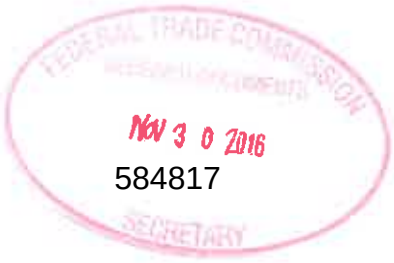
PUBLIC

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



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

MOTION TO COMPEL COMPLAINT COUNSEL TO ANSWER RESPONDENT'S INTERROGATORIES NOS. 10 AND 11

Pursuant to Rule 3.38(a), Respondent respectfully requests that this Court order Complaint Counsel to answer fully Respondent's Interrogatory Nos. 10 and 11. These two interrogatories seek essential factual information regarding the sales of contact lenses in the United States, namely the dollar volume of retail sales by each retailer of contact lenses broken down between sales online and not online. Although this economic data is directly related to the market shares and purported relevant markets that Complaint Counsel allege in their own Complaint (at ¶¶ 14 & 29), Complaint Counsel refuse to provide any information in response to these interrogatories and instead contend that they do not, "at present," have "sufficient" information to respond to these interrogatories. *See* Ex. 5.

Complaint Counsel's position provides serious cause for concern. On the one hand, it may mean that Complaint Counsel filed their Complaint without having conducted a thorough economic analysis of the relevant market that they themselves alleged. The starting point for such an analysis would be to gain an understanding of the size of the alleged market and the shares of its individual participants—the very facts that Respondents requested in their interrogatories. On the other hand, it may mean that Complaint Counsel is simply refusing to comply with their discovery obligations. The Commission's rules require Complaint Counsel to "fully" answer interrogatories, *see* 16 C.F.R. § 3.35(a)(2), and they therefore must respond with whatever responsive factual information—insufficient as it may be—that they have at this time. To the extent that Complaint Counsel has responsive information in their possession—as they should—nothing prevents them from providing it now. If additional responsive information becomes available during the course of discovery or following consultation with their experts, Complaint Counsel can provide that information in a supplemental response, as required by the

Commission's rules. *See* 16 C.F.R. § 3.31(e)(2). Courts have compelled parties to respond in this manner, and this Court should do so here.

I. FACTUAL BACKGROUND

On September 9, 2016, Respondents served Complaint Counsel with its First Set of Interrogatories. *See* Ex. 1. Interrogatory Number 10 asked Complaint Counsel to:

> Identify the dollar volume of online retail sales in the United States of contact lenses for each Person who is or was an "online seller of contact lenses" at retail for each of the years from 2002 through 2015.

Id. at 13. Interrogatory 11 asked Complaint Counsel to:

> Identify the dollar volume of retail sales of contact lenses in the United States, other than online sales of contact lenses, in total and individually by each Person who made such sales, for each of the years 2002 through 2015.

Id.

Complaint Counsel provided its Objections and Responses to Respondent's First Set of Interrogatories on October 11, 2016. *See* Ex. 2. In essence, Complaint Counsel took the position that they these interrogatories were "premature." *Id.* at 14-16. They refused to provide information responsive to these two interrogatories on the grounds that discovery is ongoing and they needed to consult with their experts. *Id.*

On October 25, 2016, Respondent sent a letter to Complaint Counsel responding to their objections and offering to meet and confer regarding Complaint Counsel's deficient responses. *See* Ex. 3. Respondent's letter explained that the possibility of further discovery, including expert consultation, does not shield a party from responding to an interrogatory with any information that it currently possesses. *Id.* at 6.

The parties met and conferred on October 28, 2016. Complaint Counsel agreed to take under advisement Respondent's proposal that it provide all responsive information it had in possession at the time, recognizing that they may obtain additional information through discovery or from its experts. Respondent sent Complaint Counsel a letter on October 31, 2016 confirming that they would consider this proposal. *See* Ex. 4.

Complaint Counsel rejected Respondent's proposal. On November 8, 2016, Complaint Counsel provided its Amended Responses and Objections to Respondent's First Set of Interrogations, which did not alter the substance of their original responses to Interrogatories 10 and 11. *See* Ex. 5. Complaint Counsel did add, however, that, "at present," they lacked information "sufficient" to respond to the interrogatories. *Id.* at 17-18. Ultimately, they persisted in their position that Respondent's requests for sales and market share data were premature and would be provided only after discovery was completed. *Id.*

On November 17, 2016, the parties met and conferred again on this issue. Complaint Counsel confirmed that they had provided their final answer to Interrogatories 10 and 11.

II. ARGUMENT

Commission Rule 3.31(c) provides that "[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). The Rules further provide that a party served with interrogatories must answer them "fully." 16 C.F.R. § 3.35(a)(2). If a party fails to comply with this obligation, Rule 3.38 authorizes the opposing party to seek an order compelling such compliance. "Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that . . . [answers to] interrogatories be served or disclosure otherwise be made." 16 C.F.R. § 3.38(a). "Parties resisting discovery of relevant information carry a heavy burden of showing why

discovery should be denied." *In re Daniel Chapter One*, No. 9329, 2009 WL 569694, at *2 (FTC Jan. 9, 2009).

Complaint Counsel cannot satisfy this heavy burden. As an initial matter, they do not dispute that Interrogatory Nos. 10 and 11 will yield information relevant to the allegations in their Complaint. Nor could they. Paragraph 29 of the Complaint alleges that a "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."[1] Interrogatory Nos. 10 and 11 track the allegations described in this paragraph and appropriately seek data about the volume of sales by the participants in the alleged markets for retail contact lenses.

Complaint Counsel presumably gathered at least *some* of this market share data before alleging anticompetitive effects in their proposed relevant market. Indeed, determining market share is an essential early step of any antitrust analysis. *See Gordon v. Lewistown Hosp.*, 423 F.3d 184, 211 (3d Cir. 2005) ("Once the markets are defined, we must determine whether the [defendant's] market share is sufficient to infer the existence of market power."); Areeda & Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application at ¶ 535 (4th Ed.) ("Once a market has been defined, a firm's 'market share' must be computed."). Complaint Counsel could not have (and certainly *should* not have) alleged that Respondent's settlement agreements restrained price competition in a market for contact lenses without first having collected data regarding that market's size and the relative shares of its participants.

In fact, the Complaint itself indicates that Complaint Counsel collected some of this information during their investigation. It contains express factual allegations regarding

[1] To be clear, Respondent's position is that the relevant market is the retail sale of contact lenses in the United States and that there is no smaller relevant market.

