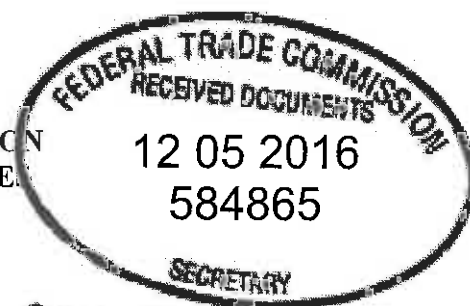


PUBLIC

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



In the Matter of

1-800 CONTACTS, INC.,
a corporation

Docket No. 17
ORIGINAL

COMPLAINT COUNSEL'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS IN RESPONSE TO
REQUESTS FOR PRODUCTION 22-25

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Dated: December 5, 2016

COMPLAINT COUNSEL'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that, pursuant to Federal Trade Commission Rule of Practice 3.38(a), Complaint Counsel hereby respectfully requests an order compelling Respondent to conduct a reasonable search for, and produce in timely fashion, documents responsive to Complaint Counsel's Requests for Production ("RFPs") 22, 23, 24, and 25. For the reasons set forth in the accompanying Memorandum, this motion should be granted.

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

Respectfully submitted,

/s/ Daniel J. Matheson

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Barbara Blank
Charles A. Loughlin
Thomas H. Brock
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Counsel Supporting the Complaint

Dated: December 5, 2016

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

In the Matter of

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

Docket No. 9372

**MEMORANDUM OF LAW IN SUPPORT OF COMPLAINT COUNSEL'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS IN RESPONSE TO
REQUESTS FOR PRODUCTION 22-25**

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Dated: December 5, 2016

Complaint Counsel respectfully requests that this Court, pursuant to Rule 3.38(a), order Respondent to conduct a reasonable search for, and produce in a timely fashion, documents responsive to Complaint Counsel’s Third Set of Requests for Production, encompassing Requests 22, 23, 24, and 25 (hereafter, “the RFPs”). Requests 22 and 24 seek production of specific regularly prepared reports that Respondent uses to track orders attributed to paid search advertising, including advertising using trademarked keywords. Requests 23 and 25 seek documents discussing or analyzing the reports responsive to Requests 22 and 24, respectively.

Respondent has produced a handful of the reports sought by the RFPs in response to previous discovery requests, which confirm that the documents sought are highly relevant to this case, as they will provide evidence regarding the impact of Respondent’s successful efforts to use the Bidding agreements challenged in this matter to suppress its competitors’ search advertising. For example, one weekly report candidly acknowledged the competitive threat posed by rivals’ search advertising. Ex. A (Matheson Decl.) Tab 1, 1-800F_00030798 at -799

[REDACTED]

[REDACTED]

[REDACTED]).

Respondent is particularly vulnerable to rivals’ ads, as its competitors offer identical products at much lower prices, and many consumers who become aware of this fact naturally buy from Respondent’s competitors. Moreover, the reports provide information on the fraction of new customers who searched for Respondent’s trademarked terms and actually made a purchase from Respondent. To the extent these reports show [REDACTED]

[REDACTED] this belies Respondent's claim that all customers who searched for its trademarks had already made up their minds to navigate to Respondent's website and make a purchase. To the contrary, such information suggests that many consumers who search for "1-800 Contacts" or similar terms had not already made up their minds to purchase from Respondent, and instead remained open to buying from rival sites, and might have done so had the Bidding Agreements not restricted the information available to them. Given the obvious importance of the documents sought, Respondent should be required to conduct a reasonable search for them and make a prompt production.

I. FACTUAL BACKGROUND

RFP 22 seeks "All regularly prepared reports referred to as "Weekly Website Overview: or "Weekly Core Website Overview" reports (for example, the reports produced at 1-800F_00024943, at -00024944-47 and 1-800F_00031674, at -00031675-77) and, for any period during which such reports were not prepared, regularly prepared reports presenting the same or substantially similar categories of information (Pursuant to Instruction No. 4, all reports must be produced with cover emails and attachments)." Ex. A Tab 4. RFP 24 seeks "All regularly prepared reports referred to as "Digital Commerce Dashboard" reports (for example, the report produced at 1-800F_00047609) and, for any period during which such reports were not prepared, regularly prepared reports presenting the same or substantially similar categories of information (Pursuant to Instruction No. 4, all reports must be produced with cover emails and attachments)." *Id.* RFPs 23 and 25 seek all documents discussing the reports responsive to RFPs 22 and 24. *Id.*

¹ [REDACTED] See Ex. A Tab 3 at 2 ([REDACTED]).

Complaint Counsel served the RFPs on October 19. *Id.* On November 18, 2016, Respondent served its Objections and Responses. *See* Ex. A Tab 5. The parties met and conferred on Monday, November 21, 2016. It became clear during that meet and confer that, despite receiving the RFPs more than a month earlier, Respondent's counsel had performed no investigation that might facilitate a productive discussion. For example, Respondent's counsel had failed to investigate:

- the time periods during which Respondent prepared the particular reports that the RFPs identified by name;
- which custodians might be in possession of the reports or whether the reports were kept systematically in a central location such as a particular shared folder;
- whether any regularly prepared reports with different titles had preceded or succeeded the reports that the RFPs identified by name; or
- the volume of emails and documents that referred to these reports by name.²

