine to cease implementing each Negative Keyword to the extent such documents are reasonably available and can be identified by a search of reasonable scope and particularity.

REQUEST FOR PRODUCTION NO. 4:

All documents submitted to the Federal Trade Commission and/or the Department of Justice in connection with any filing made pursuant to the Hart-Scott-Rodino Antitrust

Improvements Act of 1976 relating to a transaction to which 1-800 Contacts was a party. This request includes documents submitted by 1-800 Contacts, as well as documents submitted by any other person who made a filing relating to a transaction to which 1-800 Contacts was a party.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence. 1-800 Contacts further objects to this request to the extent that it seeks documents outside of the possession of 1-800 Contacts.

Subject to the foregoing objections, 1-800 Contacts states that it will produce the filing made by the Ultimate Parent Entity of 1-800 Contacts in connection with the proposed acquisition of Vision Direct in the redacted format in which such filing was made available to 1-800 Contacts. 1-800 Contacts further responds by referring to the documents produced by Complaint Counsel on September 28, 2016, including those labeled FTC-00000400 – 815. 1-800 Contacts will produce any other such filings that 1-800 Contacts itself made between 2002 and the present to the extent such filings are reasonably available and subject to any applicable confidentiality agreements or restrictions. 1-800 Contacts will not produce any such filings made by any entity other than 1-800 Contacts.

REQUEST FOR PRODUCTION NO. 5:

All documents submitted to the Federal Trade Commission and/or the Department of Justice in connection with any Request for Additional Information made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 relating to a transaction to which 1-800 Contacts was a party.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence. 1-800 Contacts further objects to this request to the extent that it seeks documents outside of the possession of 1-800 Contacts.

Subject to the foregoing, 1-800 Contacts states that it is not aware of any such documents other than those sought by Request No. 4 and those submitted in connection with the proposed acquisition of Vision Direct. 1-800 Contacts will produce such documents submitted in connection with the proposed acquisition of Vision Direct to the extent and in the form that those documents are available to 1-800 Contacts and do not contain confidential information of any other entity.

REQUEST FOR PRODUCTION NO. 6:

All Documents Relating to any Unilateral Pricing Policy adopted by a manufacturer of contact lenses, such as the Unilateral Pricing Policies adopted by Johnson & Johnson Vision Care, Alcon, Bausch + Lomb, and CooperVision, beginning on or about July 2014, including but not limited to: (a) Documents discussing the impact of a Unilateral Pricing Policy on 1-800 Contacts; and (b) Documents discussing the impact of a Unilateral Pricing Policy on any Competitor, Affiliate, or group of Competitors or Affiliates of 1-800 Contacts.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, 1-800 Contacts will produce responsive, non-privileged documents that constitute reports or analyses of the impact of “Unilateral Pricing Policies” on 1-800 Contacts or any competitor, if any such documents exist, have not been produced already in the prior investigation (FTC No. 141-0200), and can be identified by a search of reasonable scope and particularity.

REQUEST FOR PRODUCTION NO. 7:

All documents related to correspondence between any employee, agent, or representative of 1-800 Contacts and any employee, agent, or representative of any other seller of contact lenses regarding: trademarks, litigation, advertising (including but not limited to search advertising), or a contractual relationship between 1-800 Contacts and any other seller of contact lenses (including but not limited to actual, potential, or claimed breaches of existing contracts).

RESPONSE TO REQUEST FOR PRODUCTION NO. 7:

1-800 Contacts objects to this Request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, and seeks information that is not relevant to any party’s claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, 1-800 Contacts will produce responsive, non-privileged documents that constitute correspondence between 1-800 Contacts or its outside counsel in prior trademark-related litigation and another retailer of contact lenses that relates to the use of trademarked terms as Keywords in Internet paid search advertising, if any such documents exist, have not been produced already in the prior investigation (FTC No. 141-0200), and can be identified by a search of reasonable scope and particularity.

REQUEST FOR PRODUCTION NO. 8:

All Documents Relating to contact lens purchases by customers or former customers of 1-800 Contacts from any retailer seller of contact lenses other than 1-800 Contacts, including documents analyzing switching by 1-800 Contacts' customers and former customers and/or switching by customers of other contact lens retailers.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8:

1-800 Contacts objects to this Request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, 1-800 Contacts will produce responsive, non-privileged documents that constitute reports or analyses of switching by 1-800 Contacts' customers or former customers to or from other retailers of contact lenses, if any such documents exist, have not been produced already in the prior investigation (FTC No. 141-0200), and can be identified by a search of reasonable scope and particularity.

REQUEST FOR PRODUCTION NO. 9:

All data used, presented, or summarized by Bain and Company in connection with due diligence or competitive analysis of Vision Direct on behalf of 1-800 Contacts, including but not limited to responses to surveys of contact lens consumers such as the data summarized in the draft presentation "Vision Direct Competitive Positioning," dated May 2015. *See* Bates number 1-800F_00056323.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is

not reasonably calculated to lead to the discovery of admissible evidence. 1-800 Contacts further objects to this request to the extent that it seeks documents outside of the possession of 1-800 Contacts.

Subject to the foregoing objections, 1-800 Contacts will produce responsive, non-privileged documents in its possession, if any such documents exist, have not been produced already in the prior investigation (FTC No. 141-0200), and can be identified by a search of reasonable scope and particularity.

REQUEST FOR PRODUCTION NO. 10:

All analyses comparing 1-800 Contacts' prices to the prices of a Competitor.

RESPONSE TO REQUEST FOR PRODUCTION NO. 10:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, 1-800 Contacts will produce responsive, non-privileged documents that constitute reports or analyses of 1-800 Contacts' retail prices for contact lenses in comparison to the retail prices of other retailers of contacts lenses, if any such documents exist, have not been produced already in the prior investigation (FTC No. 141-0200), and can be identified by a search of reasonable scope and particularity.

REQUEST FOR PRODUCTION NO. 11:

All documents analyzing the effect of increased price visibility on 1-800 Contacts' sales, pricing, or profitability. This request includes, but is not limited to, all documents created in response to Tim Roush's request for analysis in 1-800F_00055885. The term "price visibility" has the same meaning as in 1-800F_00055885.

RESPONSE TO REQUEST FOR PRODUCTION NO. 11:

1-800 Contacts objects to this Request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, 1-800 Contacts will produce responsive, non-privileged documents that were prepared in response to Mr. Roush's request for analysis regarding "price visibility," as that term is used in the referenced document, if any such documents exist, have not been produced already in the prior investigation (FTC No. 141-0200), and can be identified by a search of reasonable scope and particularity.