Respondent's market share and that of the other online retailers with which Respondent entered agreements settling trademark infringement disputes. Specifically, the Complaint alleges that, in 2015, Respondent's revenues represented "50 percent of the online retail sales of contact lenses," and that together with the fourteen other settling parties, their "combined share" of this purported market was "80 percent." Compl. ¶ 14.

One can only assume that Complaint Counsel has information to support these specific allegations. After all, the Commission's Operating Manual states that "staff is expected to have developed during the investigation substantial evidence to support the allegations of the complaint or have identified such evidence and determined that it will be available through post-complaint discovery." FTC Operating Manual at § 4.2.2.[2] In addition, the Operating Manual requires Complaint Counsel to send the Bureau of Economics its recommendation for complaint for concurrence or comment, *id.*, and that Bureau likely undertook an economic analysis of the retail contact lens market and the shares of its participants. As such, if Complaint Counsel followed its own internal procedures and collected evidence to support the allegations in its complaint, Interrogatory Nos. 10 and 11 seek information that Complaint Counsel possesses and is within the permissible scope of interrogatories. *See* 16 C.F.R. § 3.31(c)(2) ("Complaint counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter, including the

[2] The Commission's website states that "[m]any parts of the Operating Manual are outdated and no longer accurately reflect Commission practice." See FTC Administrative Staff Manuals, Operating Manual, *available at*, https://www.ftc.gov/about-ftc/foia/foia-resources/ftc-administrative-staff-manuals. It is hard to believe, however, that staff members would no longer be required have factual support for all allegations in their complaints.

Bureau of Economics.").[3]

Assuming that Complaint Counsel do, in fact, possess information responsive to Interrogatory Nos. 10 and 11, they cannot refuse to provide it at this time.[4] Courts routinely reject Complaint Counsel's position that interrogatories seeking factual information are premature and must await additional discovery or expert consultation.[5] In these cases, courts

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[3] It is no answer, as Complaint Counsel suggest in boilerplate objections to Interrogatory Nos. 10 and 11, that Respondent may possess some of this information or that the market share data may be a matter of the public record. *See* Ex. 5 at 16-17. It is well-established that a party may not object to an interrogatory on these grounds. *See In The Matter of Champion Spark Plug Co.*, No. 9141, 1981 FTC LEXIS 109, at *1 (Sep. 3, 1981) (rejecting complaint counsel's objection that "respondent now has access to the same information as complaint counsel"); *see generally* 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2014 (4th ed. 2014) ("[I]t is not usually ground for objection that the information is equally available to the interrogator or is a matter of public record.").

[4] *See Seabron v. American Family Mut. Ins. Co.*, No. 11-cv-01096, 2011 WL 6096497, at * 2 (D. Colo. Dec. 7, 2011) ("Plaintiffs must be aware of many of the material facts which form the basis of their complaint or Fed R. Civ. P. 11(b) would bar the advancement of the claim. Accordingly, they have a duty to answer the interrogatories with whatever factual information they have when the question is posed.... Plaintiffs are therefore ordered to respond fully and completely ... with non-privileged information to the best of their knowledge at this time."); *In the Matter of Beatrice Food Co, et al.*, No. 9112, 1979 FTC LEXIS 598, at *3-4 (June 1, 1979) (ordering complaint counsel to respond to interrogatories seeking facts supporting allegations in their complaint and dismissing their objection as an impermissible attempt to "draw the curtain on facts needed to understand the theory behind the complaint"); *In the Matter of Karl Preventative Med. Prods., Inc., et al.*, No. 9109, 1978 FTC LEXIS 111, at *1, 9 (Nov. 14, 1978) (ordering complaint counsel to answer interrogatories seeking "factual information concerning the tests upon which the complaint in this case was based" where "[m]ost, if not all, of such information must already be within the confines of the Commission's files").

[5] *See, e.g., 2000 Island Blvd Condo. Ass'n Inc. v. QBE Ins. Corp.*, No. 11–20247–CIV, 2011 WL 3441621, at *1 (S.D. Fla. Jul. 25, 2011) (granting a motion to compel discovery responses despite prematurity objection because "Plaintiff must necessarily have completed a factual investigation before submitting such a claim, and Defendant should not be forced to wait until the exchange of expert reports to obtain it"); *Geer v. Cox*, No. 01–2583–JAR, 2003 WL 21254731, at *3 (D. Kan. May 21, 2003) (holding that "[e]ven if complete answers to discovery requests may require the answering party to consult with experts, such considerations do not transform permissible factual discovery into "expert discovery" and that "[i]t is no answer for a plaintiff to assert that he will need discovery or to consult with an expert to determine his losses"); *Cook v. Rockwell Int'l Corp.*, 161 F.R.D. 103, 105–06 (D. Colo. 1995) (rejecting

order parties to respond to interrogatories with whatever information they currently possess, and hold that "they may later supplement their responses" if they obtain further information through discovery. *Cook*, 161 F.R.D. at 106; *see Seabron*, 2011 WL 6096497, at *2 (noting the "ample procedure for supplementing a response, if necessary").

This Court should follow this sensible approach here. Even if Complaint Counsel believe that the factual information in their possession is "insufficient," *see* Ex. 5 at 17-18, they surely possess *something* responsive to Respondent's requests. They must immediately provide that data to Respondents to fully answer Interrogatory Nos. 10 and 11. If Complaint Counsel acquire additional responsive information or data in the future, the Commission's rules contemplate providing a supplemental answer. 16 C.F.R. § 3.31(e)(2).

III. CONCLUSION

For these reasons, Respondent's motion to compel should be granted.

DATED: November 30, 2016

Respectfully submitted,

/s/ Justin P. Raphael

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plaintiffs' argument that discovery requests were premature where they sought to "discover the factual bases and documents relevant to allegations Plaintiffs have made in the course of this litigation," and holding that "[a]lthough Plaintiffs may need to consult their experts before responding to the Requests, this does not excuse them from responding to the Requests with the information they possess"); *cf. In the Matter of Flowers Indus.*, No. 9148, 1981 FTC LEXIS 110, at *3 (Oct. 7, 1981) (ordering complaint counsel to answer an interrogatory seeking "information about allegations of the complaint" and rejecting the argument that "the interrogatories are premature" because complaint counsel had "not yet chosen all of their witnesses and documents which they will use to support the allegations of the complaint").

