PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

In the Matter of **1-800 Contacts, Inc.** **a corporation**	**Docket No. 9372**

RESPONDENT 1-800 CONTACTS, INC.'S ANSWER AND DEFENSES TO ADMINISTRATIVE COMPLAINT

General Response to the Commission's Allegations

Respondent 1-800 Contacts, Inc. has been a leader in increasing competition in the contact lens retail marketplace, which has resulted in greater convenience, better service, and lower prices for contact lens consumers. The agreements alleged in the Complaint are legitimate, reasonable, and commonplace settlements of *bona fide* trademark litigation based on other contact lens retailers' unauthorized use of 1-800 Contacts' trademarks as keywords to trigger Internet search advertising (and, in a single instance, a broader sourcing and fulfillment agreement). These agreements are not improper "bidding agreements," as the Complaint alleges. 1-800 Contacts has not engaged in conduct that violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

1-800 Contacts has invested enormous amounts (hundreds of millions of dollars) in advertising—including extensive television advertising—and customer service to build a brand and trademarks that are well-recognized by consumers. 1-800 Contacts' efforts to protect its trademarks in the litigations that gave rise to the settlement agreements described in the Complaint were reasonable. The Complaint does not allege that any of 1-800 Contacts' cases

constituted "sham" litigation. Settling *bona fide* trademark disputes with non-use agreements is reasonable and does not violate the antitrust laws. *See Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 57 (2d Cir. 1997) (upholding non-use agreement against antitrust challenge; and explaining "because the antitrust laws protect competition, not competitors, and trademarks are non-exclusionary, it is difficult to show that an unfavorable trademark agreement raises antitrust concerns").

The agreements do not limit the vast majority of ways in which contact lens retailers advertise; the limitations that the agreements impose are narrow, applying to only a few keywords (*e.g.*, the parties' respective trademark terms and URLs) out of the several thousands of keywords used by contact lens retailers for Internet search advertising. The agreements are pro-competitive; they do not harm consumers or competition. "Efforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies." *Clorox*, 117 F.3d at 61.

* * *

Pursuant to 16 C.F.R. § 3.12(b), 1-800 Contacts respectfully submits this Answer and Defenses to the allegations set forth in the Administrative Complaint ("Complaint") filed by the Federal Trade Commission on August 8, 2016. Except to the extent specifically admitted here, 1-800 Contacts denies each allegation in the Complaint, including each allegation contained in a heading or otherwise not contained in the Complaint's numbered paragraphs.

"Nature of the Case"[1]

1. 1-800 Contacts admits that it has more U.S. online sales of contact lenses than any other retailer. 1-800 Contacts avers that it has achieved its success by investing heavily in advertising and by offering the same contact lenses that eye care professionals sell but at lower prices and with greater convenience and better service. 1-800 Contacts also admits and avers that the Complaint purports to challenge settlement agreements that 1-800 Contacts entered into to resolve *bona fide* trademark litigation that it filed in United States District Courts against other online sellers of contact lenses who were using 1-800 Contacts' trademarks in commerce (and, in one instance, a broader sourcing and fulfillment agreement). 1-800 Contacts otherwise denies the allegations in paragraph 1.

2. 1-800 Contacts admits that some search engine companies use certain variants of auction elements as part of the process for purchasing certain types of advertising on their search engine results page. 1-800 Contacts admits and avers that it entered into settlement agreements with other online sellers of contact lenses to resolve *bona fide* trademark litigation filed by 1-800 Contacts against other online sellers of contact lenses who were using 1-800 Contacts' trademarks in commerce (and, in one instance, a broader sourcing and fulfillment agreement). 1-800 Contacts denies the Complaint's description and characterization of those agreements; 1-800 Contacts denies that it "engineered" or is a party to a "bid allocation scheme;" 1-800 Contacts denies that there are any so-called "search advertising auctions" that "are reserved to 1-800 Contacts alone;" and 1-800 Contacts otherwise denies the allegations in paragraph 2.

3. Paragraph 3 states legal conclusions to which no answer is required. To the extent the allegations in paragraph 3 do require an answer, 1-800 Contacts denies the allegations.