Nonetheless, during the meet and confer, Complaint Counsel proposed several approaches that Respondent could employ, if necessary, to reduce the burden of review. *See* Ex. A Tab 6. For example, Complaint Counsel suggested limiting the searches to the files of particular custodians and/or, for RFPs 23 and 25, particular file types. In addition, Complaint Counsel clarified that RFPs 23 and 25 seek only documents that explicitly discuss the reports in question, and proposed narrow search terms that would identify only those documents. Complaint Counsel also requested that Respondent produce responsive documents by December 9, the date on which it has promised to complete its production of documents sought in

² *See* Ex. A Tab 6. (D. Matheson email to G. Sergi (Nov. 23, 2016)). Respondent's lack of investigation was all the more surprising because Complaint Counsel had already informed Respondent that at least some of the documents sought by the RFPs were also responsive to Complaint Counsel's First Set of Document Requests. *Id.*

Complaint Counsel's previous motion to compel. *See* Complaint Counsel's Notice of Withdrawal of Motion to Compel (Nov. 21, 2016) at 2.

The next day, Respondent stated that, regarding RFPs 22 and 24, it had identified one responsive predecessor report and would use the name of that report along with the names of the other identified reports as search terms. *See* Ex. A Tab 6. However, Respondent insisted on running the search term only on a set of documents that it had previously agreed to collect in response to *other* document requests. *See id.*³ Complaint Counsel stated that if Respondent could provide assurances that this search method is likely to produce a complete set of responsive reports, then Respondent's proposal was acceptable. *Id.* (requesting "a complete set of the weekly reports . . . to the extent that such materials exist and can be collected without restoring unduly burdensome emergency backup tapes."). Respondent has not provided such assurances.

Regarding RFPs 23 and 25, Respondent claims that a response "would result in the need to review about 20,000 additional documents."⁴ Respondent complains that such a review would be unduly burdensome, despite Complaint Counsel's offer to use the names of the reports as search terms so that only documents expressly mentioning the reports would have to be reviewed and produced, and despite the fact that Complaint Counsel both solicited and provided ways to

³ Despite the very restrictive nature of this search, Respondent could not commit to produce all these files by December 9, nor did it commit to any other, later date for completing this production. *See* Ex. A Tab 6.

⁴ It is not clear whether Respondent's reference to the need to review 20,000 "additional" documents in order to respond to RFPs 23 and 25 means that the names of the reports appear in 20,000 documents *in addition to* the documents Respondent will review in response to RFPs 22 and 24 (that is, the reports themselves and any documents attached to them, such as cover emails). If the 20,000 documents overlap with the set of documents responsive to RFPs 22 and 24, then Respondent is overstating the marginal burden of RFPs 23 and 25. If this is not the case, it suggests that Respondent has already accomplished the task of segregating the documents responsive to RFPs 22 and 24, and should have no trouble producing them by December 9.

target the search for responsive and relevant materials as precisely as possible.⁵ Rather than proposing an alternative, however, Respondent refuses to make any production at all, claiming that the “burden and expense of reviewing that number of documents far outweighs any conceivable benefit, and is grossly disproportionate to any possible need or relevance of those documents.” Ex. A Tab 6 at 3.

II. ARGUMENT

As explained below, each RFP at issue seeks information that “may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” 16 C.F.R. § 3.31(c)(1). Given the clear relevance, the scope of the search and production Complaint Counsel seeks is eminently reasonable. The minimal burden imposed is entirely proportional given that the reports produced to date, which went directly to Respondent’s CEO and its other most senior executives, contain both important data and candid admissions regarding the anticompetitive impact of the Bidding Agreements. *See supra* at 1-2.

Respondent provides no basis for its refusal to conduct a reasonable search or for its refusal to discuss in good faith reasonable approaches to the search, even after Complaint Counsel suggested several such approaches. Indeed, Respondent objected to the Requests as

⁵ Complaint Counsel suggested several methods for reducing Respondent’s burdens, such as limiting the search to certain file types, limiting the search to certain custodians, or even foregoing human responsiveness review and simply producing the documents that include search terms, subject to a privilege filter. *See* Ex. A Tab 6. Likewise, in past disputes Complaint Counsel has agreed to limitations such as restricting searches to certain electronic documents, excluding custodians from some searches, and foregoing privilege logs for certain categories of communications. *See* Ex. A Tab 7 (D. Matheson email to G. Vincent et. al. (Nov. 21, 2016)). But despite Complaint Counsel’s constructive suggestions and demonstrated willingness to work with Respondent, Respondent has ignored all suggestions, provided no ideas of its own, and simply refused to make any production whatsoever in response to RFPs 23 and 25. *See* Ex. A Tab 6.

unduly burdensome without first determining (in the month that had passed since service of the Requests) even the most basic information about its alleged burdens, such as the approximate volume of documents at issue, the time periods during which the reports were prepared, or which particular custodians would be most likely to have responsive files. For example, during the meet and confer, Respondent's counsel claimed to be completely at a loss as to how to even begin to inquire about the existence of any regularly prepared reports that preceded or succeeded the reports identified in the Requests. This investigation could have and should have been performed a month earlier. To allow Respondent to avoid a timely and sufficient production because of the delay it created would only reward its dilatory and obstructive approach to these document requests.