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STATEMENT CONCERNING MEET AND CONFER

The undersigned counsel certifies that Complaint Counsel conferred with Respondent's counsel in a good faith effort to resolve by agreement the issues raised by Objections and Responses to Respondent's First Set of Interrogatories. On October 25, 2016, Respondent's counsel (Gregory Stone) sent Complaint Counsel (Daniel Matheson) a letter regarding the issues that gave rise to this motion. On October 28, 2016, Respondent's counsel (Gregory Stone, Justin Raphael, and Julian Beach) and Complaint Counsel (Daniel Matheson, Barbara Blank, and Thomas Block) communicated by telephone. On October 31, 2016, Respondent's counsel (Gregory Stone) and Complaint Counsel (Barbara Blank) communicated by letter. On November 17, 2016, Respondent's counsel (Gregory Stone and Julian Beach) and Complaint Counsel (Daniel Matheson) communicated by telephone. The parties have been unable to reach an agreement on the issues raised in the attached motion.

DATED: November 30, 2016

Respectfully submitted,

/s/ Justin P. Raphael

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

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

DECLARATION OF JUSTIN P. RAPHAEL IN SUPPORT OF RESPONDENT'S MOTION TO COMPEL COMPLAINT COUNSEL TO ANSWER RESPONDENT'S INTERROGATORIES NOS. 10 AND 11

I, Justin P. Raphael, declare as follows:

1. I am an attorney at the law firm of Munger, Tolles & Olson LLP, counsel for Respondent 1-800 Contacts, Inc. in this matter. I am duly licensed to practice law before the courts of the State of California and have appeared in the action pursuant to Rule 4.1 of the Commission's Rules of Practice.

2. I submit this Declaration in Support of Respondent's Motion to Compel Complaint Counsel to Answer Respondent's Interrogatories Nos. 10 and 11. I have personal knowledge of the facts stated in this declaration and, if called as a witness, could competently testify to them.

3. Attached hereto as Exhibit 1 is a true and correct copy of Respondent's First Set of Interrogatories to the Federal Trade Commission, served September 9, 2016 in this matter.

4. Attached as Exhibit 2 is a true and correct copy of Complaint Counsel's Responses and Objections to Respondent's First Set of Interrogatories (1-14), served October 11, 2016 in this matter.

5. Attached as Exhibit 3 is a true and correct copy of a letter from Greg Stone representing Respondent to Daniel Matheson representing Complaint Counsel, dated October 25, 2016.

6. Attached as Exhibit 4 is a true and correct copy of a letter from Greg Stone representing Respondent to Barbara Blank representing Complaint Counsel, dated October 31, 2016.

7. Attached as Exhibit 5 is a true and correct copy of Complaint Counsel's Amended Responses and Objections to Respondent's First Set of Interrogatories (1-14), served November 8, 2016 in this matter.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on November 30, 2016, in San Francisco, California.

/s/Justin P. Raphael
Justin P. Raphael

EXHIBIT 1

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

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

RESPONDENT'S FIRST SET OF INTERROGATORIES TO THE FEDERAL TRADE COMMISSION

Pursuant to the Federal Trade Commission's Rules of Practice, 16 C.F.R §§ 3.31 and 3.35, Respondent 1-800 Contacts, Inc. hereby propounds the following interrogatories to the Federal Trade Commission ("Commission"), which it requests be answered within 30 days from the date of service thereof or in such lesser time as the Administrative Law Judge may allow pursuant to Rule of Practice 3.35(a)(2).

DEFINITIONS

1. The terms "1-800 Contacts," "1-800," "Company," or "Respondent" mean Respondent 1-800 Contacts, Inc., its directors, officers, employees, and representatives, its subsidiaries, and the directors, officers, employees, and representatives of its subsidiaries.

2. The term "Affiliate" means any Person other than 1-800 Contacts which attempts to generate online sales for 1-800 Contacts in exchange for a commission on such online sales.

3. The terms "Agreement" or "Contract" mean any oral, written, or implied contract, arrangement, understanding, or Plan, whether formal or informal, between two or more Persons, together with all modifications or amendments thereto.

4. The terms "and" and "or" have both conjunctive and disjunctive meanings.

5. The term "Commission" means the Federal Trade Commission and each of its employees, attorneys, agents, accountants, consultants, and representatives.

6. The term "Communication" means any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.

7. The term "Competitor" means any person engaged in the business of selling contact lenses to consumers other than the Company.

8. The term "Consumer Confusion" means confusion or mistake "as to the affiliation, connection, or association" of another person with 1-800 Contacts,

or as to "the origin, sponsorship, or approval" of another person's "goods, services, or commercial activities" by 1-800 Contacts, as these terms are used in 15 U.S.C. § 1125(a).

9. The term "Documents" means all written, recorded, transcribed, or graphic matter of every type and description, however and by whomever prepared, produced, reproduced, disseminated, or made, including, but not limited to, analyses, letters, telegrams, memoranda, reports, bills, receipts, telexes, contracts, invoices, books, accounts, statements, studies, surveys, pamphlets, notes, charts, maps, plats, tabulations, graphs, tapes, data sheets, data processing cards, printouts, net sites, microfilm, indices, calendar or diary entries, manuals, guides, outlines, abstracts, histories, agendas, minutes or records of meetings, conferences, electronic mail, and telephone or other conversations or Communications, as well as films, tapes, or slides, and all other data compilations in the possession, custody, or control of the Commission, or to which the Commission has access. The term "documents" includes the complete original document (or a copy thereof if the original is not available), all drafts (whether or not they resulted in a final document), and all copies that differ in any respect from the original, including any notation, underlining, marking, or information not on the original.

10. The term "each," "any," and "all" mean "each and every."

11. The term "Effect" means the actual, intended, forecast, desired, predicted, or contemplated consequence or result of an action or Plan.

12. The term "Identify" means to state:

a) in the case of a natural person, his or her name, employer, business address and telephone number, title or position, and dates the person held that position(s);

b) in the case of a Person other than a natural person, its name and principal address, telephone number, and name of a contact person;

c) in the case of a document, the title of the document, the author, the title or position of the author, the addressee, each recipient, the type of document, the subject matter, the date of preparation, and its number of pages; and

d) in the case of a communication, the date of the communication, the parties to the communication, the method of communication (oral, written, etc.), and a description of the substance of the information exchanged during the communication.

