PUBLIC

ORIGINAL

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

In the Matter of **1-800 CONTACTS, INC.,** **a corporation**	**Docket No. 9372**

COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

Geoffrey M. Green
Assistant Director

Barbara Blank
Deputy Assistant Director

Charles A. Loughlin
Chief Trial Counsel

Daniel J. Matheson
Kathleen M. Clair
Thomas H. Brock
Gustav P. Chiarello
Joshua B. Gray
Nathaniel M. Hopkin
Mika Ikeda
Charlotte S. Slaiman
Attorneys

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2075
Facsimile: (202) 326-3496
Email: dmatheson@ftc.gov

Counsel Supporting the Complaint

Dated: November 3, 2016

COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION AND [PROPOSED] ORDER

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that, pursuant to Federal Trade Commission Rule of Practice 3.24, Complaint Counsel hereby respectfully move for a partial summary decision in this action. For the reasons set forth in the accompanying Memorandum, this motion should be granted.

By this Motion, Complaint Counsel seek partial summary decision dismissing Respondent's Second Defense (the *Noerr-Pennington* doctrine and the First Amendment to the United States Constitution) and Third Defense (that the Bidding Agreements settled litigation that was not objectively or subjectively baseless). Both defenses fail as a matter of law.

Between 2004 and 2013, Respondent entered into fourteen Bidding Agreements with rival sellers of contact lenses. Thirteen of the Bidding Agreements ended threatened or actual trademark lawsuits. These private settlements do not constitute "petitioning" protected by the First Amendment and the *Noerr* doctrine. Rather, they are merely private agreements between Respondent and thirteen of its competitors. The Commission's Complaint alleges that the Bidding Agreements violate Section 5 of the FTC Act. The Second and Third Defenses alleged in Respondent's Answer and Defenses assert that the Bidding Agreements are immune from antitrust scrutiny under the *Noerr* doctrine, and argue that the underlying trademark litigations were not objectively baseless. For the reasons set forth in the accompanying Memorandum, these defenses fail as a matter of law. This Motion is supported by the accompanying Memorandum and the authorities cited therein.

Complaint Counsel does not seek summary decision as to the remaining defenses in Respondent's Answer and Defenses, or as to the allegations of the Complaint. Complaint

Counsel requests entry of an Order granting partial summary decision on Respondent's Second and Third defenses and directing Chief Administrative Law Judge Chappell to receive evidence and issue an initial decision on all of the remaining factual and legal allegations in the Complaint. A Proposed Order is attached.

Respectfully submitted,

/s/ Dan Matheson

Daniel J. Matheson
Geoffrey M. Green
Barbara Blank
Charles A. Loughlin
Kathleen M. Clair
Thomas H. Brock
Gustav P. Chiarello
Joshua B. Gray
Nathaniel M. Hopkin
Mika Ikeda
Charlotte S. Slaiman

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2075
Facsimile: (202) 326-3496
Email: dmatheson@ftc.gov

Counsel Supporting the Complaint

Dated: November 3, 2016

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

In the Matter of **1-800 CONTACTS, INC.,** **a corporation**	**PUBLIC** **Docket No. 9372**

[PROPOSED] ORDER

Having carefully considered Complaint Counsel's Motion for Partial Summary Decision, Respondent 1-800 Contacts, Inc.'s Opposition thereto, and Complaint Counsel's Reply, and all supporting and opposing declarations and other evidence, and the applicable law, it is hereby ORDERED AND ADJUDGED, that Respondent's Second Defense and Third Defense fail as a matter of law, and Complaint Counsel's Motion for Partial Summary Decision as to this issue is hereby GRANTED.

Chief Administrative Law Judge Chappell is hereby directed to receive and consider all of the parties' evidence on all other factual and legal allegations in the Administrative Complaint. *See* Section 3.24(a)(5) of the Commission's Rules of Practice, 16 C.F.R. § 3.24(a)(5).

ORDERED:

By the Commission.

_____
Donald S. Clark
Secretary

SEAL

ISSUED:

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

In the Matter of **1-800 CONTACTS, INC.,** **a corporation**	**Docket No. 9372**

MEMORANDUM OF LAW IN SUPPORT OF COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

Geoffrey M. Green
Assistant Director

Barbara Blank
Deputy Assistant Director

Charles A. Loughlin
Chief Trial Counsel

Daniel J. Matheson
Kathleen M. Clair
Thomas H. Brock
Gustav P. Chiarello
Joshua B. Gray
Nathaniel M. Hopkin
Mika Ikeda
Charlotte S. Slaiman
Attorneys

Federal Trade Commission
Bureau of Competition
Anticompetitive Practices Division
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2075
Facsimile: (202) 326-3496
Email: dmatheson@ftc.gov

Counsel Supporting the Complaint

Dated: November 3, 2016

TABLE OF AUTHORITIES

Cases

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) 3, 5

Andrx Pharms., Inc. v. Biovail Corp. Int'l, 256 F.3d 799 (D.C. Cir. 2001) 4, 5

Andrx Pharms., Inc. v. Elan Corp., PLC, 421 F.3d 1227 (11th Cir. 2005) 4, 5

Blackburn v. Sweeney, 53 F.3d 825 (7th Cir. 1995) 6

Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 3

Duplan Corp. v. Deering Milliken, Inc., 594 F.2d 979 (4th Cir. 1979) 4

E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 3

FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013) 4

In re Androgel Antitrust Litig., No. 1:09-CV-955-TWT, 2014 WL 160331 (N.D. Ga. Apr. 21, 2014) 5

In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618 (E.D. Mich. 2000) 4

In re N.M. Nat. Gas Antitrust Litig., MDL No. 403, 1982 U.S. Dist. LEXIS 9452 (D.N.M. Jan. 26, 1982) 4, 5

In re Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367 (D. Mass. 2013) 4, 5

In re North Carolina State Board of Dental Examiners, 151 F.T.C. 607 (2011) 2, 3

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 2

Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993) 5

United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965) 3

United States v. Singer Mfg. Co., 374 U.S. 174 (1963) 4

Rules

16 C.F.R. § 3.24(a) 2

16 C.F.R. § 3.24(a)(3) 2

INTRODUCTION

This case challenges fourteen agreements between Respondent and its competitors that restrict price competition and reduce the availability of truthful, non-confusing advertising (hereinafter the "Bidding Agreements"). Respondent asserts that the Bidding Agreements are immune from antitrust scrutiny under the *Noerr-Pennington* doctrine because thirteen of the fourteen Bidding Agreements settled lawsuits alleging trademark infringement. Respondent also asserts that Complaint Counsel's claims are barred because the lawsuits underlying thirteen of the fourteen settlement agreements were not objectively and subjectively baseless. Respondents' assertions are set forth in their Answer as their Second and Third Defenses to Complaint Counsel's Complaint. Neither Defense is valid.

The *Noerr-Pennington* doctrine exempts from antitrust scrutiny only genuine "petitioning" that seeks action from a governmental body. It is inapplicable to an agreement among private parties that restrains competition, regardless of whether the agreement settles litigation. The doctrine is equally inapplicable to private agreements that settle litigation brought in "good faith," and to private agreements that settle entirely baseless litigation. Thus, Complaint Counsel respectfully asks the Commission to issue an Order ruling that Respondent's Second and Third Defenses fail to present cognizable defenses to the Complaint.