REQUEST FOR PRODUCTION NO. 12:

All documents, except for documents which have already been produced to the Federal Trade Commission, responsive to Specifications 1, 4, 5, 6, 11, 12, 13, and 15 of the Civil Investigative Demand issued to 1-800 Contacts on January 20, 2015, in connection with the Commission investigation of 1-800 Contacts, FTC No. 141-0200, found in the following locations:

- a. the files of former 1-800 Contacts employee Josh Aston, including but not limited to shared file locations Mr. Aston accessed in the ordinary course of business; and
- b. backup tapes which were restored in connection with the Civil Investigative Demand issued to 1-800 Contacts on January 20, 2015 or in connection with the Commission investigation of 1-800 Contacts, FTC No. 141-0200.

RESPONSE TO REQUEST FOR PRODUCTION NO. 12:

1-800 Contacts objects to this Request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objection, 1-800 Contacts states that Josh Aston's documents and files no longer exist in any reasonably accessible form because he left 1-800 Contacts in 2004. 1-800 Contacts will, however, produce responsive, non-privileged documents for which Josh Aston was an author or recipient during his employment at 1-800 Contacts from the files previously collected of other 1-800 Contacts employees, to the extent any such documents exist, have not been produced already in the prior investigation (FTC No. 141-0200), and can be identified by a search of reasonable scope and particularity.

With respect to subpart (b) of this Request, 1-800 Contacts objects to the production of any documents from backup tapes, whether previously restored or not, as overbroad and unduly burdensome.

REQUEST FOR PRODUCTION NO. 13:

All documents relating to the existence, terms, scope, or implementation of any Price Match Policy including but not limited to:

- a. Documents distributed to 1-800 Contacts employees with responsibility for speaking with customers or potential customers, including but not limited to scripts or other guidance provided to employees working within a call center;
- b. Documents created to inform any customer or potential customer about the existence or terms of any Price Match Policy, including but not limited to copies of all advertising relating to any Price Match Policy;

- c. Documents tracking, analyzing, or discussing the implementation, use, or effectiveness of any Price Match Policy, including, but not limited to, any log(s) that record price-match requests and fulfillment; and
- d. Documents Sufficient to Show the following information relating to 1-800's Price-Match Policies: (i) the inception date and reasons for implementing each Price Match Policy; (ii) any periods of time during which any Price Match Policy was terminated, suspended, paused, not honored, or otherwise not in effect; (iii) any actual or considered modifications in advertising policies related to the Price Match Policy, and the reasons therefor, (iv) the process required for consumers to take advantage of each Price Match Policy; and (v) the identity of the contact lens sellers whose prices were matched each time a 1-800 Contacts customer paid a price pursuant to any Price Match Policy.
- e. Documents Sufficient to Show the following information for each sale made since January 1, 2004 pursuant to any Price Match Policy: (1) SKU or UPC of product; (2) shipped date; (3) type of Competitor;¹ (4) discount provided due to price match; (5) order revenues after price match; (6) identity of Competitor; (7) whether Competitor was an internet seller; (8) customer ID number; (9) Order Number.

¹ This Request seeks the most precise available information regarding the Competitor's line of business (e.g., internet seller, Eye Care Professional, mass market retailer, club store).

RESPONSE TO REQUEST FOR PRODUCTION NO. 13:

1-800 Contacts objects to this Request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, 1-800 Contacts states that it previously produced during the prior investigation (FTC No. 141-0200) a log providing transaction-level detail for two years on the utilization of the Price Match Policy. 1-800 Contacts will produce responsive, non-privileged documents sufficient to show the existence, terms, and scope of any Price Match Policy, documents sufficient to show the training provided to employees on how to apply any Price Match Policy, and documents or data sufficient to show the aggregate utilization of any Price Match policy as such information is generated in the ordinary course of business, to the extent that such documents exist, have not been produced already in the prior investigation (FTC No. 141-0200), and can be identified by a search of reasonable scope and particularity.

REQUEST FOR PRODUCTION NO. 14:

Documents Sufficient to Show the Company's quarterly and annual sales revenue for contact lenses in total, and separately, for each of the following consumer channels:

- a. Online;
- b. Telephone mail-order;
- c. In-store; and
- d. Other (identify "Other" channels).

RESPONSE TO REQUEST FOR PRODUCTION NO. 14:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, 1-800 Contacts states that it previously produced during the prior investigation (FTC No. 141-0200) documents responsive to this request covering the years 2003 through 2014, and that 1-800 Contacts will supplement its prior production with documents sufficient to show the same information from 2014 through the most recent date for which such information is reasonably available.

REQUEST FOR PRODUCTION NO. 15:

Documents Sufficient to Show on a quarterly and annual basis, for contact lens sales both in total, and for each channel listed in Specification 14:

- a. Contribution Margins (defined as selling price minus variable cost);
- b. Net revenue (defined as revenue net of discounts and returns);
- c. Cost of goods sold;
- d. Credit card fees;
- e. Variable selling, general and administrative costs.

RESPONSE TO REQUEST FOR PRODUCTION NO. 15:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, 1-800 Contacts will produce documents or data sufficient to show the requested information, to the extent such information is kept in the

ordinary course of business, can be identified through a search of reasonable scope and particularity, and can be compiled without undue burden for the time period 2004 through the most recent date for which such information is reasonably available.

REQUEST FOR PRODUCTION NO. 16:

Documents Sufficient to Show, either by transaction or on a weekly basis, for each UPC or SKU number sold by 1-800 Contacts:

- a. Date of sale;
- b. UPC or SKU number;
- c. Description of the product;
- d. All classification variables and product descriptors;
- e. Package size;
- f. Sales revenue;
- g. Total promotional discount;
- h. Unit sales (i.e., quantity of each item sold);
- i. Acquisition cost of the product; and
- j. The distributor from which the item was acquired.

RESPONSE TO REQUEST FOR PRODUCTION NO. 16:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, 1-800 Contacts will produce documents or data sufficient to show the requested information, to the extent such information is kept in the ordinary course of business, can be identified through a search of reasonable scope and

particularity, and can be compiled without undue burden for the time period 2004 through the most recent date for which such information is reasonably available.

REQUEST FOR PRODUCTION NO. 17:

Documents Sufficient to Show, on a weekly, quarterly, and annual basis, the number of orders and dollar volume of sales that 1-800 Contacts attributes to each of the following advertising channels:

- a. Paid search advertising attributable to search terms on which 1-800 claims trademark protection;
- b. Paid search advertising attributable to search terms on which 1-800 does **not** claim trademark protection;
- c. Other online advertising (and identify other online channels);
- d. Television;
- e. Print;
- f. Radio;
- g. In-store advertising;
- h. Other advertising.

