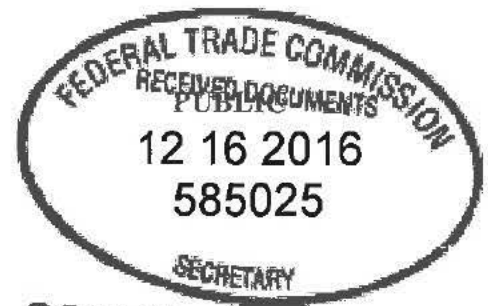


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



ORIGINAL

In the Matter of

1-800 Contacts, Inc.,
a corporation,

Respondent.

DOCKET NO. 9372

**ORDER GRANTING COMPLAINT COUNSEL'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

I.

On November 29, 2016, Federal Trade Commission ("FTC") Complaint Counsel filed a Motion to Compel Production of Documents in Response to Requests for Production 22-25 ("Motion"). On December 7, 2016, Respondent 1-800-Contacts, Inc. filed an Opposition to the Motion ("Opposition"). By Order issued December 8, 2016, Complaint Counsel was directed to file a Reply. Complaint Counsel filed its Reply Brief on December 13, 2016. For the reasons set forth below, Complaint Counsel's Motion is GRANTED.

II.

Based on the exhibits submitted regarding the Motion and the representations of the parties, Complaint Counsel served Respondent with its Third Set of Requests for Production of Documents encompassing Requests 22, 23, 24, and 25 (hereafter, "RFPs"), on October 19, 2016. Respondent served Complaint Counsel with Respondent's Responses and Objections on November 18, 2016. Thereafter, the parties met and conferred. The parties were unable to resolve their dispute and Complaint Counsel's Motion followed.

Complaint Counsel files its Motion pursuant to FTC Rule 3.38, 16 C.F.R. § 3.38 ("A party may apply by motion to the Administrative Law Judge for an order compelling . . . discovery, including . . . a production of documents . . . under §3.37."). Under Rule 3.38, an order compelling the requested discovery shall be entered, unless the Administrative Law Judge determines that the objections to the requested discovery are justified. Respondent's arguments opposing Complaint Counsel's RFPs are evaluated against the scope of discovery set forth in Rule 3.31, which provides in pertinent part: "Parties 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. . . . Information may not be withheld from discovery on grounds that the information will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 16 C.F.R. § 3.31(c)(1). Even if requested discovery is deemed relevant under Rule 3.31(c)(1), discovery can be limited if, among other reasons, “[t]he burden and expense of the proposed discovery on a party or third party outweigh its likely benefit.” 16 C.F.R. § 3.31(c)(2)(iii).

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).” Motion Ex. A.

RFP 24 seeks: “All regularly prepared reports referred to as ‘Digital Commerce Dashboard’¹ 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).” Motion Ex. A.

RFPs 23 and 25 seek all documents discussing the reports responsive to RFPs 22 and 24. Motion Ex. A. Complaint Counsel, as a result of the parties’ negotiations and for purposes of its Motion, has narrowed the scope of RFPs 23 and 25 to request only those documents expressly mentioning the reports named in RFPs 22 and 24 in the body of the document, based on a search of (1) the existing collection and (2) emails and electronic documents beyond the existing collection for certain custodians. Motion at 3; *see* Proposed Order at paragraph 2.

III.

A. Relevance

Complaint Counsel asserts that the RFPs seek production of specific, regularly prepared reports that Respondent uses to track orders attributed to paid search advertising, including advertising using trademarked keywords and the production of documents relating to these reports. Complaint Counsel argues that the documents sought are highly relevant to this case, as they will provide evidence regarding the impact of Respondent’s efforts to use the bidding agreements challenged in this matter to suppress its competitors’ search advertising and will provide information on the fraction of new customers who searched for Respondent’s trademarked terms and made a purchase from Respondent. Complaint Counsel further argues

¹ RFP 24 seeks only reports referred to as “Digital Commerce Dashboard.” In the parties’ negotiations, Respondent informed Complaint Counsel that prior to the “Digital Commerce Dashboard” report, certain employees generated a regular report titled the “Conversion Dashboard” that provided similar information and that Respondent is willing to include “Conversion Dashboard” in its search for documents responsive to RFP 24.

that documents relating to the reports are likely to reveal executives' discussions of and reactions to the reports and competitive strategies.

Respondent does not challenge the relevance of the RFPs. Instead, Respondent asserts that the RFPs would impose costs and burdens on Respondent that far outweigh any likely benefits.

Based on the foregoing, Complaint Counsel has demonstrated that the RFPs seek 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 Respondent. *See* Docket 9372, Order on Respondent's Motion for Issuance of a Subpoena Under Rule 3.36 (October 28, 2016) (summarizing the allegations of the Complaint and defenses thereto).