I. SUMMARY OF UNDISPUTED FACTS

Between 2004 and 2013, Respondent entered into fourteen Bidding Agreements with rival sellers of contact lenses. Statement of Undisputed Facts ¶¶ 7-20. All but one of the Bidding Agreements ended threatened or actual trademark lawsuits. The Bidding Agreements restrict Respondent and each of those fourteen rivals from purchasing or using certain internet search keywords to trigger the placement of advertisements on search engine results pages. *Id.* ¶¶ 28-32. The Bidding Agreements further require the rivals to use certain terms as "negative

keywords" to prevent search engines from displaying an ad even where the party did not purchase the keyword. *Id.* ¶¶ 29, 33-38. These restrictions on placing ads apply regardless of the content of the ad – regardless of whether the ad causes confusion and regardless of whether the ad is truthful. There is no dispute about the terms of the Bidding Agreements. And Respondent admits that it entered into these agreements. *Id.* ¶¶ 6, 20. The anticompetitive effects alleged in the Complaint all flow from these private agreements. *Id.* ¶ 40 (citing Compl. ¶ 31) (alleging nine examples of anticompetitive effects resulting from Respondent's Bidding Agreements).

Respondent's Second and Third Defenses to the Complaint in this case assert that the Bidding Agreements are immune from antitrust scrutiny under the *Noerr* doctrine, and argue that the underlying trademark litigations were not objectively baseless.

II. STANDARD FOR SUMMARY DECISION

A "party may move . . . for summary decision in the party's favor upon all or any part of the issues being adjudicated." 16 C.F.R. § 3.24(a). If the party seeking summary decision meets its burden by identifying portions of the record that demonstrate the absence of a genuine issue of material fact, the opposing party must establish "specific facts showing that there is a genuine issue for trial." *In re North Carolina State Board of Dental Examiners*, 151 F.T.C. 607, 611 (2011) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)); *see also* 16 C.F.R. § 3.24(a)(3). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial,'" and summary decision should be granted in favor of the moving party. *North Carolina State Board*, 151 F.T.C. at 611 (quoting *Matsushita*, 475 U.S. at 587).

Motions for partial summary decision can be particularly helpful in expediting resolution when the legal sufficiency of a defense is at issue. For example, in *North Carolina State Board*,

the Commission determined that there was no genuine issue of material fact regarding "the propriety of the [respondent's] invocation of the state action doctrine as an affirmative defense," *id.* at 609, and issued an Order dismissing respondent's defense, *id.* at 633. Here, as in *North Carolina State Board*, there is no genuine issue for trial regarding the propriety of Respondent's Second and Third Defenses, which rest on the inapposite *Noerr* doctrine.

III. PRIVATE SETTLEMENTS ARE NOT EXEMPT FROM ANTITRUST SCRUTINY

The essence of the *Noerr* doctrine is that parties do not violate the antitrust laws by seeking governmental action, even if the governmental action sought would result in anticompetitive effects. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961) ("[N]o violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (*Noerr* precludes antitrust liability for restraints "'incidental' to a valid effort to influence governmental action" or "valid governmental action" resulting from such efforts).[1]

The *Noerr* doctrine generally protects the act of filing a good-faith lawsuit, as this constitutes "petitioning" activity that seeks action from the government in the form of a decision by a court. *See Cal. Motor Transp.*, 404 U.S. at 510 ("Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition."); *Andrx Pharms., Inc. v. Elan Corp., PLC*, 421 F.3d 1227, 1233 (11th Cir.

[1] *Noerr* immunizes "petitioning" activity that seeks to influence government action, because Congress did not intend the Sherman Act—which regulates "business activity"—to regulate "political activity." 365 U.S. at 137. The *Noerr* doctrine protects petitioning and advocacy before all branches of government. *Noerr*, 365 U.S. at 135 (petitioning legislature); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (petitioning executive officials); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (petitioning administrative agencies and courts).

2005) ("*Noerr-Pennington* immunity thus shields a defendant from antitrust liability for resorting to litigation to obtain from a court an anticompetitive outcome."). But the *Noerr* doctrine is inapplicable to settlement agreements among private parties that restrain competition. In such settlements, the restraint on competition results from the *agreement*, not from any governmental act, such as a court decision. As a result, litigation settlements between private parties have long been treated as commercial business activity subject to the antitrust laws.[2] The Supreme Court explicitly confirmed that private settlements of intellectual property disputes are subject to antitrust scrutiny in *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), stating that "this Court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws." *Id*. at 2232.

Indeed, the law is clear that when parties "voluntarily withdraw their dispute from the court and resolve it by agreement among themselves there would be no purpose served by affording *Noerr-Pennington* protection. The parties by so doing must abide with any antitrust consequences that result from their settlement." *In re N.M. Nat. Gas Antitrust Litig*., MDL No. 403, 1982 U.S. Dist. LEXIS 9452, at *16 (D.N.M. Jan. 26, 1982). *See Andrx Pharms., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 819 (D.C. Cir. 2001) ("[A] final, private settlement agreement resolving [a] patent infringement litigation . . . would not enjoy *Noerr-Pennington* immunity.").[3]

[2] *See, e.g., United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963) (settlement of patent interference claim before the PTO held to violate Sherman Act); *Duplan Corp. v. Deering Milliken, Inc.*, 594 F.2d 979, 981 (4th Cir. 1979) (finding a patent settlement agreement to be the core of a horizontal agreement in violation of the antitrust laws).

[3] *See also In re Nexium (Esomeprazole) Antitrust Litig.*, 968 F. Supp. 2d 367, 395 (D. Mass. 2013) ("Courts are largely uniform in their view that private settlement agreements entered into during the pendency of litigation . . . fall outside the ambit of *Noerr-Pennington* immunity."); *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 641 (E.D. Mich. 2000) ("courts have consistently observed that private agreements settling litigation may result in antitrust liability when they are attended by anticompetitive results") (internal quotation and citation omitted).

In this case, just as in *New Mexico Natural Gas* and *Biovail*, the source of each anticompetitive restraint at issue is not governmental action, but instead, an agreement among private parties resolving litigation, which is unquestionably subject to antitrust scrutiny.[4]

IV. PRIVATE SETTLEMENT AGREEMENTS ARE SUBJECT TO ANTITRUST SCRUTINY EVEN IF THE UNDERLYING LITIGATION IS NOT OBJECTIVELY OR SUBJECTIVELY BASELESS

Respondent's Defenses (in particular, its Second Defense) appear to reference the rule that a lawsuit potentially covered by the *Noerr* doctrine will lose its antitrust immunity if the lawsuit is a sham, that is, if the lawsuit is both objectively and subjectively baseless. *See Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) (the act of filing a lawsuit is not protected by *Noerr* if it "conceals an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process") (citation omitted). But the issue of sham litigation is inapposite here, because the Complaint in this matter challenges *agreements* among private parties that resolved lawsuits, not the filing of the lawsuits themselves. As discussed above, the *Noerr* defense is inapplicable to the settlement agreements at issue here; it follows that the objectively and subjectively baseless standard invoked in Respondent's Second Defense is entirely irrelevant.