RESPONSE TO REQUEST FOR PRODUCTION NO. 17:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, 1-800 Contacts states that it does not systematically track sales volumes based on the types of advertising identified in this Request. 1-800 Contacts is willing to meet and confer to discuss producing documents that constitute reports or analyses

of the impact of different types of advertising on its sales, to the extent such documents exist, have not been produced already in the prior investigation (FTC No. 141-0200), and can be identified by a search of reasonable scope and particularity.

REQUEST FOR PRODUCTION NO. 18:

For each Ad Group 1-800 Contacts has used on any Search Engine, provide Documents Sufficient to Show: the Campaign associated with the Ad Group, each Keyword used in the Ad Group, and for each Keyword, the following data, on a daily basis:

- a. Impressions;
- b. Clicks;
- c. Click through Rate (CTR);
- d. Maximum Cost Per Click Bid;
- e. Keyword Matching Option (e.g., exact match, phrase match, or broad match);
- f. Cost Per Click;
- g. Cost Per Action;
- h. Cost Per Impression;
- i. Cost USD;
- j. Average Ad Rank;
- k. Conversion Rate; and
- l. Conversion Value.

RESPONSE TO REQUEST FOR PRODUCTION NO. 18:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, 1-800 Contacts will produce documents or data sufficient to show the requested information on a monthly basis, to the extent such information is reasonably available, can be identified through a search of reasonable scope and particularity, and can be compiled without undue burden for the time period 2004 through the most recent date for which such information is reasonably available.

REQUEST FOR PRODUCTION NO. 19:

All documents Relating to surveys conducted of customers and potential customers, and comments provided by customers or potential customers. *See, e.g.*, 1-800F_00075522; 1-800F_00075523; 1-800F_00075524; 1-800F_00075525.

RESPONSE TO REQUEST FOR PRODUCTION NO. 19:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, 1-800 Contacts states that it is willing to meet and confer with Complaint Counsel if there are particular types of customer surveys or comments that Complaint Counsel believes may be relevant to this case and that could be collected by a search of reasonable scope and particularly without undue burden. 1-800 Contacts, however, is not willing to produce, for example, all comments provided by customers or potential customers, regardless of subject, over a time period of nearly 15 years, as well as all documents Relating to any such comments.

REQUEST FOR PRODUCTION NO. 20:

All documents Relating to communications or reports received from Hitwise Pty. Ltd., Experian Hitwise, or any entity referred to as Hitwise in the ordinary course of Your business. *See, e.g.*, 1-800F_00072892; 1-800F_00072921.

RESPONSE TO REQUEST FOR PRODUCTION NO. 20:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing objections, 1-800 Contacts will produce responsive, non-privileged documents that constitute reports received from Hitwise, if such documents exist, have not been produced already in the prior investigation (FTC No. 141-0200), and can be identified by a search of reasonable scope and particularity.

REQUEST FOR PRODUCTION NO. 21:

All documents, except for documents which have already been produced to the Federal Trade Commission, Relating to Memorial Eye P.A. including, but not limited to: all correspondence between any agent or employee of 1-800 Contacts and any agent or employee of Memorial Eye P.A.; all documents Relating to any allegation that Memorial Eye P.A. infringed 1-800 Contacts' trademark rights; all transcripts of depositions taken in litigation to which Memorial Eye was a party (including but not limited to any transcripts of depositions given by Jordan Judd and Amy Larson); and all documents Relating to 1-800's petition to lift the protective order in 1-800 Contacts v. Memorial Eye, Civil Action No. 2:08-cv-00983, D. Utah, Central Division.

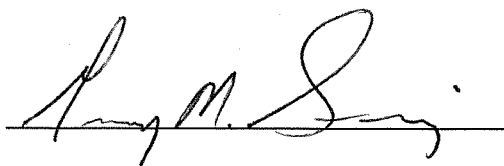
RESPONSE TO REQUEST FOR PRODUCTION NO. 21:

1-800 Contacts objects to this Request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, and seeks information that is not relevant to any party's claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence. 1-800 Contacts also objects to this request to the extent that it seeks documents outside of the possession of 1-800 Contacts. 1-800 Contacts further objects to this request to the extent that it seeks documents produced by another company in prior litigation and designated as confidential pursuant to the Protective Order entered by the Court in that action. Under the terms of the Protective Order in that action, 1-800 Contacts is prohibited from producing certain documents designated as confidential by Memorial Eye.

Subject to the foregoing objections, 1-800 Contacts will produce responsive, non-privileged documents that relate to any dispute, litigation, or settlement between 1-800 Contacts and Memorial Eye regarding the unauthorized use of trademarks in paid Internet search advertising, to the extent it is permitted to do so by, and subject to the terms of, the Protective Order entered in that action. To be clear, 1-800 Contacts will not produce any documents that were designated as confidential (Confidential or Confidential – Attorneys' Eyes Only) by Memorial Eye pursuant to the Protective Order entered by the United States District Court for the District of Utah in the applicable litigation without the express authorization of Memorial Eye or a Court order allowing production of such materials.

DATED: October 11, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gregory M. Sergi", written over a horizontal line.

Gregory P. Stone, Esq. (gregory.stone@mto.com)
Steven M. Perry, Esq. (steven.perry@mto.com)
Garth T. Vincent, Esq. (garth.vincent@mto.com)
Stuart N. Senator, Esq. (stuart.senator@mto.com)
Gregory M. Sergi, Esq. (gregory.sergi@mto.com)
Justin P. Raphael, Esq. (justin.rafael@mto.com)

MUNGER, TOLLES & OLSON LLP
355 South Grand Ave, 35th Floor
Los Angeles, CA 90071
Phone: (213) 683-9100
Fax: (213) 683-5161
Counsel for 1-800 Contacts, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2016, I served a copy of **RESPONDENT 1-800 CONTACTS, INC.'S RESPONSES AND OBJECTIONS TO COMPLAINT COUNSEL'S FIRST AND SECOND SETS OF REQUESTS FOR PRODUCTION** via electronic mail on the following counsel supporting the Complaint:

Thomas H. Brock, *tbrock@ftc.gov*
Barbara Blank, *bblank@ftc.gov*
Gustav Chiarello, *gchiarello@ftc.gov*
Kathleen Clair, *kclair@ftc.gov*
Joshua B. Gray, *jbgray@ftc.gov*
Geoffrey Green, *ggreen@ftc.gov*
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Mark Taylor, *mtaylor@ftc.gov*
BC-1040-1800-SearchAdTeam-DL@ftc.gov

DATED: October 11 , 2016

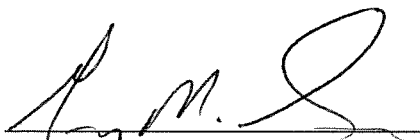
By: 
Gregory M. Sergi

Exhibit C

REDACTED IN ENTIRETY

Exhibit D

REDACTED IN ENTIRETY

Exhibit E

From: [Vincent, Garth](#)
To: [Matheson, Daniel](#)
Cc: [Sergi, Gregory](#)
Subject: 1-800 Contacts custodial searches
Date: Wednesday, October 19, 2016 9:12:47 PM

Dan,

As a follow up to our call earlier today regarding 1-800 Contacts' previous document collections and productions, below is the list of 20 custodians from whom we previously collected and produced documents. As I mentioned in our call, although we actually agreed with FTC Staff to collect from only a subset of this list, we ultimately chose to go beyond that agreement and collect and produce documents from each of the custodians listed below.