A. RFP Nos. 22 and 24

Both RFP 22 and RFP 24 seek reports that track the sources of Respondent's internet traffic and internet-based orders and report on, [REDACTED]
[REDACTED]
[REDACTED]. See Ex. A Tabs 1, 2, 3. These reports discuss, among other things, [REDACTED]
[REDACTED]. As a result, the reports are directly relevant to the impact of competitive search advertising on Respondent's commercial performance, as compared to Respondent's performance when consumers are denied information about Respondent's rivals' prices.

For RFPs 22 and 24, Respondent has proposed to gather and produce only those responsive reports that are included in the documents that Respondent already agreed to collect in response to other document requests. Ex. A Tab 6. Respondent refused to provide any assurances, however, that such a limited search would provide Complaint Counsel with the

complete set of reports it requested. As such, Respondent's proposal is inadequate. Accordingly, Complaint Counsel requests an Order compelling Respondent to produce a complete set of the reports specifically identified in the RFPs, as well as the "Conversion Dashboard" report identified by Respondent's counsel on November 22. *See id.* In addition, Complaint Counsel's Proposed Order requests a complete set of all "Web Channel Trend" reports, as Respondent's documents confirm that this was the name previously given to the Digital Commerce Dashboard report. *See Ex. A Tab 2* ([REDACTED] [REDACTED] [REDACTED]).

B. RFP Nos. 23 and 25

RFPs 23 and 25 seek all documents relating to the weekly tracking reports discussed above, *i.e.*, RFPs 22 and 24. RFPs 23 and 25 are targeted at critical materials, because while data regarding search advertising is highly relevant to Complaint Counsel's allegations, Respondent's executives' discussions of and reactions to the reports are likely to provide additional relevant information. Indeed, executives' discussions of how to respond to the reports, and the competitive strategies such discussions will reveal, are likely to prove at least as illuminating and relevant to the Complaint's allegations as the weekly reports themselves.

During the meet and confer, Respondent's counsel claimed that searching for all documents "relating to" the specified reports would be extremely burdensome. To address that concern, Complaint Counsel proposed that Respondent run electronic search terms using the names of the reports at issue so that only those documents that explicitly discuss the relevant reports need be reviewed and produced. Given that accommodation, any suggestion that these RFPs are overbroad or lack reasonable particularity because they seek all documents "relating

to” specified topics is misplaced. Such a concern is inapposite where electronic search terms will necessarily ensure that the documents reviewed in response to each RFP will refer to the relevant topic on the face of the document. This is precisely the approach that this Court approved in *In re North Texas Specialty Physicians* when it denied a motion to quash with respect to “documents that specifically mention or reference” the respondent in that matter. 2004 FTC LEXIS 19, *12. Complaint Counsel’s proposal to run reasonable search terms distinguishes this discovery request from those courts find overbroad and insufficiently particular. *Cf.* Docket No. 9372, Order on Respondent’s Motion for a Rule 3.36 Subpoena (Oct. 28, 2016) at 6.

CONCLUSION

Complaint Counsel’s Motion should be granted with respect to each of these RFPs, because each RFP is narrowly tailored, imposes minimal burdens on Respondent, and seeks documents clearly relevant to the Complaint’s allegations and Respondent’s defenses, *see* 16 C.F.R. § 3.31(c)(1).

Dated: December 5, 2016

Respectfully Submitted: /s/ Daniel J. Matheson
Daniel J. Matheson
Kathleen M. Clair
Thomas H. Brock
Gustav P. Chiarello
Joshua B. Gray
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Counsel Supporting the Complaint

STATEMENT CONCERNING MEET AND CONFER

The undersigned counsel certifies that Complaint Counsel conferred with Respondent's counsel in a good faith effort to resolve by agreement the issues raised by Respondent's Objections and Responses to Complaint Counsel's Third Set of Requests for Production. On October 21, 2016, Complaint Counsel (Dan Matheson and Kathleen Clair) and Respondent's Counsel (Gregory Sergi) communicated by telephone. On October 22 and October 23, Complaint Counsel (Dan Matheson) and Respondent's Counsel (Gregory Sergi) communicated by email. The parties have been unable to reach an agreement on the issues raised in the attached motion.

Dated: December 5, 2016

Respectfully submitted,

/s/ Daniel J. Matheson

Daniel J. Matheson
Federal Trade Commission
400 7th Street SW
Washington, DC 20024

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

In the Matter of

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

Docket No. 9372

[PROPOSED] ORDER

Having carefully considered Complaint Counsel's Motion to Compel Production of Documents in Response to Requests for Production 22-25, Respondent 1-800 Contacts, Inc.'s Opposition thereto, and all supporting and opposing declarations and other evidence, and the applicable law, it is hereby ORDERED that Complaint Counsel's Motion to Compel Production of Documents in Response to Requests for Production 22-25 is GRANTED and it is hereby ORDERED that, Respondent shall:

- 1) In response to Requests for Production 22 and 24, no later than December 9, 2016, produce a complete set of all regularly prepared reports referred to as "Weekly Website Overview" reports, "Weekly Core Website Overview" reports, "Digital Commerce Dashboard" reports, and "Conversion Dashboard" reports that exist in any location (except unrestored backup tapes) within Respondent's possession, custody, or control, along with all electronic parent and attachment files;
- 2) In response to Requests for Production 23 and 25 no later than December 16, 2016,:
 - a. apply the search terms "Weekly Website Overview," "Weekly Core Website Overview," "Digital Commerce Dashboard," "Conversion Dashboard," and "Web Channel Trend" to:

- i. all files that Respondent collected but did not produce in connection with FTC investigation number 141-0200, from the twenty (20) individual custodians and three (3) departmental custodians identified in the October 19, 2016 email from Garth Vincent to Daniel Matheson titled "1-800 Contacts custodial searches," for the period from January 1, 2004 through the date that each individual or departmental custodian's files were collected, and
 - ii. the e-mail and other electronic documents within the custodial files of each Brian Bethers, Tim Roush, Laura Schmidt, Brady Roundy, and Kevin Hutchings that were sent, received, created, or last modified between the date that the custodian's files were collected in connection with Respondent's document production in response to FTC investigation number 141-0200 and the date of this Order.
- b. produce all resulting non-privileged documents that contain one or more of those search terms.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

Ex. A

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

**In the Matter of
1-800 CONTACTS, INC.,
a corporation**

Docket No. 9372

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 to Compel Production of Documents in Response to Requests for Production 22-25.
3. Tab 1 is a true and correct copy of a document produced by Respondent, summarizing and attaching a Core Website Overview report, bearing Bates numbers 1-800F_00030798 through 1-800F_00030802.
4. Tab 2 is a true and correct copy of a cover email attaching a Digital Commerce Dashboard report, produced by Respondent bearing Bates numbers 1-800F_00047679 through 1-800F_00047680.

5. Tab 3 is a true and correct copy of the first worksheet of the Digital Commerce Dashboard report attached to Tab 2. The Digital Commerce Dashboard was produced by Respondent as an Excel file in native format, bearing Bates number 1-800F__00047681.
6. Tab 4 is a true and correct copy of Complaint Counsel's Third Set of Requests for Production.
7. Tab 5 is a true and correct copy of Respondent's Objections and Responses to Complaint Counsel's Third Set of Requests for Production, dated November 17, 2016, and the cover email sent by Counsel for Respondent sent on November 18, 2016.
8. Tab 6 is a true and correct copy of an email I sent on November 23, 2016 to Gregory Sergi, Counsel for Respondent.
9. Tab 7 is a true and correct copy of an email I sent on November 21, 2016 to Garth Vincent, Counsel for Respondent.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 5th day of December, 2016, at Washington, DC.

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Counsel Supporting the Complaint

TAB 1

REDACTED IN ENTIRETY

TAB 2

REDACTED IN ENTIRETY

TAB 3

REDACTED IN ENTIRETY

TAB 4

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

In the Matter of

1-800 CONTACTS, INC.,
a corporation

Docket No. 9372

COMPLAINT COUNSEL'S THIRD SET OF REQUESTS
FOR PRODUCTION ISSUED TO 1-800 CONTACTS, INC.

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

22. All regularly prepared reports referred to as "Weekly Website Overview" or "Weekly Core Website Overview" reports (for example, the reports produced at 1-800F_00024943, at -00024944-47 and 1-800F_00031674, at -00031675-77) and, for any period during which such reports were not prepared, regularly prepared reports presenting the same or substantially similar categories of information. (Pursuant to Instruction No. 4, all reports must be produced with cover emails and attachments.)

23. All documents Relating to reports responsive to Request for Production No. 22.

24. All regularly prepared reports referred to as "Digital Commerce Dashboard" reports (for example, the report produced at 1-800F_00047609) and, for any period during which such reports were not prepared, regularly prepared reports presenting the same or substantially similar categories of information. (Pursuant to Instruction No. 4, all reports must be produced with cover emails and attachments.)

25. All documents Relating to reports responsive to Request for Production No. 24.

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

DEFINITIONS

1. The terms "1-800 Contacts," "1-800," "Company" or "Respondent" mean Respondent 1-800 Contacts, Inc., its directors, officers, trustees, employees, attorneys, agents, accountants, consultants, and representatives, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, consultants, and representatives of its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, and partnerships and joint ventures.
2. The term "Computer Files" includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Respondent should produce Documents that exist in machine-readable form, including Documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off company premises. If the Respondent believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with Complaint Counsel's need for Documents and information, you are encouraged to discuss a possible modification to this instruction with the Complaint Counsel identified on the last page of this request. Complaint Counsel will consider modifying this instruction to:
 - a. exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Respondent;
 - b. limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain specifications identified by Complaint Counsel; or
 - c. include other proposals consistent with Commission policy and the facts of the case.
3. The term "Containing" means containing, describing, or interpreting in whole or in part.
4. The terms "Discuss" or "Discussing" mean in whole or in part constituting, Containing, describing, analyzing, explaining, or addressing the designated subject matter, regardless of the length of the treatment or detail of analysis of the subject matter, but not merely referring to the designated subject matter without elaboration. A document that "Discusses" another document includes the other document itself.
5. The term "Documents" means all Computer Files and written, recorded, and graphic materials of every kind in the possession, custody, or control of the Respondent. The term

“Documents” includes, without limitation: electronic mail messages; electronic correspondence and drafts of documents; metadata and other bibliographic or historical data describing or Relating to documents created, revised, or distributed on computer systems; copies of documents that are not identical duplicates of the originals in that Person’s files; and copies of documents the originals of which are not in the possession, custody, or control of the Respondent.

Unless otherwise specified, the term “Documents” excludes (a) bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely transactional nature; (b) architectural Plans and engineering blueprints; and (c) documents solely Relating to environmental, tax, human resources, OSHA, or ERISA issues.