For example, in *Andrx Pharmaceuticals v. Elan Corp.*, the Court held that, even though the *Noerr* doctrine immunized the defendant's act of filing lawsuits against the plaintiff, the

[4] Indeed, private agreements resolving litigation are subject to antitrust scrutiny even when incorporated into a consent judgment entered by a court. For example, in *In re Androgel Antitrust Litigation*, No. 1:09-CV-955-TWT, 2014 WL 1600331 (N.D. Ga. Apr. 21, 2014), the court rejected the argument that an agreement providing for a "reverse payment" from one drug manufacturer to another was "protected by the *Noerr-Pennington* doctrine because the underlying litigation was terminated by a consent judgment." *Id.* at *1. The court explained that "the consent decree was formed by [the parties] to settle their dispute, not by the Court in order to terminate pending litigation. . . . [therefore] the 'source . . . of the anticompetitive restraint at issue' is the parties' reverse payment agreement itself, not the governmental action. The Defendants' private agreement should not be due *Noerr-Pennington* immunity." *Id*. at *8 (quoting *Allied Tube*, 486 U.S. at 499). *See also In re Nexium*, 968 F. Supp. 2d at 396 ("The entry of a consent judgment cannot be construed as conduct that is 'incidental' to litigation.").

doctrine did not protect from antitrust scrutiny the defendant's settlement agreements resolving patent litigation. 421 F.3d at 1233-36. Similarly, in *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), the Seventh Circuit held that a litigation settlement agreement represented a *per se* unlawful agreement to restrict advertising, even though the underlying suit was clearly meritorious, as the trial court ruled in favor of the plaintiff and ordered an accounting of partnership assets. *Id*. at 826-28.

Respondent suggests that, somehow, filing "*bona fide*" or "good faith" trademark infringement lawsuits against rivals insulates the resulting settlement agreements from antitrust scrutiny. But the question of whether the underlying lawsuit was "bona fide" or filed in "good faith" is not determinative of whether the challenged agreement is procompetitive or anticompetitive. Because private agreements settling litigation are subject to antitrust scrutiny irrespective of the merits of the underlying lawsuit, Respondent's defenses are irrelevant to the allegations of the Complaint, and fail to provide Respondents with any legally cognizable defense.

CONCLUSION

For the reasons stated above, the Commission should find that the agreements challenged here are subject to antitrust scrutiny and are not immunized by the *Noerr* doctrine, regardless of whether the litigation that led to the agreements was filed in good faith, or was objectively or subjectively unreasonable. Complaint Counsel therefore respectfully asks the Commission to enter an Order granting summary decision in Complaint Counsel's favor regarding Respondent's Second Defense and Third Defense.

Dated: November 3, 2016

Respectfully Submitted,

/s/ Dan Matheson

Daniel J. Matheson
Geoffrey M. Green
Barbara Blank
Charles A. Loughlin
Kathleen M. Clair
Thomas H. Brock
Gustav P. Chiarello
Joshua B. Gray
Nathaniel M. Hopkin
Mika Ikeda
Charlotte S. Slaiman

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2075
Facsimile: (202) 326-3496
Email: dmatheson@ftc.gov

Counsel Supporting the Complaint

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

In the Matter of **1-800 CONTACTS, INC.,** **a corporation**	**Docket No. 9372**

COMPLAINT COUNSEL'S STATEMENT OF UNDISPUTED FACTS

Pursuant to Rule 3.24, Complaint Counsel submits, in support of its motion for partial summary decision, the following statement material facts as to which there is no genuine dispute:

A. 1-800 Contacts Entered at Least Fourteen Agreements With Contact Lens Retailers

1. 1-800 Contacts, Inc. ("1-800 Contacts") is a retailer of contact lenses and sells contact lenses primarily over the internet. Matheson Decl. Tab 2, Answer ¶ 14.[1]

2. 1-800 Contacts has more U.S. online sales of contact lenses than any other retailer. Matheson Decl. Tab 2, Answer ¶ 1.

3. 1-800 Contacts sent cease-and-desist letters to online contact lens retailers whose advertisements appeared in response to a search engine query for "1-800 Contacts" (or variations thereof). Matheson Decl. Tab 2, Answer ¶ 17.

[1] "Matheson Decl." refers to the Declaration of Daniel Matheson, to which all exhibits and pleadings referred to herein are attached.

4. Those cease-and-desist letters stated that the conduct of the recipient may constitute trademark infringement. Matheson Decl. Tab 2, Answer ¶ 17.

5. 1-800 Contacts filed complaints in federal court against certain of those online contact lens retailers for trademark infringement. Matheson Decl. Tab 2, Answer ¶ 18.

6. 1-800 Contacts entered into agreements resolving trademark disputes with thirteen online contact lens retailers. Matheson Decl. Tab 2, Answer ¶ 20.

7. 1-800 Contacts entered into an agreement with **{** [redacted] **}**. Matheson Decl. Tab 3, **{** [redacted] **}**.

8. 1-800 Contacts entered into an agreement with **{** [redacted] **}**. Matheson Decl. Tab 4, **{** [redacted] **}**. 1-800 Contacts later entered into another agreement with **{** [redacted] **}** which provided that the earlier agreement would remain in full force. Matheson Decl. Tab 5, **{** [redacted] **}**. The later agreement was incorporated in a consent decree entered by a court. Matheson Decl. Tab 6, CX0316 (Order of Permanent Injunction).

9. 1-800 Contacts entered into an agreement with **{** [redacted] **}**. Matheson Decl. Tab 7, **{** [redacted] **}**.

10. 1-800 Contacts entered into an agreement with **{** [redacted] **}**. Matheson Decl. Tab 8, **{** [redacted] **}**.

11. 1-800 Contacts entered into an agreement with **{** [redacted] **}**. Matheson Decl. Tab 9, **{** [redacted] **}**.

12. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 10, {[redacted]}.

13. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 11, {[redacted]}.

14. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 12, {[redacted]}.

15. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 13, {[redacted]}.

16. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 14, {[redacted]}.

17. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 15, {[redacted]}.

18. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 16, {[redacted]}.

19. 1-800 Contacts entered into an agreement with {[redacted]}. Matheson Decl. Tab 17, {[redacted]}.

20. 1-800 Contacts also entered into a sourcing and services agreement with a contact lens retailer. Matheson Decl. Tab 2, Answer ¶ 20; Tab 18, {[redacted]}. 1-800 Contacts has never sued {[redacted]} for infringement of 1-800 Contacts' trademark rights. 1-800 Contacts did not enter into the sourcing and services agreement to settle litigation. Matheson Decl. Tab 2, Answer ¶ 20.

21. In total, 1-800 Contacts has entered into at least fourteen agreements with rival contact lens retailers ("Bidding Agreements").

B. Search Engine Advertising

22. An internet search engine is a website that uses software to locate information on other internet websites based on a search engine user's "query," which is a word or phrase entered by user. Search engines such as Google and Bing are available to the general public, and do not charge end users for entering queries. Matheson Decl. Tab 1, Compl. ¶ 7; Tab 2, Answer ¶ 7.

23. A search engine results page is the list of results produced by an internet search engine. A search engine results page includes "organic" or "natural" search results that are identified by the search engine's software as relevant to the user's query. A search engine results page may also include advertisements.