"Respondent"

4. 1-800 Contacts admits the allegations in paragraph 4, with the correction that the address of 1-800 Contacts' headquarters is 261 *West* Data Drive, Draper, Utah 84020.

"Jurisdiction"

5. 1-800 Contacts admits the allegations in paragraph 5.

6. 1-800 Contacts admits that the agreements described in the Complaint are "in commerce or affect commerce, as 'commerce' is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44." 1-800 Contacts otherwise denies the allegations of paragraph 6.

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[1] The headings in quotation marks are copied from the Complaint merely for ease of reference. They do not constitute part of 1-800 Contacts' answer to the allegations. To the extent that answers may be required to the headings, 1-800 Contacts denies them.

"Overview of Online Search Advertising"

7. 1-800 Contacts admits the allegations in the first sentence of paragraph 7. 1-800 Contacts denies the allegations in the third sentence of paragraph 7. 1-800 Contacts currently lacks knowledge or information sufficient to form a belief as to the allegations in the second sentence of paragraph 7 and on that basis denies them. 1-800 Contacts avers that the screenshot depicted as Exhibit 1 to the Complaint does not fully display the search results that Exhibit 1 purports to represent, let alone the entire set of search results provided by the search engine. 1-800 Contacts further avers that the agreements described in the Complaint do not prohibit any party to those agreements from bidding on or purchasing the keyword phrase "1-800 Contacts cheaper competitors;" and the fact that no company's sponsored ad, other than 1-800 Contacts', appeared in the portion of search results included in Exhibit 1 in response to that query (which is not alleged to be an actual query commonly used by consumers) on Google's search engine platform at the particular time the Complaint was filed is not the result of any agreement entered into by 1-800 Contacts but the result of independent decisions by the parties to the agreements described in the Complaint and by the numerous retailers who are not parties to the agreements described in the Complaint, and who likewise did not have sponsored ads that appeared in Exhibit 1.

8. 1-800 Contacts denies the overly broad and generalized allegations in paragraph 8. 1-800 Contacts also denies that any of the agreements described in the Complaint would prohibit a party from bidding on or purchasing the "contact lens" search query exemplar set forth in the second sentence of paragraph 8.

9. 1-800 Contacts denies the overly broad and generalized allegations in paragraph 9.

10. 1-800 Contacts admits that the process by which some search engine companies currently sell certain types of advertising on their search engine results page includes variants of certain auction elements. 1-800 Contacts presently lacks knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 10 (including subparts a-c) and on that basis denies them.

11. 1-800 Contacts presently lacks knowledge or information sufficient to form a belief as to the allegations in paragraph 11 and on that basis denies them. 1-800 Contacts avers that the process for placing advertisements in search engine results is not a traditional auction.

12. 1-800 Contacts admits the allegations in the first sentence of paragraph 12. The second sentence of paragraph 12 contains allegations that are too broad and generalized for 1-800 Contacts to admit, and 1-800 Contacts therefore denies them.

13. 1-800 Contacts admits that some search engines allow an advertiser to specify "negative keywords." 1-800 Contacts avers that the advertiser often has options for the effect to be given to negative keywords, and that those options are not explained or even mentioned in paragraph 13. The remaining allegations in paragraph 13 are too broad and generalized for 1-800 Contacts to admit, and 1-800 Contacts therefore denies them.

"Competition in the Online Retail Sale of Contact Lenses"

14. 1-800 Contacts admits that it is a retailer of contact lenses and that it currently sells contact lenses primarily over the Internet and also by phone. 1-800 Contacts admits that its sales of contact lenses over the Internet currently exceed the Internet sales of any other single company. In response to the second sentence of paragraph 14, 1-800 Contacts admits and avers that its revenues (as it understands the term to be used in the Complaint) in 2015 from its own retail sales of contact lenses were approximately as alleged in the second sentence of paragraph 14. Except as expressly so admitted, 1-800 Contacts denies the allegations in the second sentence of paragraph 14. 1-800 Contacts presently lacks knowledge or information sufficient to form a belief as to the size and sales of other contact lens retailers and on that basis denies the remaining allegations of paragraph 14.