13. The term "Keyword" has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its AdWords product: "[w]ords or phrases describing [an advertiser's] product that [the advertiser] choose[es] to help determine when and where [the advertiser's] ad can appear" in response to a User Query. *See*

https://support.google.com/adwords/answer/6323?hl=en. The term "Keyword" is not limited use in connection with Google's AdWords product, but is intended to capture any such words or phrases used in connection with any similar product offered in connection with any other Search Engine.

14. The term "Negative Keyword" has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its AdWords product: "[a] type of keyword that prevents [an advertiser's] ad from being triggered by certain words or phrases." *See* https://support.google.com/adwords/answer/105671?hl=en. The term "Negative Keyword" is not limited use in connection with Google's AdWords product, but is intended to capture any such words or phrases used in connection with any similar product offered in connection with any other Search Engine.

15. The term "Person" means any natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or any other organization or entity engaged in commerce.

16. The term "Plan" includes tentative and preliminary proposals, strategies, recommendations, analyses, reports, or considerations, whether or not precisely formulated, finalized, authorized, or adopted.

17. The term "Price-Match Sale" means a sale of contact lenses to a customer pursuant to any policy offering a customer a discounted price equal to or less than a competitor's price when the customer identifies a competitor's price.

18. The term "relating to" means in whole or in part constituting, containing, concerning, embodying, reflecting, discussing, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to.

19. "Search Engine" means a computer program, available to the public without charge, to search for and identify websites on the World Wide Web based on a User Query.

20. The terms "Settlement Agreement" or "Settlement Agreements" mean any agreement, whether formal or informal, including oral and written agreements, entered into by or between any Person and any other Person to resolve any allegation, dispute, litigation, or other matter concerning use of trademarks as Keywords.

21. The term "Settlement Partner" means any person that has entered into a Settlement Agreement.

22. The term "Trademark Dilution" means any form of "dilution," as this term is used in 15 U.S.C.§ 1125, including but not limited to "dilution by blurring" or "dilution by tarnishment."

23. "User Query" means data entered into a computer by an end user of a Search Engine for the purpose of operating the Search Engine.

24. "You" and "Your" means and refers to the Commission as previously defined.

INSTRUCTIONS

1. The relevant period for each Interrogatory is January 1, 2002 to the present.

2. Provide separate and complete sworn responses for each Interrogatory and subpart. Please note that under 16 C.F.R. § 3.35, interrogatories directed to a governmental agency shall be answered by an "officer or agent," "[e]ach interrogatory shall be answered separately and fully in writing under oath," and "[t]he answers are to be signed by the person making them, and the objections signed by the attorney making them." *See* 16 C.F.R. §§ 3.35(a), (b), (c).

3. State if You are unable to answer any of the Interrogatories herein fully and completely after exercising due diligence to secure the information necessary to make full and complete answers. Specify the reason(s) for Your inability to answer any portion or aspect of such Interrogatory, including a description of all efforts You made to obtain the information necessary to answer the Interrogatory fully.

4. Answer each Interrogatory fully and completely based on the information and knowledge currently available to You, regardless of whether You intend to supplement Your response at a later date.

5. If You object or otherwise decline to set forth in Your response any of the information requested by any Interrogatory, set forth the precise grounds upon which You rely with specificity so as to permit the Administrative Law Judge or other administrative or judicial entity to determine the legal sufficiency of Your objection or position, and provide the most responsive information You are willing to provide without an order.

6. Your answers to any Interrogatory herein must include all information within Your possession, custody or control, including information reasonably available to You and Your agents, attorneys or representatives. Information "shall not be deemed available insofar as it is in the possession of the Commissioners, the General Counsel, the office of Administrative Law Judges, or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staffs." *See* 16 C.F.R. § 3.35(a). However, information that is in the possession of others at the Commission not specifically excluded by 16 C.F.R. § 3.35(a) shall be provided even if that information also is in possession of those Persons identified in 16 C.F.R. § 3.35(a).

7. If in answering any of the Interrogatories You claim any ambiguity in either the Interrogatory or any applicable definition or instruction, identify in Your response the language You consider ambiguous and state the interpretation You are using in responding.

8. Each Interrogatory herein is continuing and requires prompt amendment of any prior response if You learn, after acquiring additional information or otherwise, that the response is in some material respect incomplete or incorrect. *See* 16 C.F .R. § 3.31(e).

9. If You object to any Interrogatory or any portion of any Interrogatory on the ground that it requests information that is privileged (including the attorney-client privilege) or falls within the attorney work product doctrine, state the nature of the privilege or doctrine You claim and provide all other information as required by 16 C.F.R. § 3.38A.

10. The singular form of a word shall be interpreted as plural, and the plural form of a word shall be interpreted as singular, so as to bring within the scope of the Interrogatory that which might otherwise be excluded.

11. "And" and "or" are to be interpreted inclusively so as not to exclude any information otherwise within the scope of any request.

12. None of the Definitions or Interrogatories set forth herein shall be construed as an admission relating to the existence of any evidence, to the

relevance or admissibility of any evidence, or to the truth or accuracy of any statement or characterization in the Definition or Interrogatory.

13. Whenever a verb is used in one tense it shall also be taken to include all other tenses, so as to bring within the scope of the Interrogatory that which might otherwise be excluded.

14. All words that are quoted from the Complaint filed in this matter have the same meaning as those used therein.

15. For each natural person You refer to in Your answers, state (1) that person's full name; (2) the person's last known business address and business phone number, or where that person's business address and phone number is unavailable, that person's home address and home phone number; (3) the person's business affiliation and title during the time period of the matter at issue; and (4) the person's current business affiliation and title.

INTERROGATORIES

INTERROGATORY NO. 1:

Identify each of the "[l]ess restrictive alternatives" that was "available to 1-800 Contacts to safeguard any legitimate interest the company may have under trademark law," as alleged in Paragraph 32 of the Complaint.

INTERROGATORY NO. 2:

Identify each fact known to Complaint Counsel that supports the allegation in Paragraph 31 of the Complaint that Respondent's conduct "had the purpose, capacity, tendency, and likely effect of restraining competition unreasonably and injuring consumers and others."

INTERROGATORY NO. 3:

Identify each instance in which competition has actually been restrained as a result of any conduct challenged in the Complaint (including but not limited to being restrained in any manner alleged in Paragraph 31 of the Complaint) and, for each such instance, Identify each Communication that describes, evidences, or comprises that restraint.