24. Search engines use an auction process to sell advertising space on the search engine results page. Matheson Decl. Tab 1, Compl. ¶ 10; Tab 2, Answer ¶ 10. Advertisers seeking to place advertisements on a search engine results page submit bids to the search engine. A bid denotes the maximum amount the advertiser is willing to pay to the search engine each time a user clicks on a displayed advertisement.

25. Advertisers choose the auctions they enter by placing bids on particular terms, called "keywords." A keyword instructs the search engine to display an advertisement if the user enters that keyword as a search engine query and certain other conditions are met. Alternatively, the advertiser may allow the search engine to choose the auctions the advertiser enters by instructing the search engine to match its bids to queries that the search engine deems relevant to the advertiser.

26. Advertisers may also ensure that their ads are not displayed in response to certain searches by submitting "negative keywords" to the search engine. A "negative keyword" instructs a search engine not to display an advertisement in response to a search query that contains that particular term or terms. Matheson Decl. Tab 1, Compl. ¶ 13; Tab 2, Answer ¶¶ 13, 24.

27. When a user enters a query, the search engine evaluates relevant bids. Whether an advertisement is displayed depends upon the amount of the bid, the quality of the advertisement as determined by the search engine, and negative keywords, if any. Quality refers to the search engine's assessment of whether the advertisement will be relevant and useful to the user.

C. The Terms of the Bidding Agreements Challenged in the Administrative Complaint

28. While the Bidding Agreements were phrased in various ways, each required a rival of 1-800 Contacts to refrain from bidding on 1-800 Contacts' specified trademark terms as keywords.

29. Four of the Bidding Agreements prohibit a rival of 1-800 Contacts from causing its website or advertisements to appear in response to any internet search for 1-800 Contacts' brand name, trademarks, or URLs and from causing its brand name, internet link or websites to

appear as a listing in a search engine results page when a user specifically searches for 1-800 Contacts' brand name, trademarks or URLs. These agreements were reached between 1-800 Contacts and {[redacted]}. Matheson Decl. Tab 3, {[redacted]}; Tab 4, {[redacted]}; Tab 7, {[redacted]}; Tab 8, {[redacted]}.

30. Seven of the agreements prohibit a rival of 1-800 Contacts from engaging in internet advertising or any other action that causes any website, advertisement, or a link to any website to be displayed in response to any search that includes 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, or 1-800 Contacts' URLs, as listed in an exhibit to the agreement. These agreements were reached between 1-800 Contacts and {[redacted]}. Matheson Decl. Tab 9, {[redacted]}; Tab 10, {[redacted]}; Tab 11, {[redacted]}

[redacted]; Tab 12, [redacted]; Tab 13, [redacted]; Tab 15, [redacted]; Tab 16, [redacted].

31. Two of the Bidding Agreements prohibit a rival of 1-800 Contacts from purchasing or using any of 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, or 1-800 Contacts' URLs, as listed in an exhibit to the agreement, as triggering keywords in any internet search advertising campaign. Matheson Decl. Tab 14, [redacted]; Tab 17, [redacted].

32. One of the Bidding Agreements prohibits a rival of 1-800 Contacts from purchasing or using any of 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, or 1-800 Contacts' URLs, as listed in a schedule to the agreement, as triggering keywords in any internet search advertising campaign. Matheson Decl. Tab 18, [redacted].

33. Thirteen of the Bidding Agreements explicitly require a rival of 1-800 Contacts implement negative keywords.

34. Seven Bidding Agreements explicitly require a rival of 1-800 Contacts to implement negative keywords in order to prevent any advertisement or a link to its website from appearing as a listing in the search results page of an internet search engine, when a user enters a search that includes 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, or 1-800 Contacts' URLs, as listed in an exhibit to the agreement. These Bidding Agreements were reached between 1-800 Contacts and **{** **}**. Matheson Decl. Tab 9, **{** **}**; Tab 10, **{** **}**; Tab 11, **{** **}**; Tab 12, **{** **}**; Tab 13, **{** **}**; Tab 15, **{** **}**; Tab 16, **{** **}**.

35. Two Bidding Agreements require a rival of 1-800 Contacts to implement negative keywords listed in an exhibit to the agreement whenever they purchased any keywords through any search engine provider, in order to prevent the generation of advertisements and internet

links triggered by those keywords. The list includes 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, and 1-800 Contacts' URLs. These Bidding Agreements were reached between 1-800 Contacts and {[redacted]}. Matheson Decl. Tab 7, {[redacted]}; Tab 8, {[redacted]}.

36. Two Bidding Agreements require a rival of 1-800 Contacts to implement terms listed in an exhibit to the agreement as negative keywords in all search engine advertising campaigns. The list includes 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, and 1-800 Contacts' URLs. These Bidding Agreements were reached between 1-800 Contacts and {[redacted]}. Matheson Decl. Tab 14, {[redacted]}; Tab 17, {[redacted]}.

37. One Bidding Agreement required a rival of 1-800 Contacts to agree to entry of a stipulated permanent injunction. Matheson Decl. Tab 5, {[redacted]}. The injunction requires the rival, for the purpose of preventing the rival's internet advertising from appearing in response to a search for 1-800 Contacts' intellectual property rights, to implement as negative keywords 1-800 Contacts'

trademarks, variations on 1-800 Contacts' trademarks, and 1-800 Contacts' URLs, as listed in an exhibit to the permanent injunction. This Bidding Agreement was reached between 1-800 Contacts and **{ }**. *Id.* **{ }**; Tab 6, CX0316 at -004 (Order of Permanent Injunction, Exhibit A) (listing trademark terms and variations).

38. One Bidding Agreement requires a rival of 1-800 Contacts to implement as negative keywords in all internet search engine advertising campaigns 1-800 Contacts' trademarks, variations on 1-800 Contacts' trademarks, and 1-800 Contacts' URLs, as listed in a schedule to the agreement. This agreement was reached between 1-800 Contacts and **{ }**. Matheson Decl. Tab 18, **{ }**.

39. The agreements are bilateral, meaning that 1-800 Contacts must also refrain from using each party's trademark terms as keywords for internet search advertising and must use each party's trademarks terms as negative keywords. Matheson Decl. Tab 2, Answer ¶ 23.

40. The Administrative Complaint alleges that the fourteen agreements unreasonably restrain competition and injure consumers. Matheson Decl. Tab 1, Compl. ¶ 31.

Respectfully submitted,

/s/ Dan Matheson

Daniel J. Matheson
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2075
Facsimile: (202) 326-3496
Email: dmatheson@ftc.gov

Counsel Supporting the Complaint

Dated: November 3, 2016

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

In the Matter of **1-800 CONTACTS, INC.,** **a corporation**	**Docket No. 9372**

DECLARATION OF DANIEL J. MATHESON

1. I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could and would testify competently under oath to such facts.

2. I am an attorney at the Federal Trade Commission and Complaint Counsel in this proceeding. Attached to this declaration are the exhibits submitted in support of Complaint Counsel's Motion for Partial Summary Decision.

3. Tab 1 is a true and correct copy of the Administrative Complaint issued by the Federal Trade Commission in the above-captioned matter dated August 8, 2016.