6. The terms “each,” “any,” and “all” mean “each and every.”
7. The term “Person” includes the Company, and means any natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or any other organization or entity engaged in commerce.
8. The terms “Relate” or “Relating to” mean in whole or in part Discussing, constituting, commenting, Containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to.
9. The term “Technology Assisted Review” means any process that utilizes a computer algorithm to limit the number of potentially responsive documents subject to a manual review. A keyword search of documents with no further automated processing is not a Technology Assisted Review.

INSTRUCTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 12. Any questions you have relating to the scope or meaning of anything in subpoena or suggestions for possible modifications thereto should be directed to Dan Matheson at (202) 326-2075, dmatheson@ftc.gov. The response to the request shall be addressed to the attention of Dan Matheson, Federal Trade Commission, 400 7th Street SW, Washington, D.C. 20024, and delivered between 8:30 a.m. and 5:00 p.m. on any business day.

Dated: October 19, 2016

Respectfully Submitted:

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

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on OCTOBER 19, 2016 I served COMPLAINT COUNSEL'S SECOND SET OF REQUESTS FOR PRODUCTION via electronic mail on the following counsel for Respondents:

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

Date: October 19, 2016

By: [/s/Dan Matheson](#)
Dan Matheson

TAB 5

Matheson, Daniel

From: Sergi, Gregory <gregory.sergi@mto.com>
Sent: Friday, November 18, 2016 12:06 AM
To: Matheson, Daniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.; Blank, Barbara; Chiarello, Gustav; Clair, Kathleen; Gray, Joshua Barton; Green, Geoffrey; Hopkin, Nathaniel; Loughlin, Chuck; Matheson, Daniel; Slaiman, Charlotte; Taylor, Mark
Cc: ~800CON_FTC_ATTYS
Subject: RE: Dkt. 9372: Responses and Objections to Complaint Counsel's Third Set of Requests for Production
Attachments: Respondent 1-800 Contacts' Responses and Objections to Complaint Counsel's Third Set of Requests for Production (Nov. 17, 2016).pdf

Counsel,

Please see the attached: Respondent 1-800 Contacts' Responses and Objections to Complaint Counsel's Third Set of Requests for Production.

Best regards,
Greg Sergi

Gregory M. Sergi | Munger, Tolles & Olson LLP
355 South Grand Avenue | Los Angeles, CA 90071
Tel: 213.683.9261 | Fax: 213.683.5161 | Gregory.Sergi@mto.com | www.mto.com

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From: Matheson, Daniel [<mailto:dmatheson@ftc.gov>]
Sent: Wednesday, October 19, 2016 2:26 PM
To: ~800CON_FTC_ATTYS
Cc: BC-1040-1800-Search Ad Team-DL
Subject: Dkt. 9372: Complaint Counsel's Third Set of Requests for Production

Counsel,

Attached please find Complaint Counsel's Third Set of Requests for Production in the above-referenced matter.

Respectfully,

Dan

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

In the Matter of

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

Docket No. 9372

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

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

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

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

information omitted from any response to these Requests for Production as a result of mistake, error, oversight, or inadvertence.

GENERAL OBJECTIONS

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

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

Inc., its directors, officers, and employees, and its subsidiaries, and their directors, officers, and employees.

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

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

SPECIFIC RESPONSES AND OBJECTIONS

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

REQUEST FOR PRODUCTION NO. 22:

All regularly prepared reports referred to as “Weekly Website Overview” or “Weekly Core Website Overview” reports (for example, the reports produced at 1-800F_00024943, at -00024944-47 and 1-800F_00031674, at -00031675-77) and, for any period during which such reports were not prepared, regularly prepared reports presenting the same or substantially similar categories of information. (Pursuant to Instruction No. 4, all reports must be produced with cover emails and attachments.)

RESPONSE TO REQUEST FOR PRODUCTION NO. 22:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party’s claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence. 1-800 Contacts further objects to this Request as vague and ambiguous in seeking documents “presenting the same or substantially similar categories of information,” which is not specified in any manner.

Subject to the foregoing objections, 1-800 Contacts will produce responsive, non-privileged documents, if any such documents exist and have not been produced already in the prior investigation (FTC No. 141-0200), that constitute regularly prepared reports labeled “Weekly Website Overview” or “Weekly Core Website Overview” to the extent such documents can be identified through a reasonable search, applying those specific phrases as search terms.

REQUEST FOR PRODUCTION NO. 23:

All documents Relating to reports responsive to Request for Production No. 22.

RESPONSE TO REQUEST FOR PRODUCTION NO. 23:

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

1-800 Contacts is willing to meet and confer regarding this Request if Complaint Counsel is able to narrow the scope to a search that would be reasonable. 1-800 Contacts is otherwise not willing to produce any additional documents in response to this Request.

REQUEST FOR PRODUCTION NO. 24:

All regularly prepared reports referred to as “Digital Commerce Dashboard” reports (for example, the report produced at 1-800F_00047609) and, for any period during which such reports were not prepared, regularly prepared reports presenting the same or substantially similar categories of information. (Pursuant to Instruction No. 4, all reports must be produced with cover emails and attachments.)

RESPONSE TO REQUEST FOR PRODUCTION NO. 24:

1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party’s claim or defenses and is not reasonably calculated to lead to the discovery of admissible evidence. 1-800 Contacts further objects to this Request as vague and ambiguous in seeking documents “presenting the same or substantially similar categories of information,” which is not specified in any manner.