INTERROGATORY NO. 4:

Identify each Communication that evidences or comprises 1-800 Contacts "aggressively polic[ing] the Bidding Agreements" as alleged in Paragraph 25 of the Complaint.

INTERROGATORY NO. 5:

Identify each Communication that evidences or comprises "1-800 Contacts act[ing] without regard to whether the advertisements [of its rivals] were likely to cause consumer confusion or infringed 1-800 Contacts' trademarks," as alleged in Paragraph 27 of the Complaint.

INTERROGATORY NO. 6:

State whether Complaint Counsel contend that any Lawsuit or cease-and-desist letters by Respondent constituted or threatened "sham" litigation as defined by the Supreme Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

INTERROGATORY NO. 7:

Identify each Person other than the Commission and Respondent who used as a Keyword a term on which 1-800 Contacts owned a trademark for a purpose other than navigating to a website of 1-800 Contacts.

INTERROGATORY NO. 8:

Identify each Person who presently would use as a Keyword a term on which 1-800 Contacts owns a trademark, but who is restrained by an agreement with 1-800 Contacts from doing so.

INTERROGATORY NO. 9:

Identify each Person, other than 1-800 Contacts, who presently uses as a Keyword a term on which 1-800 Contacts owns a trademark or who presents paid ads or sponsored links in response to a Keyword on which 1-800 Contacts owns a trademark.

INTERROGATORY NO. 10:

Identify the dollar volume of online retail sales in the United States of contact lenses for each Person who is or was an "online seller of contact lenses" at retail for each of the years from 2002 through 2015.

INTERROGATORY NO. 11:

Identify the dollar volume of retail sales of contact lenses in the United States, other than online sales of contact lenses, in total and individually by each Person who made such sales, for each of the years 2002 through 2015.

INTERROGATORY NO. 12:

Identify each Person at 1-800 Contacts who "recognized that [1-800 Contacts] was losing sales to lower-priced online competitors" and who then "devised a plan to avoid" lowering its prices to compete with its rivals, as alleged in Paragraph 16 of the Complaint.

INTERROGATORY NO. 13:

Identify each action taken in furtherance of the "plan" alleged in Paragraph 16 of the Complaint.

INTERROGATORY NO. 14:

Identify each Settlement Agreement to which Respondent is not a Settlement Partner and, for each such Settlement Agreement, identify each Settlement Partner.

DATED: September 9, 2016

Respectfully submitted,

/s/ Stuart N. Senator

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016, I served a copy of **RESPONDENT'S FIRST SET OF INTERROGATORIES TO THE FEDERAL TRADE COMMISSION** via electronic mail on the following counsel for the Complaint:

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DATED: September 9, 2016

By: */s/ Eunice Ikemoto*
Eunice Ikemoto

EXHIBIT 2

SUBMITTED *IN CAMERA*

EXHIBIT 3

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VIA E-MAIL

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Federal Trade Commission
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Re: **In re 1-800 Contacts, Inc., FTC Docket No. 9372**

Dear Dan:

I write regarding Complaint Counsel's Objections and Responses to Respondent's First Set of Interrogatories dated October 11, 2016. Several of Complaint Counsel's Objections and Responses are improper, as detailed below. To the extent that Complaint Counsel have withheld, on the basis of these improper objections, any information that they have available, their responses are incomplete and the withheld information should be provided forthwith. *See* 16 C.F.R. § 3.35(a)(2) (parties are obligated to respond to interrogatories to the fullest extent possible under oath). Please let us know as soon as possible when Complaint Counsel are available to meet and confer regarding these deficiencies.

Interrogatories Nos. 1-5, 12, and 13

Interrogatories Nos. 1 through 5 ask Complaint Counsel to identify facts and communications relevant to different statements and allegations made in the Complaint. Interrogatories 12 and 13 ask Complaint Counsel to identify persons who had particular knowledge and took action as alleged in the Complaint. Complaint Counsel object to each of Respondent's Interrogatories Nos. 1-5, 12, and 13 as "premature and unduly burdensome

because [they] are contention interrogator[ies] and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2)." None of these interrogatories is, in fact, a contention interrogatory. Thus, that objection is not a basis on which to withhold responsive information. To the extent Complaint Counsel have withheld any responsive information that is available to them, the responses are incomplete and the withheld information should be provided forthwith.

A contention interrogatory is one in which "an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact." Fed. R. Civ. P. 33(c); 16 C.F.R. § 3.35(b)(2).[1] Contention interrogatories are those that "ask a party to: state what it contends; to state whether it makes a specified contention; to state all the facts upon which it bases a contention; to take a position, and explain or defend that position, with respect to how the law applies to facts; or to state the legal or theoretical basis for a contention." *B. Braun Med. Inc. v. Abbott Labs.*, 155 F.R.D. 525, 527 (E.D. Pa. 1994).

Requests for factual information typically are not characterized as contention interrogatories. *Dot Com Entm't Grp., Inc. v. Cyberbingo Corp.*, 237 F.R.D. 43, 45 (W.D.N.Y. 2006) (interrogatories that require a party to "provide the factual basis for [its] defense" are not contention interrogatories); *see also In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. 228, 230-31 (E.D. Pa. 2014) ("interrogatories seek facts on which Plaintiffs base their claims, such as the names of the alleged conspirators, dates of communications, and the products subject to price fixing . . . are not contention interrogatories"). Put another way, interrogatories that "simply require [a party to] disclose the evidentiary basis upon which [a legal argument in support of their claim] may be made at trial" are not contention interrogatories. *Dot Com Entertainment Group, Inc.*, 237 F.R.D. at 45 (interrogatories seeking the basis for alleged infringers' prior art defense did not involve an opinion or contention). An interrogatory can require the answering party to "employ a degree of legal analysis and reasoning" in determining which facts support a legal argument made without it transforming into a contention interrogatory. *Id.* (explaining that categorizing all requests requiring any legal analysis as contentions would "defeat the objective of liberal pretrial discovery in federal civil cases").