4. Tab 2 is a true and correct copy of the Answer and Defenses of Respondent 1-800 Contacts, Inc. dated August 29, 2016.

5. Tab 3 is a true and correct copy of **{** [redacted] **}**.

6. Tab 4 is a true and correct copy of **{** [redacted] **}**.

7. Tab 5 is a true and correct copy of {[redacted]}.

8. Tab 6 is a true and correct copy of CX0316, an Order of Permanent Injunction issued in *1-800 Contacts, Inc. v. Vision Direct, Inc.*, No. 08-cx-01949 (S.D.N.Y. May 15, 2009).

9. Tab 7 is a true and correct copy of {[redacted]}.

10. Tab 8 is a true and correct copy of {[redacted]}.

11. Tab 9 is a true and correct copy of {[redacted]}.

12. Tab 10 is a true and correct copy of {[redacted]}.

13. Tab 11 is a true and correct copy of {[redacted]}.

14. Tab 12 is a true and correct copy of {[redacted]}.

15. Tab 13 is a true and correct copy of {[redacted]}.

16. Tab 14 is a true and correct copy of {[redacted]}.

17. Tab 15 is a true and correct copy of {[redacted]}.

18. Tab 16 is a true and correct copy of {[redacted]}.

19. Tab 17 is a true and correct copy of {[redacted]}.

20. Tab 18 is a true and correct copy of {[redacted]}.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 1st day of November, 2016, at Washington, DC.

/s/ Dan Matheson
Daniel J. Matheson
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2075
Facsimile: (202) 326-3496
Email: dmatheson@ftc.gov

Counsel Supporting the Complaint

Tab 1

PUBLIC

1410200

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that 1-800 Contacts, Inc. ("1-800 Contacts"), a corporation, hereinafter sometimes referred to as "Respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Nature of the Case

1. This action challenges a series of bilateral agreements between 1-800 Contacts and numerous online sellers of contact lenses that prevent the parties from competing against one another in certain online search advertising auctions. The driving force behind these agreements and this anticompetitive scheme is 1-800 Contacts, the largest online seller of contact lenses in the United States.

2. The major online search engine companies, Google and Bing, sell advertising space on their search engine results pages through computerized auctions. Beginning in 2004, 1-800 Contacts secured agreements with at least fourteen competing online sellers of contact lenses providing that the parties would not bid against one another in certain search advertising auctions (the "Bidding Agreements"). As 1-800 Contacts engineered this bid allocation scheme, certain auctions are reserved to 1-800 Contacts alone.

3. These bidding agreements unreasonably restrain both price competition in search advertising auctions and the availability of truthful, non-misleading advertising. The Bidding Agreements individually and in combination constitute an unfair method of competition and violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Respondent

4. Respondent 1-800 Contacts is a corporation organized, existing, and doing business under and by virtue of the laws of the United States, with its office and principal place of business located at 261 Data Drive, Draper, Utah, 84020.

Jurisdiction

5. At all times relevant herein, 1-800 Contacts has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

6. The acts and practices of 1-800 Contacts, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Overview of Online Search Advertising

7. Search engines, including Google and Bing, are available to users of the internet without charge. This service is financed primarily through the sale of search advertising. Search advertising refers to the paid advertisements that appear, in response to a search query, on the search engine results page above or adjacent to the unpaid "organic" or "natural" results. Attached hereto as Exhibit 1 is a screen shot showing a Google search engine results page that appeared in response to a query on June 27, 2016, for "1 800 Contacts cheaper competitors." The first listing in this screen shot, which is preceded by a yellow box containing the text "Ad," is a paid advertisement (for 1-800 Contacts). The remaining results on the page are unpaid organic results.

8. Search advertising is especially valuable to advertisers because, unlike with other forms of advertising, an advertiser can deliver a message to a user at the precise moment that the user has expressed interest in a specific subject, and may be ready to make a purchase. For example, a seller of contact lenses (or any of a wide variety of products and services advertised online) can display its advertisement to a user who, milliseconds earlier, entered the search query "contact lenses" (or for another product or service).

9. Search advertising is also especially valuable to internet users because a user can quickly and easily navigate between the search engine results page and the websites of several different advertisers (e.g., visiting several different websites that sell contact lenses). In this way, the user can readily compare price and service, purchase the desired merchandise, and arrange for delivery.

10. Search engine companies sell advertising space on the search engine results page by means of auctions. A separate and automated search advertising auction is conducted each time a user enters a query.

a. Advertisers submit to the search engine companies "bids" specifying the maximum price they are willing to pay to place a particular advertisement on the results page.

b. An advertiser may identify the auctions that it wishes to enter by bidding on particular words, referred to as "keywords," contained in a given query. Alternatively, the advertiser may allow the search engine company, through its algorithms, to identify relevant auctions for the advertiser (thus participating in auctions for relevant queries even without having bid on the precise terms in those queries).

c. When a consumer enters a search query, an algorithm instantly evaluates the relevant bids. The winner or winners of the auction will have their advertisements displayed to the user. If the user clicks on an advertisement and visits the advertiser's website, then the advertiser pays a fee to the search engine company.

11. Search engine companies do not simply place advertisements on the search engine results page in the order of the price bid by the advertiser. Rather, in determining whether and in what order to place advertisements, search engines employ sophisticated algorithms that consider the quality of the advertisement. Quality, in this context, refers to the search engine's assessment of whether the advertisement will be relevant and useful to the user. The search engine makes this assessment based largely on the search engine's continual analysis of user feedback (such as click-through data), which is incorporated, in real-time, into the algorithms that determine which advertisements, if any, will be shown. The search engine demotes or eliminates advertisements that prove, based on user feedback, not to be relevant or useful to users.

12. Computer users sometimes enter a search query that contains a trademarked word or phrase (*e.g.*, "1-800 Contacts," "Mattress Discounters," "POLO shirt"). In response, the search engine may present the user with relevant advertisements on behalf of multiple companies, including but not limited to the owner of the trademark.

13. An advertiser also may specify to the search engine one or more "negative keywords." This is an instruction that the company's advertisement should *not* appear in response to a search query that contains a particular term or terms. For example, a business that sells eyeglasses and bids on the term "glasses" in search advertising auctions may use a negative keyword (*e.g.*, "wine") to prevent its advertisement from being displayed in response to a query for "wine glasses."

Competition in the Online Retail Sale of Contact Lenses

14. 1-800 Contacts has long been the largest online seller of contact lenses in the United States. In 2015, 1-800 Contacts had revenues of approximately [redacted] million. This represents approximately 50 percent of the online retail sales of contact lenses. The combined share of 1-800 Contacts and the fourteen firms that executed the Bidding Agreements is approximately 80 percent.

15. 1-800 Contacts was a pioneer in the online sale of contact lenses. However, by the early 2000s, a number of competing online retailers had emerged and were expanding rapidly. Online rivals invested in search advertising and competed directly against 1-800 Contacts in search advertising auctions. These online rivals undercut 1-800 Contacts' prices for contact lenses, many by a substantial amount.

16. As early as 2003, 1-800 Contacts recognized that it was losing sales to lower-priced online competitors. However, 1-800 Contacts did not want to lower its prices to compete with these rivals, and devised a plan to avoid doing so. To this day, 1-800 Contacts' prices for contact lenses remain consistently higher than the prices of its online rivals.