Subject to the foregoing objections, 1-800 Contacts will produce responsive, non-privileged documents, if any such documents exist and have not been produced already in the prior investigation (FTC No. 141-0200), that constitute regularly prepared reports labeled “Digital Commerce Dashboard” to the extent such documents can be identified through a reasonable search, applying that specific phrase as a search term.

REQUEST FOR PRODUCTION NO. 25:

All documents Relating to reports responsive to Request for Production No. 24.

RESPONSE TO REQUEST FOR PRODUCTION NO. 25:

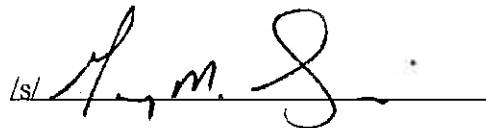
1-800 Contacts objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is not relevant to any party’s claim or defenses and is

not reasonably calculated to lead to the discovery of admissible evidence. 1-800 Contacts further objects to this Request as vague and ambiguous.

1-800 Contacts is willing to meet and confer regarding this Request if Complaint Counsel is able to narrow the scope to a search that would be reasonable. 1-800 Contacts is otherwise not willing to produce any additional documents in response to this Request.

DATED: November 17, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read "G.P. Stone", is written over a horizontal line. The signature is cursive and somewhat stylized.

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.raaphael@mto.com)

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

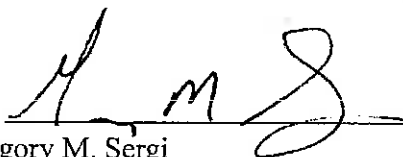
CERTIFICATE OF SERVICE

I hereby certify that on November 17, I served a copy of **RESPONDENT 1-800 CONTACTS, INC.'S RESPONSES AND OBJECTIONS TO COMPLAINT COUNSEL'S THIRD SET OF REQUESTS FOR PRODUCTION** via electronic mail on the following counsel supporting the Complaint:

Thomas H. Brock, *tbrock@ftc.gov*
Barbara Blank, *bblank@ftc.gov*
Gustav Chiarello, *gchiarello@ftc.gov*
Kathleen Clair, *kclair@ftc.gov*
Joshua B. Gray, *jbgray@ftc.gov*
Geoffrey Green, *ggreen@ftc.gov*
Nathaniel Hopkin, *nhopkin@ftc.gov*
Charles A. Loughlin, *cloughlin@ftc.gov*
Daniel Matheson, *dmatheson@ftc.gov*
Charlotte Slaiman, *cslaiman@ftc.gov*
Mark Taylor, *mtaylor@ftc.gov*
BC-1040-1800-SearchAdTeam-DL@ftc.gov

DATED: November 17, 2016

By:



Gregory M. Sergi

TAB 6

Matheson, Daniel

From: Matheson, Daniel
Sent: Wednesday, November 23, 2016 1:49 PM
To: 'Sergi, Gregory'
Cc: Vincent, Garth; Clark, Lisa; BC-1040-1800-Search Ad Team-DL
Subject: RE: Docket 9372 - Complaint Counsel's Third Set of RFPs

Greg,

Your proposal is not acceptable.

Complaint Counsel served its Third Set of Requests for Production (“RFPs”) on October 19, comprising RFPs 22, 23, 24, and 25. These RFPs targeted two categories of weekly reports, and documents discussing those reports. As we informed you, many if not all of these weekly reports were responsive to our first set of RFPs. *See, e.g.*, D. Matheson Ltr. to G. Stone and G. Sergi (Oct. 18, 2016) at 3-4 (noting that the reports sought by RFP No. 22 included “detailed spreadsheets responsive to Specification 17 [contained in Complaint Counsel’s First Set of RFPs].”). In addition, many if not all of these weekly reports are responsive to the Civil Investigative Demand issued in January of 2015, demonstrated by the fact that (as you readily admit), you produced an incomplete set of the reports in response to the CID.

On November 18 you served your Objections to the RFPs. We immediately requested a meet and confer. *See* D. Matheson email to G. Sergi (Nov. 18, 2016). On November 21 we met and conferred regarding your Objections. You clarified that you had performed no inquiry to determine which, if any, documents were responsive to our Requests for Production. Specifically, you clarified that during the 31 days between the service of our RFPs and your Objections:

- you performed no investigation to ascertain the time periods during which Respondent prepared the reports we identified by name in our RFPs;
- you performed no investigation to determine whether reports with different titles had preceded or succeeded the reports we identified by name (the minimal burden and time required for this inquiry is only underscored by the fact that, after our meet and confer, you were in fact able to identify such a predecessor report *the very next day*);
- you performed no investigation to determine which custodians might be in possession of the reports, and/or whether the reports might kept systematically on a central shared folder;
- you performed no investigation to determine the volume of emails and documents that referred to these reports by name.

As I informed you, Complaint Counsel is troubled by your failure to make any inquiry in response to our RFPs until the last possible moment. This conduct is especially concerning in light of the fact that in response to our First and Second sets of RFPs, your refusal to search for and produce readily available and clearly responsive documents forced Complaint Counsel to involve the Court by filing a Motion to Compel, at which point you agreed to produce essentially everything we asked for in the first place. Complaint Counsel hopes that you will not repeat this unproductive dilatory tactic in this instance. In particular, we informed you on November 21 that we sought only documents that explicitly discuss or refer to the weekly reports at issue or the contents of those reports. Your email of November 22 claims that this is not a productive suggestion, without providing any alternative suggestion that might identify responsive documents. In addition, we informed you on November 21 that we are open to proposals that might reduce the number of documents that would have to be reviewed by, *inter alia*, limiting the searches to particular custodians (and/or, for RFPs 23 and 25, particular file types), or

running a privilege screen and producing documents responsive to search terms subject to a strong clawback agreement. You have made no such proposals.