Similarly, "[i]nterrogatories...which seek the identification of witnesses or documents that support or contradict any of the controverted allegations in a complaint, do not fall into the category of contention interrogatories." *In re Auto. Refinishing Paint Antitrust Litig.*, MDL 1426, 2006 WL 1479819 (E.D. Pa. May 26, 2006), at *4 (citation and quotation marks omitted);

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[1] Rule 33 of the Federal Rules of Civil Procedure is considered analogous to Rule 3.35 of the Commission's Rules of Practice. *See In the Matter of McWane, Inc.*, Dkt. No. 9351, 2012 WL 1561040 (F.T.C. Apr. 16, 2012) (applying Fed. R. Civ. P. 33 as analogous to Commission Rule 3.35); *In re Aspen Technology, Inc.*, Dkt. No. 9310, 2003 WL 23010845, at *5 (F.T.C. Dec. 12, 2003) (applying the "identically worded rule 33(c) of the Federal Rules of Civil Procedure" to analyze contention interrogatories under Commission Rule 3.35(b)).

accord B. Braun Med. Inc., 155 F.R.D. at 527 (questions "seeking the identification of witnesses or documents are not contention interrogatories"). Asking for facts that support allegations in the Complaint is precisely what Respondent's interrogatories seek to do.

Interrogatory No. 1 asks Complaint Counsel to "[i]dentify each of the 'less restrictive alternatives' that was 'available to 1-800 Contacts to safeguard any legitimate interest the company may have under trademark law.'" This is a request for factual information: What less restrictive alternatives were available to 1-800 Contacts? "[T]he existence of a viable less restrictive alternative is ordinarily a question of fact." PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1913(b), at 375 (3d ed. 2010). As discussed above, such a request for information is not a contention interrogatory. *See In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. at 230-31 ("interrogatories [that] seek facts on which Plaintiffs base their claims...are not contention interrogatories"). Respondent is entitled to discovery "reasonably expected to yield information relevant to the allegations of the complaint." 16 C.F.R. § 3.31(c)(1). Indeed, you respond with what you describe as one less restrictive alternative, but you describe it as only one of the alternatives available: the less restrictive alternatives "would include" ... . If there are any other less restrictive alternatives that were available to 1-800 Contacts, please identify them. If there were no others, please correct your interrogatory answer to make that plain.

Interrogatory No. 2 asks Complaint Counsel to identify "each fact known to Complaint Counsel that supports the allegation in Paragraph 31 of the Complaint that Respondent's conduct 'had the purpose, capacity, tendency, and likely effect of restraining competition unreasonably and injuring consumers and others.'" This request specifically asks for facts pertaining to a "controverted allegation in the Complaint"; it is not a contention interrogatory. *Fischer & Porter Co. v. Tolson*, 143 F.R.D. 93, 95 (E.D. Pa. 1992). Identifying these facts does not require Complaint Counsel to engage in the detailed sort of legal analysis or reach the sort of legal conclusions that might justify characterizing this interrogatory as a contention interrogatory. If Complaint Counsel are not aware of any facts that support this allegation in the Complaint, then you should so state.

Interrogatory No. 3 asks Complaint Counsel to identify "each instance in which competition has actually been restrained as a result of any conduct challenged in the complaint" and "each Communication that describes, evidences, or comprises that restraint." The activities that allegedly restrained competition in an antitrust dispute are questions of fact. *See Gary Theatre Co. v. Columbia Pictures Corp.*, 120 F.2d 891, 894 (7th Cir. 1941) (whether "the restrictive provisions ...did in fact work an unreasonable restraint of interstate commerce to the injury of the public" is largely a question of fact). Respondent has made an even narrower request that seeks specific factual support for allegations in the Complaint in the form of events and communications. Indeed, the instances where Respondent allegedly restrained competition are precisely the pieces of information Respondent would seek at this juncture in the litigation that "provide the factual basis for" the opposing party's claims. *See Dot Com Entm't Grp., Inc*,

237 F.R.D. at 45. These are the types of questions that "do not fit within the definition of contention interrogatories." *In re Auto. Refinishing Paint.*, 2006 WL 1479819, at *4 (concluding that requests "to identify any communications regarding" a legal issue in the pleadings are not contention interrogatories). As with Interrogatory No. 2, if Complaint Counsel are not aware of any such instances or Communications, they should so state.

Interrogatories Nos. 4 and 5 ask for Complaint Counsel to identify each Communication that evidences or comprises 1-800 Contacts "aggressively polic[ing]" its agreements and "each Communication that evidences or comprises 1-800 Contacts act[ing] without regard to whether the advertisements [of its rivals] were likely to cause consumer confusion or infringed 1-800 Contacts' trademarks." These interrogatories again seek factual information in the form of communications, as your responses evidence, since you cite to various documents and testimony. As explained in reference to Interrogatory No. 3 above, they are not contention interrogatories.

In your responses to these two interrogatories you state that "These Communications include, but are not limited to, the following." This suggests that you have provided only some, but not all, of the information known to you. However, you are required to provide ***all*** of the information available to you. Complaint Counsel may not unilaterally limit the scope or completeness of the information it produces. 16 C.F.R. § 3.35(a)(2); *see also Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 616-17 (5th Cir. 1977) (respondent must provide a full answer or specifically object to any interrogatory, and an "incomplete answer is to be treated as a failure to answer" that waives further objections). Please confirm that you have provided all of the information available to you or, if you have not, then please provide forthwith any additional responsive information you possess.

Interrogatory No. 12 asks for Complaint Counsel to provide the identity of each person at 1-800 Contacts who "recognized that [1-800 Contacts] was losing sales to lower-priced online competitors" and who then "devised a plan to avoid" lowering its prices to compete with its rivals. This interrogatory sought a single list of individuals who satisfied both criteria, that is, those persons who "recognized" and "then devised." Instead of responding to the interrogatory as formulated, you provided two lists of individuals. Please provide just a single list of persons who satisfy both criteria. Please also confirm that you are not withholding any responsive information on the basis of your objections. Interrogatories seeking the identities of individuals with certain types of knowledge or who are alleged to have performed certain actions are never considered contention interrogatories. *See, e.g., In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. at 230-31 (asking for the names of alleged co-conspirators is not a contention interrogatory); *In re Auto. Refinishing Paint Antitrust Litig.*, 2006 WL 1479819, at *4 (asking to identify "any and all persons" with knowledge concerning allegations in the complaint is not a contention interrogatory).

Interrogatory No. 13 asks Complaint Counsel to "identify each action taken in furtherance of the "plan" alleged in Paragraph 16 of the Complaint." This is simply a request for

factual information. It is not a contention interrogatory. *See Dot Com Entm't Grp., Inc.*, 237 F.R.D. at 45.

In sum, please confirm that no information known to Complaint Counsel that is responsive to Interrogatories 1-5, 12, and 13 has been withheld. If any information has been withheld, please provide it forthwith as there is no basis for such information to have been withheld.