- Brian Bethers
- Joan Blackwood
- Nathan Blair
- Bryce Craven
- Brandon Dansie
- Jonathan Coon
- Rich Galan
- John Graham
- Kevin Hutchings
- Alan Hwang
- Jordan Judd
- Amy Larson
- Kevin McCallum
- Jay Magure
- Roy Montclair (in-house counsel)
- Brady Roundy
- Tim Roush
- Laura Schmidt
- Dave Zeidner (in-house counsel)
- Joe Zeidner (in-house counsel including personal email)

In addition to the above list of 20 custodians, and also beyond what we agreed with FTC Staff to collect and search previously, we also included in the scope of our prior searches the following sources:

- Marketing Server
- Corporate Server
- Legal Server

I will plan on speaking with you on Friday about 1-800 Contacts' responses to Complaint Counsel's first and second requests for production.

Garth

Garth T. Vincent | Munger, Tolles & Olson LLP

355 South Grand Avenue | Los Angeles, CA 90071

Tel: 213.683.9170 | Cell: 310.948.0788 | garth.vincent@mto.com | www.mto.com

Exhibit F



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Anticompetitive Practices Division

October 26, 2016

VIA EMAIL

Garth Vincent
Greg Sergi
Munger, Tolles & Olson LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Garth.Vincent@mto.com
Gregory.Sergi@mto.com

Re: In re 1-800 Contacts, Inc., FTC Docket No. 9372

Garth and Greg,

I write to follow up from our conversation on Friday, October 21, 2016 regarding 1-800's objections and responses to Complaint Counsel's First and Second Sets of Requests for Production.

Scope of Search and Collection Efforts:

You proposed that, to the extent you are responding to the below requests by applying search terms to and reviewing custodial documents, you plan to search the files of each of the 20 individual custodians and 3 centralized servers (departmental custodians) listed in your October 19, 2016 email to Dan Matheson for the following time periods: (1) January 1, 2004 through December 31, 2005 and (2) January 1, 2013 (or the end of the period for which that custodian's files were searched and reviewed in connection with your CID response) through the date that custodian's files were collected in connection with your response to the CID (which you stated was in most cases a date in 2015 or 2016).

Complaint Counsel Response: This general approach is acceptable to Complaint Counsel, subject to the following modifications:

Letter to Garth Vincent and Greg Sergi
October 26, 2016
Page 2

- (1) We believe it is also appropriate for 1-800 to refresh its collections to the present for the following five custodians: Brian Bethers, Tim Roush, Laura Schmidt, Brady Roundy, and Kevin Hutchings and include these custodians' files among those searched in response to Complaint Counsel's requests. To be clear, we are not asking you to refresh the collections for other current employees (Jay Magure, Nathan Blair, John Graham, and Roy Montclair) or for departmental custodians.
- (2) As noted below, we request that your searches response to RFPs 11 and 13(d)(iii), and your production of at least certain types of files in response to RFP 17, include files of the above-referenced custodians from the 2006-2012 time period that were collected but not previously produced.

Finally, to the extent you are responding to the below requests not by applying search terms to and then conducting a review of custodial files but rather by pulling a targeted set of responsive documents (i.e., treating the requests as what are sometimes referred to "go-gets"), we expect a production for the entire time period from 2004 to present.

Timing of Productions

For each request below, except those for which you have already completed your response, please inform us of the date by which you expect to complete your production.

Recent Production:

We received and are reviewing your most recent production, which you indicated during Friday's call would contain the following materials:

- Search Advertising data, including change history, in response to RFPs 2, 3, and 18;
 - It was not clear from our meet and confer whether this production would contain only data from your search engine advertising accounts dating back two years or would also any ad hoc responsive files, such as print outs from AdWords data. We will continue to review this production, but to the extent these ad hoc files are not included in today's production, please advise when they will be produced.
- Consolidated financial reports in response to RFPs 14 and 15;
- Spreadsheets reporting on the incidence of price matching dating back to either 2007 or 2009, portions of 1-800's website explaining its price match policy, portions of employee training manuals regarding methods for implementing the price match policy, in partial response to RFP 13; and
- Hitwise reports in partial response to RFP 20.

Letter to Garth Vincent and Greg Sergi
October 26, 2016
Page 3

Other Requests:

RFP 1: You stated that 1-800 will conduct a search among the custodial files identified above for relevant search terms (including, at the least, the terms “NKW,” “negative keyword,” and “negative keywords”) and produce responsive documents resulting from those searches.

CC Response: Subject to our modification regarding a limited refresh as described above, we agree that this is a reasonable approach.

RFPs 4 and 5: You stated that 1-800 will produce responsive documents in the format in which they exist in 1-800’s files, even if in some instances, the files are in redacted form.

CC Response: We agree this is a reasonable approach.

RFP 6: You proposed searching and reviewing only the files of Tim Roush and Laura Schmidt for reports or analysis of the impact of UPP policies on 1-800. You stated that these individuals were the two people within the company responsible for analysis of UPP’s impact on 1-800’s business and of 1-800’s responses thereto, and that any responsive materials in the custodial files of individuals junior to Mr. Roush and Ms. Schmidt would have also been shared or summarized at a higher level with Mr. Roush and Ms. Schmidt.

CC Response: We agree this is a reasonable approach (a) subject to our modification regarding a limited refresh as described above and (b) so long as the files of 1-800’s CEO Mr. Bethers are also included.

RFP 7: You proposed conducting a search, for the custodians and time periods identified above, for domain names used in the email addresses of relevant sellers of contact lenses and, within the results, applying a reasonable set of search terms to identify documents regarding search advertising and trademark usage.

