

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

ORIGINAL

**COMPLAINT COUNSEL'S REQUEST FOR REPLY BRIEF TO RESPONDENT'S
OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO DISREGARD AND
STRIKE CERTAIN PORTIONS OF THE REPORT AND TESTIMONY OF DR.
KENT VAN LIERE**

By this motion, Complaint Counsel respectfully requests the Court to grant leave to file a short reply brief to Respondent's Opposition to the Motion to Disregard and Strike Certain Portions of the Report and Testimony of Dr. Kent Van Liere, Respondent's survey expert.

1. The Court is authorized under FTC Practice Rule 3.22(d) to allow a reply brief "where the parties wish to draw the Administrative Law Judge's or the Commission's attention to recent important developments or controlling authority that could not have been raised earlier in the party's principal brief." 16 C.F.R. § 3.22(d). Here, Complaint Counsel wishes to respond to two factual misstatements brought to light for the first time in Respondent's Opposition.
2. First, Respondents identify and attempt to use record evidence not admitted for the truth of the matter in order to support its brief
3. Second, Respondents mischaracterize Dr. Jacoby's testimony to draw an inaccurate parallel between his survey construction and Dr. Van Liere's, in order to excuse Dr. Van Liere's violation of the scheduling order.

4. Complaint Counsel respectfully submits that this issue could not have been addressed in Complaint Counsel's principal brief, and should not go un rebutted.
5. Complaint Counsel's proposed Reply brief complies with the timing and word count requirements set forth in Rule 3.22 (c)-(d).

For these reasons, as set forth in the proposed Reply, Complaint Counsel respectfully requests leave to file its Reply pursuant to Rule 3.22.

Dated: May 30, 2017

Respectfully submitted,

/s/ Daniel Matheson

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**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S REQUEST FOR
REPLY BRIEF TO RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S
MOTION TO DISREGARD AND STRIKE CERTAIN PORTIONS OF THE REPORT
AND TESTIMONY OF DR. KENT VAN LIERE**

On May 30, 2017, Complaint Counsel filed a Request for Leave to File a Reply Brief to Respondent's Opposition to Complaint Counsel's Motion to Disregard and Strike Certain Portions of the Report and Testimony of Dr. Kent Van Liere. Complaint Counsel's Motion is GRANTED. IT IS HEREBY ORDERED that Complaint Counsel has leave to file its Reply Brief to Respondent's Opposition to Complaint Counsel's Motion to Disregard and Strike Certain Portions of the Report and Testimony of Dr. Kent Van Liere.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
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In the Matter of

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**COMPLAINT COUNSEL’S REPLY TO RESPONDENT’S OPPOSITION TO
COMPLAINT COUNSEL’S MOTION TO DISREGARD AND STRIKE CERTAIN
PORTIONS OF THE REPORT AND TESTIMONY OF DR. KENT VAN LIERE**

Complaint Counsel files this Reply brief pursuant to Rule 3.22(d) in order to rebut two significant misrepresentations contained in Respondent’s opposition. Complaint Counsel could not have been aware that Respondent would erroneously raise these issues at the time it filed its Motion, and their substance is important enough that they should not stand unrebutted.

First, Complaint Counsel’s motion is premised on Dr. Van Liere’s failure to disclose the SERPs he relied upon in constructing both the test and control version of his survey. One of Respondent’s arguments in opposition is that Complaint Counsel could have printed out its own SERPs or reviewed SERPs already in the record:

Complaint Counsel and their experts could have printed their own search pages if they so desired. Moreover, the trial record has many examples of search results for the term “1-800 Contacts” and its variants. (RX0352 (Decl. of Lisa A. Clark); RX0310, RX0311, RX0312, RX0313, RX0314 (search results pages)), which Complaint Counsel could point to if the question of whether or not 1-800 Contacts’ ads sometimes appear, and sometimes do not, were relevant.

The documents cited by Respondent were admitted *for non-hearsay purposes only*: they cannot be used to establish the truth of the matter, yet that is precisely what Respondent is trying to do here: rely on the SERPs in the record to prove the truth of their contents. The Court should

disregard this inappropriate use of exhibits admitted only for limited purposes. In any event, this argument is a *non sequitur*, as the issue is not whether Complaint Counsel could print its own SERPs or whether there are any SERPs in the record. The point is that *Respondent did not produce the SERPs that Dr. Van Liere relied upon*, as it was required to do.

Second, Respondents erroneously claim that Complaint Counsel failed to turn over all the SERPs that Complaint Counsel's expert, Dr. Jacob Jacoby, viewed when creating his survey. But unlike Dr. Van Liere, Dr. Jacoby did indeed turn over the SERP he relied on in creating his survey. Those materials were provided to Respondent's counsel on February 6, 2017 (and were accessed by counsel that same day). Perhaps cognizant of this, Respondent responds to a non-issue: they characterize the issue as whether they were required to turn over materials Dr. Van Liere (or Dr. Jacoby) "viewed" when designing their surveys, as opposed to those actually relied on. No one is questioning the former: it is only materials "relied upon" that are subject to the Court's scheduling order. Scheduling Order ¶ 19(b). And, contrary to Respondent's assertion, the materials relied upon by Dr. Jacoby were annotated in his Report (Jacoby Rep. at 5 (item 31)), produced to Respondent in a timely fashion, and, in fact, used by Respondent (RX-1993) in cross-examining Dr. Jacoby at trial. By contrast, Respondent's expert, Dr. Van Liere, failed to produce the SERPs he relied upon, making it impossible for Complaint Counsel to question him fully on the materials he used to develop his survey in this case.

Dated: May 30, 2017

Respectfully submitted,

/s/ Daniel Matheson

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2017, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
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Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing documents to:

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Dated: May 30, 2017

By: /s/ Daniel J. Matheson
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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.

May 30, 2017

By: /s/ Daniel J. Matheson
Attorney