Interrogatory No. 6

Interrogatory No. 6 inquires "whether Complaint Counsel contend that any Lawsuit or cease-and-desist letters by Respondent constituted or threatened "sham" litigation as defined by the Supreme Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993)." Complaint Counsel objected to this interrogatory as "irrelevant." However, Complaint Counsel failed to support or explain this objection despite clear evidence from the pleadings that whether 1-800 Contacts' litigation was sham is squarely "relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." *See* 16 C.F.R. § 3.31(c)(1). Thus, there is no basis for your refusal to respond to Interrogatory No. 6.[2]

A party objecting to an interrogatory on the basis of relevance "is required to specifically detail the reasons why each interrogatory is irrelevant." *Schaap v. Exec. Indus., Inc.*, 130 F.R.D. 384, 386 (N.D. Ill. 1990). Relevance is "broadly construed at the discovery stage of litigation" and a request is considered relevant if it pertains "to the subject matter of the action," including the claims and defenses in the pleadings. *Miller v. Doctor's Gen. Hosp.*, 76 F.R.D. 136, 138-39 (W.D. Okla. 1977); 16 C.F.R. § 3.31(c)(1). One of 1-800 Contacts' defenses is that the challenged agreements are presumptively procompetitive because they were settlements of *bona fide* trademark litigation. *See* Answer, at p. 1 & ¶¶ 1-2, 18, 20-24; *cf. Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 57 (2d Cir. 1997). Further, 1-800 Contacts' Third Defense is that its conduct was protected by the First Amendment and the *Noerr-Pennington* doctrine. Whether the litigation and cease-and-desist letters constituted or threatened "sham" litigation is directly relevant to the scope and availability of this defense. And, whether litigation alleging trademark infringement in connection with paid search advertising was or is "sham" is relevant to Complaint Counsel's "proposed relief," 16 C.F.R. § 3.31(c)(1), which includes a request for an order "[p]rohibiting Respondent from filing or threatening to file a lawsuit against any contact lens retailer threatening trademark infringement, deceptive advertising or unfair competition that is based on the use of 1-800 Contacts' trademarks in a search advertising auction." Cmplt. at p. 9, Notice of Proposed Relief, No. 5; *see also* Answer, at p. 9, Twelfth Defense. Plainly, such relief would not be available to Complaint Counsel if such litigation was not "sham" litigation.

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[2] We understand that Complaint Counsel are considering whether to affirm in writing that they will not contend that any of these litigations or cease-and-desist letters were sham.

That Complaint Counsel have taken the position that 1-800 Contacts' defenses lack merit is immaterial to whether 1-800 Contacts may take discovery regarding them. *See, e.g., Kimbro v. I.C. Sys., Inc.*, No. 3:01 CV 1676 (DJS), 2002 WL 1816820, at *1 (D. Conn. July 22, 2002) ("Because an adjudication on the merits normally comes only *after* discovery, it is no objection to an interrogatory that it relates to a defense or claim which is insufficient in law.") (internal quotation marks omitted); *Paramount Film Distrib. Corp. v. Ram*, 15 F.R.D. 404, 405 (E.D.S.C. 1954) ("Plaintiffs have argued in their objections to the interrogatories that such a defense is not a valid defense, but so far as I am aware no motion has been made by the plaintiffs to strike this defense of the defendants."); 8 Fed. Prac. & Proc. Civ. § 2008 (3d ed.) ("Discovery is not to be denied because it relates to a claim or defense that is being challenged as insufficient.").

In sum, Complaint Counsel must respond fully and completely to Interrogatory No. 6. Complaint Counsel's objections are not well founded and do not provide a justification for not responding.

Interrogatories Nos. 10 and 11

Interrogatories Nos. 10 and 11 ask Complaint Counsel to identify the dollar volume of online retail sales and non-online retail sales in the United States, respectively, of contact lenses for each Person who made such sales for each of the years from 2002 through 2015. Complaint Counsel has objected to Interrogatories Nos. 10 and 11 on the ground that they "are premature to the extent [they] see[k] information relating to issues that may be the subject of expert testimony in this case." Although this information may be the subject of expert testimony, that does not shield Complaint Counsel from responding to the interrogatories with the information in their possession. Where an interrogatory asks for factual information and the responding party has the requisite knowledge to answer it, that party may not object on the basis that the requested information also may be the subject of expert testimony. *Atcherley v. Clark*, No. 1:12-cv-00225-LJO-DLB (PC), 2014 WL 5902134, at *2 (E.D. Cal. Nov. 12, 2014) (granting a motion to compel further response for an interrogatory where the responding party objected that "the interrogatory calls for expert testimony"). The interrogatories do not seek opinions; they seek facts. If Complaint Counsel has information responsive to these interrogatories, it must be provided; if you do not have any such information, then you should so state. 16 C.F.R. §§ 3.31(c)(1), (c)(2); 3.35(b)(1).

Interrogatory No. 14

Interrogatory No. 14 asks Complaint Counsel to identify "each Settlement Agreement to which Respondent is not a Settlement Partner and, for each such Settlement Agreement, identify each Settlement Partner." Complaint Counsel responded that it was "not, at this time aware of any Settlement Agreements *relating to contact lenses* to which Respondent is not a Settlement Partner" (emphasis added). However, this interrogatory was not limited to contact lenses or the contact lens industry. In limiting your response to Settlement Agreements "relating to contact lenses," you failed to respond to the full scope of the interrogatory. *See Dollar*, 561 F.2d at 616-

17 (a respondent must provide a full answer or specifically object, and an "incomplete answer is to be treated as a failure to answer"). Interrogatory No. 14 is not limited to contact lenses and merits a complete response. 16 C.F.R. § 3.35(a)(2).

Complaint Counsel's "Renumbering" of Respondent's Interrogatories

In addition to its general and specific objections, Complaint Counsel systematically and unilaterally "renumbered" many of Respondent's interrogatories and treated Interrogatories No. 3, 9, 11, 12, and 14 as containing multiple "discrete subparts." If correct, such treatment would expand Respondent's original fourteen (14) interrogatories into nineteen (19) interrogatories. Respondent disagrees with your designation of Interrogatories Nos. 9, 11, 12, and 14 as containing discrete subparts. If we agree with your characterization of Interrogatory No. 3, and we are willing to discuss doing so, then Respondent has used only 15 interrogatories.