CC Response: We agree this is a reasonable approach (a) subject to our modification regarding a limited refresh as described above and (b) subject to the following guidance regarding search terms and domain names:

- Search Terms: While you mentioned potential search terms such as “AdWords,” “sponsored link,” and “trademark,” we did not come to any concrete agreement on a complete set of search terms that would be reasonable for this request. These three terms are reasonable as examples (but not a complete list) of the terms that Complaint Counsel believes would be reasonable to use for this purpose. We would appreciate if you would propose a list of search terms. In our view, a reasonable list would include at least the three terms above plus “infringement,” “infringe,” “infringing,” “infringed,” “paid search,” “Bing Ads,” “Yahoo Search,” “advertising,” “advertisement,” “ad,” “keyword” “KW,” “TM,” “search engine,” and variations of these terms as appropriate (e.g., plural versions).

Letter to Garth Vincent and Greg Sergi
October 26, 2016
Page 4

- Domain Names: You also proposed that Complaint Counsel provide a list of domain names for this search. We believe that 1-800 should undertake the responsibility to identify the relevant domain names used at any point during the relevant time period, but we believe that the list should cover at the least all known or reasonably ascertainable domain names used by the following companies (including their relevant predecessors, parents, or subsidiaries with which 1-800 may have corresponded, and including domain names associated with any relevant “doing business as” names for any such entities) from 2004 through the present:
 - 2weekdisposables
 - America’s Best
 - Arlington Contact Lens Service, d/b/a AC Lens or Discount Contact Lenses
 - BJ’s
 - Coastal Contacts
 - Contact Lens King
 - Contacts Direct
 - Costco
 - Empire Vision, d/b/a ECCA
 - EZ Contacts USA, d/b/a Provision Supply
 - Luxottica, d/b/a LensCrafters, Pearle Vision, Sears Optical, or Target Optical
 - Lens.com
 - LensDirect
 - Lens Discounters
 - Lenspure
 - Price Smart Contacts
 - Memorial Eye, d/b/a ShipMyContacts.com
 - Oakwood Eye Clinic, d/b/a Lenses for Less
 - Sam’s Club
 - Save On Lens
 - Standard Optical
 - Tram Data, d/b/a Replace My Contacts or Lensfast
 - Vision Direct, d/b/a Lensworld
 - Walgreens
 - Walmart
 - Web Eye Care

RFP 8: You stated that your client has pointed you to certain types of reports as the files likely to contain responsive information and that we can have a further discussion about these files after you are able to better understand what is in these reports.

Letter to Garth Vincent and Greg Sergi
October 26, 2016
Page 5

CC Response: Please let us know when you will be ready to make this production or further discuss this request.

RFP 9: You stated that you will produce any responsive documents and data that are in 1-800's possession, not including documents and data in the possession of 1-800's corporate parent, AEA; that 1-800 will not produce anything in AEA's possession on the grounds that some Bain materials that AEA procured before AEA's purchase of 1-800 have been considered confidential to AEA; that because Bain was retained by AEA rather than 1-800 directly, 1-800 will not ask Bain for the responsive materials; and that 1-800 will not ask AEA for assistance obtaining any of the requested data from Bain.

CC Response: As we stated on the call, we are not convinced that the distinction between 1-800 and its corporate parent is of any relevance to 1-800's practical ability or legal obligation to produce the requested materials and believe that nothing prevents 1-800 from asking AEA to produce any responsive materials in its possession or from asking AEA to request that Bain provide any responsive materials still in Bain's possession.

We have a few follow up questions:

- 1) What is the factual and legal basis for your claim that Bain-produced materials regarding the potential acquisition of Vision Direct are confidential to AEA (to the exclusion of 1-800) and not in the possession, custody, or control of 1-800?
- 2) How are the requested materials differently situated than the Bain-produced materials that are already in the record in this litigation, for example, the report referenced in Request 9?
- 3) To the extent responsive materials are confidential to AEA alone, is there any reason that production of the materials as AEA-confidential (on an outside counsel basis under the protective order) would not resolve any concerns about confidentiality?

RFP 10: You stated that you have begun to discuss this request with your client but need to continue further discussions with 1-800 personnel to identify which analyses or reports are the appropriate ones to produce.

CC Response: Please let us know when you will be ready to make this production or further discuss this request.

RFP 11: 1-800 proposed undertaking the following:

- A targeted search using email threading or a similar technology to identify all emails sent in response to the communication referenced in the Request (1-800F_00055885); and

Letter to Garth Vincent and Greg Sergi
October 26, 2016
Page 6

- Separately, a search across the custodial files identified above for the term “price” within three words of the term “visibility.” You stated that you will conduct this search for the entire time period—even including the 2006-2012 period—and either review the results and produce responsive documents or let us know whether you have concerns with the volume of the results and wish to narrow the search.

CC Response: We agree this is a reasonable approach subject to our modification regarding a limited refresh as described above.

RFP 12: You stated that, regarding Request 12(a), responsive files from Josh Aston have already been produced, and that, regarding Request 12(b), the only backup tape that was restored previously was restored only in part, not in its entirety; that the parts that have been restored contained the files of Messrs. Craven and Dansie, which have since been reviewed and produced, as well as entirely irrelevant files (for example, personal photos); and that there are consequently no remaining unrestored portions of the tape that can be searched and reviewed in connection with this request.

CC Response: Based on these representations, this is acceptable to Complaint Counsel. But, for the avoidance of doubt, to the extent that the previously restored portions of this backup tape contain files of any of the 20 individual and 3 departmental custodians identified above that have not yet been produced, they should be among the files searched in response to the other requests discussed in this letter. For example, the restored files of Messrs. Craven and Dansie (who are among the custodians identified above) from this tape that have not been produced are part of these individuals’ custodial files and should be among those searched in response to other requests.

RFP 13: In addition to the materials to be included in 1-800’s forthcoming production in response to several sub-parts of Request 13, which are described above, we also discussed Request 13(d)(iii), which seeks production of materials discussing “any actual or considered modifications in advertising policies related to the Price Match Policy, and the reasons therefor.” While we discussed some of the types of policy changes that you believe have occurred over time, we did not close the loop on a plan for reviewing and producing materials discussing these changes.

Additionally, you noted that certain information (such as the identity of the competitor whose price was matched) is unavailable except where it appears, ad hoc, in the notes field of customer call notes. I asked about the feasibility of producing 1-800’s underlying customer call notes files, including whether these are kept in electronic format, whether they consist of handwritten or typed notes, whether they are searchable (such that 1-800 or Complaint Counsel could search them for terms related to 1-800’s price matching policies).