Regarding RFPs 22 and 24, Complaint Counsel will move to compel unless you commit to producing a complete set of the weekly reports (including attachments and cover emails) identified by name in our RFPs, as well as a complete set of the "Conversion Dashboard" reports identified in your email, to the extent that such materials exist and can be collected without restoring unduly burdensome emergency backup tapes. The search you propose may in fact result in a complete set of such reports. But if it does not, we believe you are obligated to conduct an inquiry to determine whether any missing reports are reasonably accessible – for example, they may be stored in a central location from which they can readily be pulled. And with respect to "Conversion Dashboard" reports, there may be additional locations/custodians outside of the already-collected group from which a complete set of such reports could be easily obtained.

Complaint Counsel will move to compel responses to RFPs 23 and 25 unless you either:

- (1) agree to run as search terms the titles of the reports identified by name in our RFPs, as well as the term "Conversion Dashboard," over the Prior Collection and the Updated Collection (as those terms are used in the Proposed Order accompanying Complaint Counsel's November 17 Motion to Compel), review the results, and produce documents that discuss or analyze a final copy of one of the weekly relevant reports or/and discuss or analyze the content of the final copy of one of the weekly reports; OR
- (2) propose a different method that will identify the ordinary-course emails discussing the final versions of the relevant reports or/and the content of the final copy of one of the weekly reports.

Based on our discussion of November 21 and your email of November 22, which refused to provide any compromise proposal regarding RFPs 23 and 25, we understand that we are at impasse on these issues. Please confirm today that you agree to produce responsive documents, or inform us that we are not at impasse because you have a compromise that you will propose. Otherwise, we are prepared to file a motion to compel immediately.

Respectfully,

Dan

From: Sergi, Gregory [mailto:gregory.sergi@mto.com]
Sent: Tuesday, November 22, 2016 7:17 PM
To: Matheson, Daniel; Clair, Kathleen
Cc: Vincent, Garth; Clark, Lisa
Subject: Docket 9372 - Complaint Counsel's Third Set of RFPs

Dan/Katie,

Following up on our discussion yesterday regarding Complaint Counsel's Third Set of RFPs,

In accordance with our Responses and Objections, we are willing to search for additional copies or versions of the reports titled "Weekly Website Overview," "Weekly Core Website Overview," and "Digital Commerce Dashboard," using those phrases as search terms in the filename, title, and attachment fields of the documents that we have previously agreed to collect. In addition, we understand that prior to the "Digital Commerce Dashboard" report, certain employees at 1-800 Contacts generated a regular report titled the "Conversion Dashboard" that provided similar information and appears to have been created as far back as 2004. We are willing to include "Conversion Dashboard" within the same set of search parameters described above. Within those

parameters we would produce responsive, non-privileged versions of those reports, along with any cover emails or other family members for the document.

I will note that many versions of these reports were produced to the FTC long ago in the underlying investigation. In addition, 1-800 Contacts' prior document productions have included a massive amount and wide variety of other reports, metrics, and data relating to similar issues. Nevertheless, we are willing to search for the reports specified above, which will require substantial time and expense given the frequency of those reports and the time period you have asked us to cover. While we are willing to try to produce as many of these documents as possible before December 9, we are not able to commit to completing this part of the production by that date, particularly in light of all the other documents and data that we have agreed to produce by that date.

In our Responses and Objections to these RFPs, we objected to searching for "all documents relating" to the reports mentioned above or other unspecified reports that may have been created (RFPs 23 & 25). We stated, however, that we were willing to meet and confer on those if Complaint Counsel would be able to narrow the scope of those requests to a search that would be reasonable. During our meet and confer yesterday, you did not provide any meaningful attempt to narrow the scope of those requests. *See, e.g.*, Docket No. 9372, Order on Respondent's Motion for Issuance of a Subpoena Under Rule 3.36, at 6 (Oct. 28, 2016) ("[S]ubpoena requests that seek documents 'concerning' or 'relating to' have been found to lack the 'reasonable particularity' required."). You suggested that "relating to" could be interpreted as "discussing," which we do not find to be a productive suggestion at this stage. *See id.* You also suggested that we could apply the search terms proposed in our Responses and Objections to any of the text in all of the documents that we have collected. That approach, we have now determined, would result in the need to review about 20,000 additional documents. We believe that the extreme burden and expense of reviewing that number of documents far outweighs any conceivable benefit, and is grossly disproportionate to any possible need or relevance of those documents.

Best regards,
Greg Sergi

Gregory M. Sergi | Munger, Tolles & Olson LLP
355 South Grand Avenue | Los Angeles, CA 90071
Tel: 213.683.9261 | Fax: 213.683.5161 | Gregory.Sergi@mto.com | www.mto.com

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TAB 7

Matheson, Daniel

From: Matheson, Daniel
Sent: Monday, November 21, 2016 9:24 AM
To: 'Vincent, Garth'; Clark, Lisa
Cc: Clair, Kathleen
Subject: Terms for withdrawal of Motion to Compel

Garth,

Per our conversation on Friday afternoon, I include below the Hitwise-related search terms that we believe may be appropriate. I accepted the changes in the redline you sent, except I added Google and Bing to Number 2 as discussed, and I added the limiting terms to the Hitwise reports in 6. If these searches appear to generate an undue number of hits, please let us know and we can revisit. We will withdraw our motion this morning, noting in the recitals that you have committed to produce documents by December 9. As we discussed, we understand that you will provide a rolling production, to the extent practicable.