The Bidding Agreements

17. In or around 2004, 1-800 Contacts began sending cease-and-desist letters to rival online sellers of contact lenses whose search advertisements appeared in response to user queries containing the term "1-800 Contacts" (or variations thereof). 1-800 Contacts accused its rivals of infringing its trademarks.

18. 1-800 Contacts claimed—inaccurately—that the mere fact that a rival's advertisement appeared on the results page in response to a query containing a 1-800 Contacts trademark constituted infringement. 1-800 Contacts threatened to sue its rivals that did not agree to cease participating in these search advertising auctions.

19. Most often, rivals quickly acceded to 1-800 Contacts' demands in order to avoid prolonged and costly litigation. Only one competitor refused to settle and proceeded to litigation.

20. Between 2004 and 2013, 1-800 Contacts entered at least fourteen agreements with rival online sellers of contact lenses settling 1-800 Contacts' purported trademark claims by restricting bidding in search advertising auctions. The competitors that agreed not to bid against 1-800 Contacts include:

21. The Bidding Agreements go well beyond prohibiting trademark infringing conduct. They restrain a broad range of truthful, non-misleading, and non-confusing advertising.

22. All fourteen Bidding Agreements bar 1-800 Contacts' competitor from bidding in a search advertising auction for any of 1-800 Contacts' trademarked terms (*e.g.*, "1-800 Contacts") or variations thereof (such as common misspellings).

23. All fourteen Bidding Agreements are reciprocal, barring 1-800 Contacts from bidding for the competitors' trademarked terms or variations thereof. Notably, most of the competitors that entered into these Bidding Agreements had never raised trademark infringement claims or counterclaims against 1-800 Contacts.

24. Thirteen of the Bidding Agreements also require 1-800 Contacts' competitor to employ "negative keywords" directing the search engines not to display the competitor's advertisement in response to a search query that includes any of 1-800 Contacts' trademarked terms or variations thereof, even if the search engines' algorithms determine that the advertisement would be relevant and useful to the user. Thus, even if a user enters a query for "1-800 Contacts **cheaper competitors**," the user will see advertisements only for 1-800 Contacts. (See Exhibit 1.) This undertaking is also reciprocal, requiring 1-800 Contacts to employ its competitors' trade names and variations thereof as negative keywords in its own advertising campaigns.

25. 1-800 Contacts has aggressively policed the Bidding Agreements, complaining to competitors when the company has suspected a violation, threatening further litigation, and demanding compliance.

26. Only one online seller of contact lenses—Lens.com—did not settle with 1-800 Contacts. Instead, Lens.com litigated against 1-800 Contacts at significant expense. Ultimately, the Court of Appeals for the Tenth Circuit rejected 1-800 Contacts' trademark infringement claims. The court found that consumers were not confused when an advertisement for Lens.com appeared on the search results page in response to a user query for "1-800 Contacts." *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1245-49 (10th Cir. 2013). And, in the absence of the likelihood of consumer confusion, there can be no infringement of 1-800 Contacts' trademarks.

27. 1-800 Contacts targeted rivals whose advertisements appeared on the search engine results page in response to a user query for "1-800 Contacts" or variations thereof. 1-800 Contacts acted without regard to whether the advertisements were likely to cause consumer confusion or infringed 1-800 Contacts' trademarks.

Anticompetitive Effects of the Bidding Agreements

28. One relevant product market or line of commerce in which to analyze the competitive effects of 1-800 Contacts' challenged conduct is no larger than the sale of search advertising by auction in response to user queries signaling the user's interest in contact lenses, or smaller relevant markets therein.

29. A second relevant product market or line of commerce in which to analyze the competitive effects of 1-800 Contacts' challenged conduct is no larger than the retail sale of contact lenses, or smaller relevant markets therein, including the online retail sale of contact lenses.

30. The relevant geographic market for each product market alleged herein is no larger than the United States.

31. Respondent's conduct, as alleged herein, had the purpose, capacity, tendency, and likely effect of restraining competition unreasonably and injuring consumers and others in the following ways, among others:

    a. Unreasonably restraining price competition in certain search advertising auctions;

    b. Distorting prices in, and undermining the efficiency of, certain search advertising auctions;

    c. Preventing search engine companies from displaying to users on the results page the array of advertisements that are most responsive to a user's search;

    d. Impairing the quality of the service provided to consumers by search engine companies, including the results page;

e. Depriving consumers of truthful and non-misleading information about the prices, products, and services offered by online sellers of contact lenses;

f. Depriving consumers of the benefits of vigorous price and service competition among online sellers of contact lenses;

g. Preventing online sellers of contact lenses from disseminating truthful and non-confusing information about the availability of, and prices for, their products and services;

h. Increasing consumers' search costs relating to the online purchase of contact lenses; and

i. Causing at least some consumers to pay higher prices for contact lenses than they would pay absent the agreements, acts, and practices of 1-800 Contacts.

32. As horizontal agreements that restrain price competition and restrain truthful and non-misleading advertising, the Bidding Agreements are inherently suspect. Furthermore, the Bidding Agreements are overbroad: they exceed the scope of any property right that 1-800 Contacts may have in its trademarks, and they are not reasonably necessary to achieve any procompetitive benefit. Less restrictive alternatives are available to 1-800 Contacts to safeguard any legitimate interest the company may have under trademark law.

Violations Alleged

33. As set forth above, 1-800 Contacts agreed to restrain competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

34. The acts and practices of Respondent, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

NOTICE

Notice is hereby given to the Respondent that the eleventh day of April, 2017, at 10:00 a.m., is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Washington D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46 of said Rules.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after an answer is filed by Respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within five days of receiving the answer of Respondent, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Respondent has violated or is violating Section 5 of the FTC Act, as amended, as alleged in the complaint, the Commission may order such relief against Respondent as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Ordering Respondent to cease and desist from the conduct alleged in the complaint to violate Section 5 of the FTC Act, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of, the anticompetitive practices engaged in by Respondent, or similar practices.

2. Prohibiting Respondent from, directly or indirectly, maintaining, entering into, or attempting to enter into, an agreement with any contact lens retailer that restrains participation in or otherwise restrains competition in any search advertising auction.

3. Prohibiting Respondent from, directly or indirectly, maintaining, entering into, or attempting to enter into, an agreement with any contact lens retailer to forbear from disseminating truthful and non-misleading advertising.

4. Prohibiting Respondent from, directly or indirectly, enforcing, attempting to enforce, or threatening to enforce any provision of an agreement that restricts bidding for search advertising or that restricts the display of advertisements in response to certain user search queries, or any provision of an agreement requiring the use of negative keywords in search engine advertising.

5. Prohibiting Respondent from filing or threatening to file a lawsuit against any contact lens retailer alleging trademark infringement, deceptive advertising, or unfair competition that is based on the use of 1-800 Contacts' trademarks in a search advertising auction. *Provided, however*, that Respondent shall not be barred from filing or threatening to file a lawsuit challenging any advertising copy where Respondent has a good faith belief that such advertising copy gives rise to a claim of trademark infringement, deceptive advertising, or unfair competition.

6. Ordering Respondent to submit at least one report to the Commission sixty days after issuance of the Order, and other reports as required, describing how it has complied, is complying, and will comply in the future.