CC Response: Please tell us your plan for responding to Request 13(d)(iii). We believe that a response should apply a reasonable set of search terms to the files of the custodians identified above (a) subject to our modification regarding a limited refresh as described above

Letter to Garth Vincent and Greg Sergi
October 26, 2016
Page 7

and (b) including files collected but not produced from the 2006-2012 time period. To the extent that responsive files have already been produced for the 2006-201 period, applying a reasonable set of search terms to the unproduced 2006-2012 files will pose little-to-no additional burden. To the extent that files responsive to Request 13(d)(iii) from that period were not included in earlier productions, they should be produced here.

Additionally, please provide further information about the customer call notes files in response to the questions I raised on the call, as noted above.

RFP 16: You mentioned that your transactional data responsive to RFP 16 contains personally identifiable information (PII), but that in the past, you have removed or anonymized names and addresses and propose doing the same for this production in order to avoid producing PII.

You also mentioned that 1-800 has responsive information but that it is voluminous and may take several weeks to produce, and asked whether we might consider narrowing our request.

CC Response: As noted on the call, we agree that production of transactional data with individual customer names and addresses removed or rendered anonymous is our preferred approach and we appreciate your ability to produce in this manner.

We have also considered possible ways to narrow our request for transactional data and have a proposal: While the request seeks data “for each UPC or SKU number sold by 1-800 Contacts,” we will accept (and in fact, would prefer) to receive data by product code instead of the more granular UPC or SKU data. We understand that producing by product code rather than UPC or SKU is likely to be less burdensome and result in a less voluminous production.

Further, as you noted that the main concern with this request is a matter of timing, we propose a production on a rolling basis, with the last five years of data produced first, followed by productions from earlier time periods. Also, as I noted on the call, if there are particular aspects of the request that are causing any particular logistical concerns, we remain open to hearing what those particular concerns are.

RFP 17: You proposed that 1-800:

- produce “last click” data, and
- search custodian files (as described above) for ad-hoc reporting of the requested information, review the results, and produce responsive information.

CC Response: Assuming a reasonable set of search terms and search methodology (which we did not discuss in our meet and confer with respect to this request), and assuming your search captures both formal and informal reporting of responsive information and includes not only PowerPoints but also at the least, emails and Excel files, this approach is acceptable subject to our modification regarding a limited refresh as described above.

Letter to Garth Vincent and Greg Sergi
October 26, 2016
Page 8

We also refer you to the discussion in Dan Matheson's October 18, 2016 letter of Request 17 and the types of files we believe should be appropriately included in the responsive production. In compiling ensuring a complete set of the types of files we referenced in that letter, we believe that the 2006-2012 period should not be excluded.

RFP 19: You stated that 1-800 possesses materials regarding many types of surveys about a wide variety of topics and sought clarification about the types of surveys we are seeking. We stated that we are seeking responsive materials concerning surveys regarding two broad categories of information:

- Consumer confusion, and
- Competitive information, such as surveys regarding satisfaction with the company's service or prices; surveys comparing 1-800 to other retailers; and surveys asking how customers heard about 1-800, why customers chose to purchase from 1-800, or where they purchased contact lenses before purchasing from 1-800, etc.

You stated that you now understand better what we are looking for and confer with your client to identify responsive materials.

CC Response: Please let us know when you will be ready to make your production or further discuss this request.

RFP 20: In addition to the Hitwise reports you indicated are included in today's production, we also discussed documents reflecting analyses of Hitwise reports. You stated that these are not included in today's production but you will endeavor to search for and produce these as well.

CC Response: Please let us know when you will be ready to make this production or further discuss this request.

RFP 21: You stated that it is your understanding that 1-800's counsel at Holland and Hart is not at this point intentionally withholding any documents on the basis that they are Memorial Eye confidential and is looking through its files to determine whether it possesses any responsive documents other than those Complaint Counsel identified in its previous correspondence on this issue.

CC Response: Please let us know when this search will be completed and when this production will be ready. To the extent that de-duplicating files we have already received is taking time, we are happy to receive Holland and Hart's entire set of responsive Memorial Eye-produced litigation materials and handle de-duplication ourselves.

If you have any concerns, or wish to discuss this issue further, please contact me at 202-326-3435 or Dan Matheson at 202-326-2075.

Letter to Garth Vincent and Greg Sergi
October 26, 2016
Page 9

Sincerely,

/s/ Kathleen Clair
Kathleen Clair
Attorney

cc: Geoffrey Green
Barbara Blank
Dan Matheson

Exhibit G

REDACTED IN ENTIRETY

Exhibit H

From: [Clair, Kathleen](#)
To: [Vincent, Garth](#); [Sergi, Gregory](#); [Stone, Gregory](#); [~800CON_FTC_ATTYS](#)
Cc: [BC-1040-1800-Search Ad Team-DL](#)
Subject: FW: Correspondence re 1-800 Responses to Complaint Counsel's RFPs
Date: Thursday, November 03, 2016 10:50:31 AM
Attachments: [2016-10-26 - Clair to Vincent and Sergi re Meet and Confer.pdf](#)

Garth, Greg, and Greg,

I write to follow up about 1-800's responses to Complaint Counsel's First and Second Sets of RFPs. Complaint Counsel served these RFPs on September 8 and 12, respectively. We met and conferred about them by telephone on Monday, October 17 (as memorialized in Dan Matheson's October 18 letter) and again on Friday, October 21. On October 26, I sent the attached letter memorializing our conversations, making several proposals (e.g., regarding custodians and search terms), and asking several follow-up questions, including, among others, when 1-800 plans to complete its productions in response to each request.

As we have noted, we are concerned about receiving responsive documents sufficiently ahead of the depositions of 1-800's current and former employees. We are now less than two weeks away from several such depositions. Could you please provide responses to the questions and proposals in my October 26 letter today? If not today, please provide responses by COB tomorrow, Friday, November 4. We are also available to discuss by phone today or tomorrow if needed.

We also have a follow up question about one of the documents 1-800 recently produced. In the Excel file Bates labeled 1800F_00084253, data is provided by "Fiscal Week" for 2009 through 2016. How does 1-800 define its fiscal weeks as used in this document? For example, is week 1 of 2009 defined as 12/28/2008-1/3/2009, as 1/4/2009-1/10/2009, or in some other way?

Thank you,
Katie

Kathleen M. Clair

Anticompetitive Practices Division
Bureau of Competition | Federal Trade Commission
202.326.3435

From: Clair, Kathleen
Sent: Wednesday, October 26, 2016 11:51 AM
To: ~800CON_FTC_ATTYS; Vincent, Garth; Sergi, Gregory
Cc: BC-1040-1800-Search Ad Team-DL
Subject: Correspondence re 1-800 Responses to Complaint Counsel's RFPs

Garth and Greg,

Please see the attached letter following up from our meet and confer on Friday, October 21.