In addition, you confirmed that your client will not withdraw its Confidentiality designation over its Org charts. As I communicated, we believe that materials should only be designated Confidential under the protective order if it is competitively sensitive. The more material that is Confidential the more difficulty we will have come trial. We would welcome any proposals to identify materials over which confidentiality can be withdrawn.

Regards,

Dan

- 1) Refreshes its collection of the **email files only** (not stand-alone electronic documents or paper files) of **Brian Bethers, Tim Roush, Laura Schmidt, Brady Roundy, and Kevin Hutchings** that were sent or received between the date that that custodian's files were collected in connection with Respondent's document production in response to FTC investigation number 141-0200 and the date of the refresh collection ("Updated Collection");
- 2) Applies the search terms "**negative keyword**," "**negative keywords**," and "**NKW**" to not only its prior collected documents but also to the Updated Collection; reviews the resulting documents; and produces all non-privileged documents related to correspondence related to Negative Keywords between (1) 1-800 Contacts and any other retailer or advertiser of contact lenses, and (2) between 1-800 Contacts and Google and/or Bing, including but not limited to non-privileged documents that constitute correspondence between 1-800 Contacts and any other such person related to Negative Keywords;
- 3) Searches not only its prior collected documents but also the Updated Collection for **the domain names used in the email addresses of each of the sellers of contact lenses listed on page 4** of the October 26, 2016 letter from Kathleen Clair to Garth Vincent and Greg Sergi, and within the results, applies each of **the search terms identified on page 3** of the October 26, 2016 letter from Kathleen Clair to Garth Vincent and Greg Sergi; reviews the resulting documents; and produces all correspondence between any employee, agent, or representative of 1-800 Contacts and any employee, agent, or representative of any other seller of contact lenses regarding search advertising or trademark usage;

- 4) Performs a search not only of its prior collected documents but also the Updated Collection to identify any document in which the word **“price” appears within three words of the word “visibility”**; reviews the resulting documents, and produces all non-privileged documents that analyze the effect of increased price visibility on 1-800 Contacts’ sales, pricing, or profitability;
- 5) Performs a search of its prior collected documents and the Updated Collection to identify any document in which the phrase **“price match” appears within ten words of any of the following terms** (with the asterisk (*) representing a root expander): review*, chang*, modif*, alter*, switch*, updat*, adjust*, **amend*, different, stop*, start*, “go back,” increas*, decreas*, add*, remov*, includ*, and exclud***; reviews the resulting documents; and produces all non-privileged documents that concern any actual or considered modifications to the Price Match Policy and/or the reasons therefor;
- 6) Searches not only its prior collected documents but also the Updated Collection for the term **“Hitwise”**; reviews the resulting documents; and produces all non-privileged documents analyzing or evaluating Hitwise reports, with the following modification:

So long as Respondent produces all Hitwise reports themselves, its search, review, and production of other documents analyzing or evaluating Hitwise reports need only include (i) PowerPoint documents or reports, or email that contains both the term Hitwise and one of the following terms: compet*, market*, share*, diver*, switch*, threat*, (ii) from the files of Brian Bethers, Tim Roush, Laura Schmidt, Brady Roundy, Kevin Hutchings, Joan Blackwood, Brandon Dansie, Rick Galan, Bryce Craven, Jordan Judd, and Amy Larson.

- 7) Produces transactional data as described on page 5 of Garth Vincent’s November 9, 2016 letter to Daniel Matheson (that is, with personally identifiable information such as customer names and addresses removed, and at the product code level rather than the UPC level), for the period from January 1, 2004 through present;

Provided that:

- (A) Respondent completes its productions of all files in response to Complaint Counsel’s First and Second Sets of Requests for Production (including the productions described above), by December 9, 2016; and
- (B) Respondent need not include in a privilege log any communications located within the Updated Collection that were sent to or received from Respondent’s outside counsel, except that any such communications that were sent to or received from any third parties (that is, any parties other than Respondent and its outside counsel) or include within them any communications sent to or received from any third parties, must be reviewed for responsiveness and—to the extent any privilege can be claimed—logged; and
- (C) Respondent need not include in a privilege log any communications located within the Updated Collection that are authored by Respondent’s in-house counsel, except that any such communications that were sent to or received from any third parties (that is, any parties other than Respondent and its outside counsel) or include within them any communications sent to or received from any third parties, must be reviewed for responsiveness and—to the extent any privilege can be claimed—logged; and
- (D) Respondent need not include in a privilege log any communications located within the Updated Collection for which the only recipients are Respondent’s in-house counsel (that is, no non-attorney employees also received the communication), except that any such communications that were sent to or received from any third parties (that is, any parties other than Respondent and its outside counsel) or

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include within them any communications sent to or received from any third parties, must be reviewed for responsiveness and—to the extent any privilege can be claimed—logged.

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2016, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

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

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

Dated: December 5, 2016

By: /s/ Daniel J. Matheson
Attorney

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

December 5, 2016

By: /s/ Daniel J. Matheson
Attorney