7. Requiring, for a period of time, that Respondent document all communications with settlement parties, including the persons involved, the nature of the communication, and its duration, and that Respondent submit such documentation to the Commission.

8. Ordering Respondent, for a period of time, to file annual compliance reports to the Commission describing its compliance with the requirements of the order. The order would terminate twenty years from the date it becomes final.

9. Requiring that Respondent's compliance with the order may be monitored at Respondent's expense by an independent monitor, for a term to be determined by the Commission.

10. Any other relief appropriate to prevent, correct or remedy the anticompetitive effects in their incipiency of any or all of the conduct alleged in the complaint.

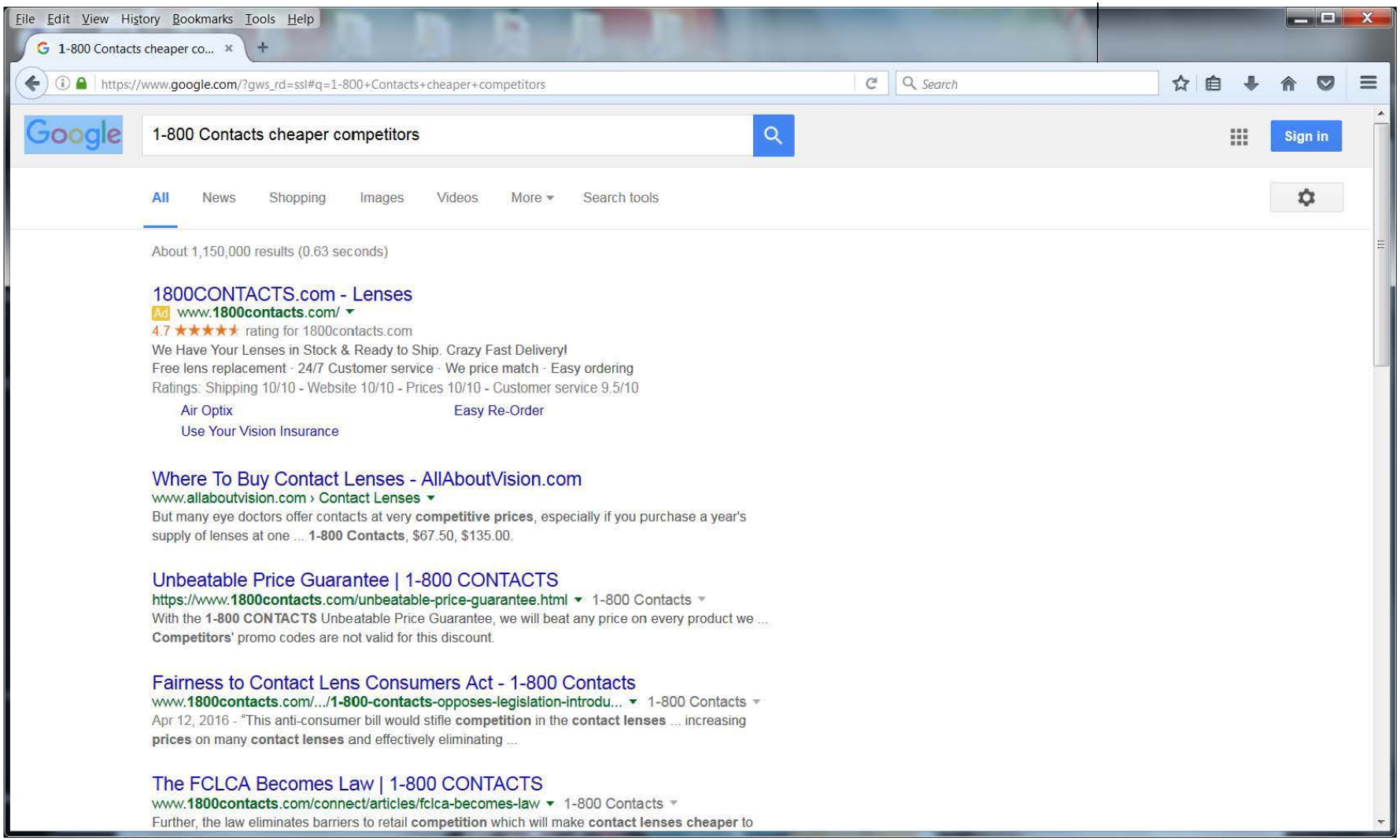
WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighth day of August, 2016 issues its complaint against Respondent.

By the Commission.

Donald S. Clark
Secretary

SEAL:

Exhibit 1


File Edit View History Bookmarks Tools Help
1-800 Contacts cheaper co...
https://www.google.com/?gws_rd=ssl#q=1-800+Contacts+cheaper+competitors
Search
Google
1-800 Contacts cheaper competitors
Sign in
All News Shopping Images Videos More Search tools
About 1,150,000 results (0.63 seconds)
1800CONTACTS.com - Lenses
Ad www.1800contacts.com/
4.7 rating for 1800contacts.com
We Have Your Lenses in Stock & Ready to Ship. Crazy Fast Delivery!
Free lens replacement · 24/7 Customer service · We price match · Easy ordering
Ratings: Shipping 10/10 - Website 10/10 - Prices 10/10 - Customer service 9.5/10
Air Optix
Easy Re-Order
Use Your Vision Insurance
Where To Buy Contact Lenses - AllAboutVision.com
www.allaboutvision.com › Contact Lenses
But many eye doctors offer contacts at very competitive prices, especially if you purchase a year's supply of lenses at one ... 1-800 Contacts, $67.50, $135.00.
Unbeatable Price Guarantee | 1-800 CONTACTS
https://www.1800contacts.com/unbeatable-price-guarantee.html 1-800 Contacts
With the 1-800 CONTACTS Unbeatable Price Guarantee, we will beat any price on every product we ... Competitors' promo codes are not valid for this discount.
Fairness to Contact Lens Consumers Act - 1-800 Contacts
www.1800contacts.com/.../1-800-contacts-opposes-legislation-introdu... 1-800 Contacts
Apr 12, 2016 - "This anti-consumer bill would stifle competition in the contact lenses ... increasing prices on many contact lenses and effectively eliminating ...
The FCLCA Becomes Law | 1-800 CONTACTS
www.1800contacts.com/connect/articles/fclca-becomes-law 1-800 Contacts
Further, the law eliminates barriers to retail competition which will make contact lenses cheaper to

Tab 2

~~PUBLIC~~

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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.

PUBLIC

"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.

[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

PUBLIC

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.

PUBLIC

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.

PUBLIC

DATED: August 29, 2016

Respectfully submitted,

/s/ Gregory P. Stone

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.raphael@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.