B. Burden

I. RFPs 22 and 24

Respondent asserts that it is unduly burdensome to require it to search for responsive documents beyond the documents it has already collected for purposes of responding to prior document requests from Complaint Counsel. Respondent agreed to search within this existing collection of documents and states that the result of that search yielded 3,500 responsive documents that it expects to produce "within a few days." Respondent argues that Complaint Counsel's demand for "assurances" that this search will yield a "complete set" of all requested reports, including all versions of each such report, for each of the agreed 12-year relevant time period, regardless of the burden associated with finding all such documents, is unreasonable. Respondent asserts that searching for and reviewing the 3,500 documents obtained from the search of Respondent's existing collection required approximately 75-80 hours of time. *See* Declaration of Lisa Clark, p. 2.

Complaint Counsel asserts that it is entitled to a complete set of the requested reports, and that there is no valid basis for Respondent's limiting its search to Respondent's existing collection, given that Respondent has provided no assurances that Respondent's limited search is likely to produce a complete set of responsive reports. In addition, Complaint Counsel argues that RFPs 22 and 24 seek specific identified documents of the sort that are centrally located or held by a given custodian or custodians and that Respondent has not provided any evidence to suggest that these requests would require searching numerous custodians.

Respondent has not demonstrated that the burden and expense of searching beyond its existing collection of documents exceed the likely benefit. As noted above, the requested documents are relevant. While Respondent has offered evidence of the time that was required to search for and review documents from the existing collection, Respondent has not provided any evidence of the alleged time or cost of searching for or reviewing documents outside the existing collection for the specific, identified reports requested by RFPs 22 and 24. *See* Declaration of Lisa Clark (attached to Opposition) ¶¶ 6, 7. Given that the universe of responsive documents that will be disclosed by a complete search is unknown, there is presently no basis for concluding that the time or the cost to review and produce such documents would be unduly burdensome.

Accordingly, Respondent's objection to producing a complete set of documents in response to RFPs 22 and 24 is rejected.

2. RFPs 23 and 25

Respondent argues that, even as narrowed by Complaint Counsel, Respondent will be required to search for any document that mentions, anywhere in the text of the document, one of the four weekly reports and will force Respondent to incur the burden and expense of reviewing thousands of additional documents. Respondent asserts that such a search will yield many irrelevant, non-substantive documents, such as task lists, reminders to pay invoices, and human resource records noting employees' roles with respect to the reports.

Complaint Counsel asserts that it has narrowed the scope of RFPs 23 and 25 in its proposed order, to request only documents that expressly mention the reports at issue in the text of the document and to require a search limited to (1) the existing collection, and (2) beyond the existing collection, only for email and other electronic documents within the files of certain custodians (*see* Proposed Order at paragraph 2). Complaint Counsel argues that Respondent has not demonstrated that this limited search and production would be unduly burdensome.

In limiting the requested documents to those that expressly mention the reports, the requests target discovery of Respondent's own statements, which are likely to be relevant. Respondent's assertion of burden rests on the vague assertion that the limited search will yield "thousands" of documents (Declaration of Lisa Clark ¶ 7). This is not sufficient to conclude that the burden of the complying with the requested discovery outweighs the likely benefit. Furthermore, as narrowed pursuant to Complaint Counsel's proposed order, the requested discovery is distinguishable from discovery requests that have been found to be overbroad and insufficiently particular. *Cf.* Docket 9372, Order on Respondent's Motion for Issuance of a Subpoena Under Rule 3.36 (October 28, 2016). For all the foregoing reasons, Respondent has not demonstrated that the burden and expense of responding to RFPs 23 and 25, as narrowed by Complaint Counsel, outweigh the likely benefit.

IV.

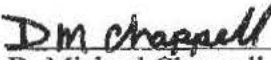
Complaint Counsel has demonstrated the relevance of the RFPs and has also demonstrated that the RFPs, as narrowed, are not unduly burdensome. Respondent has not demonstrated that its objections to the requested discovery, as narrowed, are justified. Accordingly, Complaint Counsel's Motion is GRANTED.

It is hereby ORDERED that Respondent shall:

1) In response to Requests for Production 22 and 24, no later than December 23, 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 January 4, 2017:
- a. apply the search terms “Weekly Website Overview,” “Weekly Core Website Overview,” “Digital Commerce Dashboard,” “Conversion Dashboard,” and “Web Channel Trend”² 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 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: December 16, 2016

² Respondent states that the “Web Channel Trend” report was not mentioned in any of the RFPs or identified by Complaint Counsel as part of the RFPs. Complaint Counsel states that Respondent’s documents show that Web Channel Trend was the name previously given to the Digital Commerce Dashboard report, attaching Exhibit A Tab 2 (“attached is this week’s Web Channel Trend report that we are now calling the ‘Digital Commerce Dashboard’ because it contains a new dashboard with visuals/charts.”). Respondent does not dispute that Web Channel Trend was the name previously given to the Digital Commerce Dashboard report. Based on the foregoing, this Order includes “Web Channel Trend” among the required search terms.

Notice of Electronic Service

I hereby certify that on December 16, 2016, I filed an electronic copy of the foregoing Order Granting Complaint Counsel's Motion to Compel Production of Documents (Date Correction), with:

D. Michael Chappell
Chief Administrative Law Judge
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Washington, DC, 20580

Donald Clark
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I hereby certify that on December 16, 2016, I served via E-Service an electronic copy of the foregoing Order Granting Complaint Counsel's Motion to Compel Production of Documents (Date Correction), upon:

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