15. 1-800 Contacts admits that it was (and is) a pioneer in the online sale of contact lenses. 1-800 Contacts avers that its actions have increased competition in the sale of contact lenses to consumers and have enhanced the options and experiences available to consumers. 1-800 Contacts presently lacks knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 15 and on that basis denies them.

16. 1-800 Contacts denies the allegations in paragraph 16.

"The Bidding Agreements"

17. 1-800 Contacts admits that it sent cease-and-desist letters to certain other contact lens retailers whose advertisements appeared in response to a search engine query for "1-800 Contacts" (or variations thereof). 1-800 Contacts admits and avers that those letters state that the conduct of the recipient may constitute trademark infringement. 1-800 Contacts further avers that those letters also state that the conduct may violate other laws, including, for example, the Federal Dilution Act. 1-800 Contacts otherwise denies the allegations in paragraph 17.

18. The allegations in the first sentence of paragraph 18 state a legal conclusion to which no answer is required. To the extent an answer is required, 1-800 Contacts denies the allegations in the first sentence of paragraph 18. 1-800 Contacts admits and avers that it filed complaints in federal court against certain other contact lens retailers as a result of their unauthorized use of 1-800 Contacts' trademarks, which complaints were *bona fide* and have not been alleged or shown to be sham. 1-800 Contacts otherwise denies the remaining allegations in paragraph 18.

19. 1-800 Contacts denies the allegations in paragraph 19.

20. 1-800 Contacts admits that it has entered into agreements with the companies listed in paragraph 20. 1-800 Contacts avers that all but one of those agreements were settlement agreements entered into to resolve *bona fide* trademark litigation that 1-800 Contacts brought against other contact lens retailers regarding the unauthorized use of 1-800 Contacts' trademarks in Internet search advertising. 1-800 Contacts further avers that the one remaining agreement was a sourcing and fulfillment agreement. 1-800 Contacts also

avers that those agreements contain non-use provisions that prohibit each party from using the other's trademarks in specified ways, and that non-use provisions are a commonplace form for the settlement of trademark disputes. 1-800 Contacts otherwise denies the allegations in paragraph 20.

21. The allegations in paragraph 21 state legal conclusions to which no answer is required. To the extent an answer is required, 1-800 Contacts denies the allegations in paragraph 21. 1-800 Contacts denies the characterization of the non-use provisions in the settlement agreements, or the settlement agreements more broadly, as "bidding agreements."

22. 1-800 Contacts admits and avers that it has entered into settlement agreements of *bona fide* trademark litigation that prevent each party from engaging in the unauthorized use of the other's specified trademark terms as keywords for Internet search advertising (and, in one instance, a broader sourcing and fulfillment agreement). 1-800 Contacts otherwise denies the allegations in paragraph 22, including the mischaracterizations of these agreements as "Bidding Agreements."

23. 1-800 Contacts admits and avers that it has entered into settlement agreements of *bona fide* trademark litigation (and, in one instance, a broader sourcing and fulfillment agreement) that are bilateral. 1-800 Contacts further admits that many, but not all, of the lawsuits that 1-800 Contacts filed were resolved by settlement agreement prior to the defendant asserting any counterclaims against 1-800 Contacts. 1-800 Contacts otherwise denies the allegations in paragraph 23.

24. 1-800 Contacts admits and avers that it has entered into settlement agreements of *bona fide* trademark litigation (and, in one instance, a broader sourcing and fulfillment agreement) that contain terms requiring the use of "negative keywords." 1-800 Contacts otherwise denies the allegations of paragraph 24, including the allegation in paragraph 24 that the suggested search query reflected in Exhibit 1 is impacted by the terms of the agreements described in the Complaint. 1-800 Contacts further avers that the agreements described in the Complaint do not prohibit any party to those agreements from bidding on or purchasing the keyword phrase "1-800 Contacts cheaper competitors;" and the fact that no company's sponsored ad, other than 1-800 Contacts', appeared in the portion of search results included in Exhibit 1 in response to that query (which is not alleged to be an actual query commonly used by consumers) on Google's search engine platform at the particular time the Complaint was filed is not the result of any agreement entered into by 1-800 Contacts but the result of independent decisions by the parties to the agreements described in the Complaint and by the numerous retailers who are not parties to the agreements described in the Complaint, and who likewise did not have sponsored ads that appeared in Exhibit 1.