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:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

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:

Thomas H. Brock
Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

Barbara Blank
Attorney
Federal Trade Commission
bblank@ftc.gov
Complaint

Gustav Chiarello
Attorney
Federal Trade Commission
gchiarello@ftc.gov
Complaint

Kathleen Clair
Attorney
Federal Trade Commission
kclair@ftc.gov
Complaint

Joshua B. Gray
Attorney
Federal Trade Commission
jbgray@ftc.gov
Complaint

Geoffrey Green
Attorney
Federal Trade Commission
ggreen@ftc.gov
Complaint

Nathaniel Hopkin
Attorney
Federal Trade Commission
nhopkin@ftc.gov

Complaint

Charles A. Loughlin
Attorney
Federal Trade Commission
cloughlin@ftc.gov
Complaint

Daniel Matheson
Attorney
Federal Trade Commission
dmatheson@ftc.gov
Complaint

Charlotte Slaiman
Attorney
Federal Trade Commission
cslaiman@ftc.gov
Complaint

Mark Taylor
Attorney
Federal Trade Commission
mtaylor@ftc.gov
Complaint

Gregory P. Stone
Attorney
Munger, Tolles & Olson LLP
gregory.stone@mto.com
Respondent

Steven M. Perry
Attorney
Munger, Tolles & Olson LLP
steven.perry@mto.com
Respondent

Garth T. Vincent
Munger, Tolles & Olson LLP
garth.vincent@mto.com
Respondent

Stuart N. Senator
Munger, Tolles & Olson LLP
stuart.senator@mto.com
Respondent

Gregory M. Sergi
Munger, Tolles & Olson LLP
gregory.sergi@mto.com
Respondent

Justin P. Raphael
Munger, Tolles & Olson LLP
Justin.Raphael@mto.com
Respondent

Gregory Stone
Attorney

Tab 3 – Tab 5

REDACTED IN ENTIRETY

Tab 6

DANIELS, S.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

1-800 CONTACTS, INC., Plaintiff, -vs.- VISION DIRECT, INC., Defendant.	Civil Case No.: 08-cv-01949 (GBD) ECF Case ORDER OF PERMANENT INJUNCTION
VISION DIRECT, INC., Counterclaim-Plaintiff, -vs.- 1-800 CONTACTS, INC., Counterclaim-Defendant.	

WHEREAS, 1-800 Contacts, Inc. commenced the above-captioned action on or about February 27, 2008 (the "Action");

WHEREAS, without any admission of liability, 1-800 Contacts, Inc. and Vision Direct, Inc. (collectively the "Parties") and drugstore.com, inc. have reached agreement for the settlement and dismissal of the Action, the full terms and conditions of which are set forth in a document entitled Settlement Agreement and Mutual Release effective May 8, 2009 (the "May 8, 2009 Settlement Agreement");

WHEREAS, the May 8, 2009 Settlement Agreement is conditioned upon entry by the Court of a permanent injunction on the terms and conditions set forth herein;

WHEREAS, the Parties stipulate and agree that this Court has jurisdiction to enter a permanent injunction on the following terms and conditions, in order to protect the Parties' legitimate interests in protecting their respective trademarks, and that the Court shall have continuing jurisdiction for purposes of enforcing the Injunction; and

WHEREAS, the Court finds good cause for entry of a permanent injunction on the terms and conditions set forth below in order to protect the Parties' rights in their respective trademarks;

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Parties shall implement negative keywords in accordance with paragraphs 2, 3, and 4 of this Permanent Injunction for the purpose of preventing a Party's Internet advertising from appearing in response to a search for another Party's (1) trademarks, (2) any identical or confusingly similar variation of the Party's trademarks, (3) domain names containing the Party's trademarks, (4) domain names containing any identical or confusingly similar variation of the Party's trademarks, (5) URLs containing the Party's trademarks, or (6) URLs containing any identical or confusingly similar variation of the Party's trademarks.

2. In order to comply with the terms of this Permanent Injunction, Vision Direct, Inc. and drugstore.com, inc. shall implement the negative keywords set forth on Exhibit A hereto on or in connection with Internet keyword advertising for the sale of contact lenses.

3. In order to comply with the terms of this Permanent Injunction, 1-800 Contacts, Inc. shall implement the negative keywords set forth on Exhibit B hereto on or in connection with Internet keyword advertising for the sale of contact lenses.

4. The Parties may, between themselves, supplement or modify the list of negative keywords set forth on Exhibits A or B pursuant to the procedure set forth in the May 8, 2009 Settlement Agreement. Any such supplementation or modification of the list of negative keywords set forth in Exhibits A or B shall have the same force and effect as if appended to this Permanent Injunction. Unless necessary to enforce the terms of this Permanent Injunction, any such supplementation or modification of the list of negative keywords set forth in Exhibit A or B shall not be submitted to the Court.

5. Absent a further order by this Court, this Injunction shall expire and be of no further force and effect upon the submission to the Court by the Parties of a Joint Stipulation to Dissolve Injunction.

6. This Permanent Injunction shall be effective without the posting of any bond or undertaking by any Party.

7. The entry of this Permanent Injunction shall be the final adjudication of this Action, which is otherwise dismissed with prejudice. Each Party shall bear its own costs and fees. This Court shall retain continuing jurisdiction over this matter for purposes of enforcing, implementing or construing this Order of Permanent Injunction.

IT IS SO ORDERED:

DATED: May 14 2009

MAY 15 2009

George B. Daniels

HON. GEORGE B. DANIELS

HON. GEORGE B. DANIELS

EXHIBIT A

1 800 CONTACTS
1-800 CONTACT
1-800 CONTACTS
1-800-CONTACT
1-800-CONTACT.COM
1-800-CONTACTS
1-800-CONTACTS.COM
1-800CONTACT
1800 CONTACT
1800 CONTACTS
1800.CONTACT
1800.CONTACTS
1800CONTACT
1800CONTACT.COM
1800CONTACTS
1800CONTACTS.COM
800 CONTACT
800 CONTACTS
800CONTACT
800CONTACTS
WWW.1800CONTACTS.COM
1 800 CONTACT
1 800 CONTACT.COM
1 800 CONTACTS.COM
1 800CONTACT
1 800CONTACTS
1800 CONTACTS.COM
1800 CONTACT.COM
1800CONTAC
1800CONTACS
WWW.1800CONTACT
WWW.1800CONTACTS
1800 CONTACTS.COM
1-800CONTACTS
800CONTACT.COM
800CONTACTS.COM
WWW.1800CONTACT.COM
LENS EXPRESS
LENSES EXPRESS
LENSE EXPRESS
LENSEXPRESS
LENSEXPRESS.COM

EXHIBIT B

Vision direc
Vision direct
Vision diret
Visiondirect
Vison direct
Visondirect
Visondirect.com
Visondirec.com
Visiondirect.com
lensmart
lens mart
lenssmart
lensquest
lens quest
lensqwest
lens qwest
lensworld
lens world
lensquest.com
lensmart.com
lensworld.com
www.visiondirect.com
www.visiondirect
www.lensmart.com
www.lensmart
www.lensquest.com
www.lensworld.com
www.lensquest
www.lensworld

TAB 7 – TAB 18

REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2016, I filed the foregoing document 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 document to:

Gregory P. Stone
Steven M. Perry
Garth T. Vincent
Stuart N. Senator
Gregory M. Sergi
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
gregory.stone@mto.com
steven.perry@mto.com
garth.vincent@mto.com
stuart.senator@mto.com
gregory.sergi@mto.com

Justin P. Raphael
Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
justin.raphael@mto.com

Sean Gates
Charis Lex P.C.
16 N. Marengo Avenue, Suite 300
Pasadena, CA 91101
sgates@charislex.com

Counsel for Respondent 1-800 Contacts, Inc.

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 3, 2016 By: /s/ Dan Matheson