Katie

Kathleen M. Clair

Attorney, Anticompetitive Practices Division
Bureau of Competition | Federal Trade Commission
202.326.3435 (office)
202.684.1314 (mobile)
kclair@ftc.gov

Exhibit I

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November 9, 2016

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(1922-2008)

¹A PROFESSIONAL CORPORATION

VIA E-MAIL

Daniel Matheson, Esq.
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580

Re: In re 1-800 Contacts, Inc., FTC Docket No. 9372

Dear Dan:

This letter addresses Respondent 1-800 Contacts, Inc.'s Responses and Objections to Complaint Counsel's First and Second Sets of Requests for Production. Following our meet and confer on Complaint Counsel's Requests for Production, this letter sets forth more specifically what 1-800 Contacts is willing to produce in response to each Request for which it has agreed to provide additional documents, subject to its general and specific Responses and Objections to each Request. In addition, we address separately below certain proposals that you raised for the first time following our meet and confer by letter dated October 26, 2016.

RFP 1 (Third Party Correspondence regarding Negative Keywords):

1-800 Contacts has already produced responsive documents in the prior investigation; and responsive documents have been produced by 1-800 Contacts' outside counsel, Holland & Hart, reflecting its communications with third-parties regarding the use of Negative Keywords.

Writer's Direct Contact
(213) 683-9170
(213) 683-5170 FAX
garth.vincent@mto.com

Daniel Matheson, Esq.
November 9, 2016
Page 2

In further response to this Request, 1-800 Contacts will search its prior collection of custodians¹ with the search terms “negative keywords” or “negative keyword” or “Nkw” for the time period 2004-2005 and 2013 to the end of the collection (which differs by custodian but generally continues into at least 2015), and will produce any additional responsive documents that constitute correspondence between 1-800 Contacts and a third-party who is likely to have advertised with the use of Keywords relating to 1-800 Contacts or contact lenses.

1-800 Contacts does not have any reason to believe that, subject to its applicable objections, there are responsive, non-privileged documents for the period 2006-2012 (the relevant time period covered during the investigation in this matter) that have not already been produced. Thus, the expense and burden of conducting additional broad scale searches and review of documents for that time period far outweighs any potential benefit.

RFPs 2 & 3 (Negative Keyword History):

1-800 Contacts will provide the requested history of Negative Keywords used by 1-800 Contacts that is available to it from Google and Bing. 1-800 Contacts will also search the files of the employees responsible for Internet paid search advertising campaigns for the time period 2004-2005 and 2013 to the end of the collection (which differs by custodian but generally goes into at least 2015) and will produce any additional responsive documents that constitute ad hoc reports on the implementation of, or changes to, the Negative Keywords used by 1-800 Contacts.

1-800 Contacts does not have any reason to believe that, subject to its applicable objections, there are responsive, non-privileged documents for the period 2006-2012 (the relevant time period covered during the investigation in this matter) that have not already been produced. Thus, the expense and burden of conducting additional broad scale searches and review of documents for that time period far outweighs any potential benefit.

RFPs 4 & 5 (HSR-related submissions):

1-800 Contacts understands that Complaint Counsel agrees that what 1-800 Contacts has proposed in its Responses and Objections to provide in response to these Requests would be sufficient.

RFP 6 (Impact of Unilateral Pricing Policies):

We understand that Tim Roush and Laura Schmidt had primary responsibility for analyzing the impact of the manufacturers’ implementation of resale price maintenance (referred to by the manufacturers as Unilateral Pricing Policies or “UPP”) on 1-800 Contacts. Subject to

¹ A list of those custodians for 1-800 Contacts whose files were previously collected during the investigatory phase was set forth in my email to you dated October 19, 2016.

Daniel Matheson, Esq.

November 9, 2016

Page 3

its applicable objections, 1-800 Contacts will conduct a targeted collection of files from Mr. Roush, Ms. Schmidt, and Mr. Bethers for documents that constitute reports or analyses regarding the impact of UPP. 1-800 Contacts does not believe this Request is amenable to a broader search or the effective use of search terms.

RFP 7 (Correspondence with Other Retailers):

1-800 Contacts has already produced responsive documents in the prior investigation; and responsive documents have been produced by 1-800 Contacts' outside counsel, Holland & Hart, reflecting its communications with third-parties regarding the use of trademarked terms as Keywords in Internet paid search advertising.

In further response to this Request, 1-800 Contacts will search its prior collection of custodians for domain names used in the email addresses of relevant sellers of contact lenses, including those listed in your October 26, 2016 letter, with the search terms listed in your October 26, 2016 letter, for the time period 2004-2005 and 2013 to the end of the collection (which differs by custodian but generally goes into at least 2015), and will produce any additional responsive that constitute correspondence between 1-800 Contacts and another retailer of contact lenses that relates to the use of trademarked terms as Keywords for Internet paid search advertising. 1-800 Contacts does not have any reason to believe that, subject to its applicable objections, there are responsive, non-privileged documents for the period 2006-2012 (the relevant time period covered during the investigation in this matter) that have not already been produced. Thus, the expense and burden of conducting additional broad scale searches and review of documents for that time period far outweighs any potential benefit.

RFP 8 (Customer Switching Among Retailers):

In further response to this request for documents relating to customer switching among contact lens retailers, 1-800 Contacts will conduct, subject to its applicable objections, a targeted collection of files from the employees who have had primary responsibility for preparing analyses regarding customer switching among different contact lens retailers, for any such reports or analyses. 1-800 Contacts does not believe this Request is amenable to a broader search or the effective use of search terms.

RFP 9 (Bain Merger Review Diligence):

Bain and Company served as a due diligence consultant to AEA Investors in connection with the proposed acquisition of Vision Direct. As shown by the document referenced in this RFP, 1-800 Contacts was provided with some of the information and documents prepared by Bain and Company as part of its engagement with AEA Investors. 1-800 Contacts has agreed to provide those responsive documents that are in its possession. We do not believe that the RFPs served on 1-800 Contacts require it to do anything further. *See, e.g., Dugan v. Lloyds TSB Bank, PLC*, 2013 WL 4758055, at *2 (N.D. Cal. Sept. 4, 2013) (requiring "parties to establish that a

Daniel Matheson, Esq.
November 9, 2016
Page 4

subsidiary has a legal right to obtain documents from its parent on demand before compelling those parties to produce documents”).