25. 1-800 Contacts denies the allegations in paragraph 25 and avers that it has reasonably monitored compliance with the limitations on use of its trademarks in the settlement agreements described in the Complaint.

26. 1-800 Contacts admits that it and Lens.com have not entered into a settlement agreement. The remaining allegations characterize a published decision by the United States Court of

Appeals for the Tenth Circuit, which speaks for itself. 1-800 Contacts denies the characterization of that decision contained in paragraph 26 and also denies the remaining allegations in paragraph 26.

27. 1-800 Contacts denies the allegations in paragraph 27.

"Anticompetitive Effects of the Bidding Agreements"

28. Paragraph 28 states legal conclusions to which no answer is required. To the extent an answer is required, 1-800 Contacts denies the allegations in paragraph 28.

29. Paragraph 29 states legal conclusions to which no answer is required. To the extent an answer is required, 1-800 Contacts denies the allegations in paragraph 29.

30. Paragraph 30 states legal conclusions to which no answer is required. To the extent an answer is required, 1-800 Contacts denies the allegations in paragraph 30.

31. 1-800 Contacts denies the allegations in paragraph 31 (including the allegations in subparts a-i).

32. 1-800 Contacts denies the allegations in paragraph 32.

"Violations Alleged"

33. 1-800 Contacts denies the allegations in paragraph 33.

34. 1-800 Contacts denies the allegations in paragraph 34.

DEFENSES

Without assuming any burden that it would not otherwise bear, 1-800 Contacts asserts the following defenses:

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

The claim purportedly set forth in the Complaint is barred, in whole or in part, because the lawsuits that gave rise to the trademark settlement agreements described in the Complaint

have not been alleged to be and have not been shown to be objectively and subjectively unreasonable.

Third Defense

The claim purportedly set forth in the Complaint is barred, in whole or in part, because 1-800 Contacts' conduct is protected under the *Noerr-Pennington* doctrine and the First Amendment of the United States Constitution.

Fourth Defense

To the extent that the antitrust laws apply here, the legality of the trademark settlement agreements (and the sourcing and fulfillment agreement) described in the Complaint is governed by the rule of reason. Under the rule of reason, those agreements are lawful, including because their procompetitive benefits outweigh any alleged anticompetitive effect.

Fifth Defense

The trademark settlement agreements (and the sourcing and fulfillment agreement) described in the Complaint do not, and are not likely to, harm competition.

Sixth Defense

The trademark settlement agreements (and the sourcing and fulfillment agreement) described in the Complaint do not, and are not likely to, harm consumers or consumer welfare.

Seventh Defense

Any harm to potential competition alleged in the Complaint is not actionable.

Eighth Defense

1-800 Contacts has never had, and is not likely to obtain, monopoly or market power in a relevant market.

Ninth Defense

The Complaint fails to allege facts that would establish a relevant product market.

Tenth Defense

The trademark settlement agreements (and the sourcing and fulfillment agreement) described in the Complaint did not and do not unreasonably restrain competition in a relevant market.

Eleventh Defense

The trademark settlement agreements (and the sourcing and fulfillment agreement) described in the Complaint have not caused and are not likely to cause "substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition," as is required by 15 U.S.C. § 45(n) for the Federal Trade Commission to declare unlawful an act or practice under Section 5 of the FTC Act.

Twelfth Defense

The relief sought by the Complaint would be contrary to the public interest, would be contrary to law, and would violate the First Amendment of the United States Constitution.

1-800 Contacts reserves the right to amend this Answer or to assert other defenses as this action proceeds. 1-800 Contacts respectfully requests that any relief sought by the Federal Trade Commission pursuant to the Complaint be denied and that the Complaint be dismissed in its entirety with prejudice.

DATED: August 29, 2016

Respectfully submitted,

/s/ Gregory P. Stone

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Notice of Electronic Service

I hereby certify that on August 29, 2016, I filed an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s Answer and Defenses to Administrative Complaint, with:

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I hereby certify that on August 29, 2016, I served via E-Service an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s Answer and Defenses to Administrative Complaint, upon:

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