Briefly, the determination of whether there an interrogatory has discrete subparts calls for "a comparison between the purported subpart and its parent question." *F.T.C. v. Think All Publ'g*, No. 4:07-cv-011, 2008 WL 687454, at *1 (E.D. Tex. Mar. 11, 2008). A discrete subpart that is severable as a second question exists "where 'the first question can be answered fully and completely without answering the second question.'" *Id.* (internal quotation marks omitted); *see also In the Matter of McWane, Inc.*, 2012 WL 1561040, at *1 ("Courts have found that a subpart is discrete when it is logically or factually independent of the question posed by the basic interrogatory").

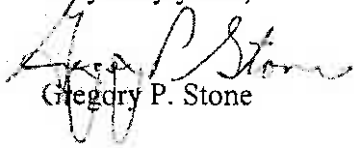
Conversely, if interrogatory subparts "are logically or factually subsumed within and necessarily related to the primary question," they are to be counted as one interrogatory. *Kendall v. GES Exposition Servs., Inc.*, 174 F.R.D. 684, 685 (D. Nev. 1997). Additionally, an interrogatory focused on a single topic or "directed at eliciting details concerning a 'common theme' should generally be considered a single question." *Swackhammer v. Sprint Corp. PCS*, 225 F.R.D. 658, 664-65 (D. Kan. 2004); *Banks v. Office of the Senate Sergeant-at-Arms*, 222 F.R.D. 7, 10 (D.D.C. 2004) (noting that subparts related to a single topic are considered part of the same interrogatory); *The Mitchell Co., Inc. v. Campus*, No. CA 07-0177-KD-C, 2008 WL 2468564, at *17 (S.D. Ala. Jun. 16, 2008) (interrogatory that asks for multiple types of costs associated with the same set of properties should be treated as one interrogatory).

Under these standards, Interrogatories Nos. 9, 11, 12, and 14 should be treated as a single interrogatory, and counted as such.

* * * *

Please let us know when you are available to meet and confer.

Very truly yours,



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cc: Counsel of Record

EXHIBIT 4

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VIA EMAIL

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Barbara Blank, Esq.
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave, NW
Washington, DC 20580

October 31, 2016

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

Dear Barbara:

Thank you for meeting with us telephonically on Friday, October 28, 2016, to discuss the matters raised in my letter of October 25, 2016, regarding Complaint Counsel's Responses to Respondent's First Set of Interrogatories. Please thank your colleagues who joined us on the call as well. I am writing to memorialize the results of our discussion. I expect that Justin Raphael will separately confirm the discussion you and he had regarding Complaint Counsel's Responses to Respondent's First Set of Requests for Admissions.

With respect to Interrogatory No. 1, you confirmed that, other than as set forth in your response to the interrogatory, Complaint Counsel is not aware of any other "less restrictive alternatives." In other words, as I understood your position, you will remove the phrase "would include" from the final paragraph of your response and replace it with the word "are" or "is."

As to Interrogatory No. 2, you declined to amend or supplement your response.

As to Interrogatory No. 3, you agreed to supplement your answer by including the actions described in your response to Interrogatory No. 13. You otherwise stated that you will not further amend or supplement your response.

As to Interrogatory Nos. 4 and 5, you assured us that you have provided us with all of the "Communications of which Complaint Counsel is aware of at the present time," and that you will substitute such language for the language "include" and "include, but are not limited to."

As to Interrogatory No. 12, we discussed, as I had explained on my October 25 letter, that you appear to have misinterpreted our inquiry. You agreed that those Persons who both "recognized" and "devised" were the six Persons listed as those who "recognized."

As to Interrogatory No. 13, you agreed to revise your response to identify all of the actions of which you presently are aware. In effect, you will replace the language "include, but are not limited to" with language that clarifies that the instances you have identified are all of the responsive actions of which you are aware.

As to Interrogatory No. 6, you agreed to redraft your responses so that they parallel the amended responses you have provided to our Request for Admissions Nos. 9 and 10. In other words, although you continue to object that the information we seek in this Interrogatory is not relevant to the issues to be tried, you agreed to confirm that you do not contend that the underlying lawsuits are or were "sham" litigation or objectively or subjectively baseless.

As to Interrogatory Nos. 10 and 11, you indicated that you would take under advisement our request that you provide us with all of the responsive information that you do have, recognizing that you may obtain additional information through discovery and from your experts.

As to Interrogatory No. 14, you assured us that you had no additional information to provide, that is, that you are not aware of any Settlement Agreements to which Respondent is not a Settlement Party, including that you are not aware of any Settlement Agreements that did not or do not relate to contact lenses.

Please let me know if I have not accurately summarized the results of our telephonic meet-and-confer.

Sincerely,

Gregory P. Stone

GPS:ros

EXHIBIT 5

SUBMITTED *IN CAMERA*

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

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

[PROPOSED] ORDER GRANTING MOTION TO COMPEL COMPLAINT COUNSEL TO ANSWER RESPONDENT'S INTERROGATORIES NOS. 10 AND 11

Having carefully considered Respondent's Motion to Compel Complaint Counsel to Answer Respondent's Interrogatories Nos. 10 and 11; Complaint Counsel's Opposition thereto; all supporting and opposing evidence; and the applicable law, it is hereby ORDERED that Respondent's Motion to Compel Complaint Counsel to Answer Respondent's Interrogatories Nos. 10 and 11is GRANTED and it is hereby ORDERED that:

1) Complaint Counsel shall fully answer Respondent's Interrogatory Nos. 10 and 11 with all responsive information currently in their possession or in the possession of the Bureau of Economics within five days of the date of this Order;

2) Complaint Counsel shall supplement its answers to Interrogatory Nos. 10 and 11 if it obtains additional responsive information and determines that their "response is in some material respect incomplete or incorrect," 16 C.F.R. § 3.31(e)(2).

ORDERED:

_____

D. Michael Chappell
Chief Administrative Law Judge

DATED:

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2016, I filed **MOTION TO COMPEL COMPLAINT COUNSEL TO ANSWER RESPONDENT'S INTERROGATORIES NOS. 10 AND 11** using the FTC's E-Filing System, which will send notification of such filing to all counsel of record as well as the following:

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

DATED: November 30, 2016

By: */s/ Justin P. Raphael*
Justin P. Raphael

CERTIFICATE FOR ELECTRONIC FILING

I hereby 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.

DATED: November 30, 2016

By: */s/ Justin P. Raphael*
Justin P. Raphael