RFP 10 (Comparison of Prices to Other Retailers):

In further response to this request for documents relating to price comparisons between 1-800 Contacts and other contact lens retailers, 1-800 Contacts will conduct, subject to its applicable objections, a targeted collection of files from the employees who have had primary responsibility for preparing reports or analyses comparing 1-800 Contacts’ prices to other contact lens retailers, for any such reports or analyses. 1-800 Contacts does not believe this Request is amenable to a broader search or the effective use of search terms.

RFP 11 (Price Visibility):

In addition to doing a targeted search of the email string regarding the communication referenced in the Request (1-800F_00055885), 1-800 Contacts will search its prior collection of custodians with the search term “Price w/3 visibility” for the time period 2004 to the end of the collection (which differs by custodian but generally goes into at least 2015), and will produce any additional responsive documents that discuss the concept of “price visibility” as that term is used in the document referenced in the Request (1-800F_00055885).

RFP 12 (Josh Aston and Backup Tapes):

1-800 Contacts has already produced documents relating to Josh Aston, as described in the specific response to this Request. As previously discussed, and as stated in the specific response to this Request, 1-800 is not willing to do anything further in response to this Request.

RFP 13 (Price Match Policy):

1-800 Contacts is willing to conduct targeted collections in response to this Request. In addition to materials originally produced discussing the 1-800 Contacts’ price match offer to customers, 1-800 Contacts recently produced, or is in the process of producing, training materials for call center representatives during different time periods reflecting how to implement the price match offer, materials from 1-800 Contacts’ website that describe the terms and conditions of the price match offer, and data that is kept in the ordinary course of business that shows, by week for 2009 through the present, the number of orders for which the price match offer was applied, the percentage of total orders for the time period for which the price match offer was applied, and the average discount that resulted from the price match offer.

RFP 14 (Sales Revenue by Distribution Channel):

1-800 Contacts recently produced information that it believes fully responds to this Request.

Daniel Matheson, Esq.
November 9, 2016
Page 5

RFP 15 (Profit & Loss by Distribution Channel):

1-800 Contacts recently produced its annual income statements for 2006 through 2015, which show by year net revenue, costs of goods sold, other selling, general, and administrative expenses, and net income. 1-800 Contacts believes the produced information fully responds to this Request.

RFP 16 (Transactional Data):

1-800 Contacts is willing to produce transactional data at the product code level (rather than the UPC or SKU level) for the past five years with the personally identifiable information (“PII”), such as customer names and addresses, removed.

RFP 17 (Sales Attribution to Advertising Channels):

As stated in its specific response to this Request, 1-800 Contacts does not systematically track sales by advertising channels. Nevertheless, 1-800 Contacts has done reports or analyses that may be responsive to this request. 1-800 Contacts is willing to conduct, subject to its applicable objections, a targeted collection of files from the employees who have had primary responsibility for preparing reports or analyses regarding the impact of different types of advertising on sales, for any such reports or analyses. 1-800 Contacts does not believe this Request is amenable to a broader search or the effective use of search terms.

RFP 18 (Internet Paid Search Advertising Data):

1-800 Contacts recently produced, or is in the process of producing, the requested data on a daily basis from 2004 through the present. 1-800 Contacts believes the produced information fully responds to this Request.

RFP 19 (Consumer Surveys and Comments):

In further response to this request for documents relating to consumer surveys and comments, 1-800 Contacts will conduct, subject to its applicable objections, a targeted collection of files from the employees who have had primary responsibility for consumer surveys, for any surveys that pertain specifically to paid search advertising or the comparison of services offered by different contact lens retailers. 1-800 Contacts does not believe this Request is amenable to a broader search or the effective use of search terms.

RFP 20 (Hitwise):

1-800 Contacts had recently produced reports responsive to this request. 1-800 Contacts is also willing to produce reports or analyses of such reports, to the extent they exist and can be located following a reasonable search.

Daniel Matheson, Esq.
 November 9, 2016
 Page 6

RFP 21 (Memorial Eye):

As previously indicated, 1-800 Contacts is not intentionally withholding any responsive documents in its possession on the basis that they constitute confidential information of Memorial Eye. 1-800 Contacts further understands that its outside counsel, Holland & Hart, likewise is not intentionally withholding any responsive documents in its possession on that basis and that it has recently produced documents responsive to this Request.

* * * *

New Proposals Following Meet and Confer

Following our meet and confer on 1-800 Contacts' responses to Complaint Counsel's First and Second Sets of Requests for Production, we received your October 26, 2016 letter proposing to modify the approach that we discussed during our meet and confer and making a few specific suggestions regarding certain of the Requests.

During our meet and confer, we discussed that 1-800 Contacts would conduct certain agreed upon searches among the voluminous files previously collected up through 2015, and do targeted searches for specific agreed upon documents up through the present, but would not do new broad scale ESI collection, processing and searching of documents beyond the collection date. We understood that you were agreeable to that approach and recognized that commencing such a broad scale effort under the schedule we are operating under was simply not practical. Your recent letter proposes to modify the approach we discussed by proposing new broad scale ESI collection, processing and searching of documents for some custodians but not others. Although we remain willing to discuss doing targeted collection of documents for the period beyond the collection date, we cannot agree to new broad scale ESI collection, processing and searching of documents beyond the collection date for the various reasons we discussed during our meet and confer.

With regard to your new proposals regarding specific requests, we are amenable to adding Mr. Bethers to the list of custodians to search for RFP 6 (impact of UPP). We also are willing to incorporate the search terms and domain names you suggest for RFP 7 (correspondence with other retailers). With regard to RFP 13(d)(iii), although the information would seem more properly obtainable by deposition, we will search for any document that discusses modifications to the Price Match Policy over time, and the reasons therefor, to the extent such a document exists and can be located after a reasonable search (though we presently are aware of no such document). Finally, with regard to RFP 16 (transactional data), we are amenable to producing transactional data at the product code level (rather than the UPC or SKU level as you originally requested).

Daniel Matheson, Esq.
November 9, 2016
Page 7

We will look forward to discussing these issues with you at your earliest convenience.

Very truly yours,

A handwritten signature in black ink that reads "Garth T. Vincent". The signature is written in a cursive, slightly slanted style.

Garth T. Vincent

cc: Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2016, I filed the foregoing documents electronically 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 delivered via electronic mail a copy of the foregoing documents to:

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Garth T. Vincent
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Counsel for Respondent 1-800 Contacts, Inc.

Dated: November 17, 2016

By: /s/ Dan Matheson
Attorney

CERTIFICATE FOR ELECTRONIC FILING

I 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.

November 17, 2016

By: /s/ Dan Matheson
Attorney