

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



ORIGINAL

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In the Matter of)
)
1-800 CONTACTS, INC.,)
a corporation,)
)
Respondent)
_____)

DOCKET NO. 9372

**COMPLAINT COUNSEL’S MOTION FOR LEAVE TO FILE A REPLY BRIEF TO
RESPONDENT’S OPPOSITION TO COMPLAINT COUNSEL’S MOTION *IN LIMINE*
TO PRECLUDE THE TESTIMONY OF DR. NEIL WIELOCH**

Pursuant to Rule 3.22 of the Rules of Practice for Adjudicative Proceedings, Complaint Counsel respectfully moves for leave to file the attached brief in reply to Respondent’s Opposition to Complaint Counsel’s Motion *In Limine* to Preclude the Testimony of Dr. Neil Wieloch. In support of its motion for leave, Complaint Counsel states as follows:

1. As explained in more detail in Complaint Counsel’s proposed Reply, Complaint Counsel seeks to draw the Court’s attention to an erroneous statement in Respondent’s March 28, 2017 Opposition to Complaint Counsel’s Motion *In Limine* to Preclude the Testimony of Dr. Neil Wieloch, specifically, that Dr. Wieloch was identified by Respondent as a “custodian” in this litigation.

2. Complaint Counsel respectfully submits that this issue could not have been raised in Complaint Counsel’s principal brief, filed on March 22, 2017, and that it should not go un rebutted, as it goes to the heart of Complaint Counsel’s motion.

3. Complaint Counsel’s proposed Reply brief complies with the timing and word count requirements set forth in Rule 3.22(c)-(d).

For these reasons, as set forth in the proposed Reply, Complaint Counsel respectfully requests leave to file its Reply pursuant to Rule 3.22.

Dated: March 29, 2017

Respectfully Submitted,

/s/ Daniel Matheson

Daniel J. Matheson
Geoffrey M. Green
Barbara Blank
Charles A. Loughlin
Kathleen M. Clair
Thomas H. Brock
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Counsel Supporting the Complaint

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
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**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL’S MOTION FOR LEAVE
TO FILE REPLY TO RESPONDENT’S OPPOSITION TO
COMPLAINT COUNSEL’S MOTION *IN LIMINE* TO PRECLUDE THE TESTIMONY
OF DR. NEIL WIELOCH**

On March 29, 2017, Complaint Counsel filed a Motion for Leave to File a Reply to Respondent’s Opposition to Complaint Counsel’s Motion *In Limine* to Preclude the Testimony of Dr. Neil Wieloch. Complaint Counsel’s Motion is GRANTED. IT IS HEREBY ORDERED that Complaint Counsel has leave to file its Reply to Respondent’s Opposition to Complaint Counsel’s Motion *In Limine* to Preclude the Testimony of Dr. Neil Wieloch.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

**UNITED STATES OF AMERICA
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**COMPLAINT COUNSEL’S REPLY TO RESPONDENT’S OPPOSITION TO
COMPLAINT COUNSEL’S MOTION *IN LIMINE* TO PRECLUDE THE TESTIMONY
OF DR. NEIL WIELOCH**

Complaint Counsel respectfully submits this reply brief in order to address an erroneous statement in Respondent’s March 28, 2017 Opposition to Complaint Counsel’s Motion *In Limine* to Preclude the Testimony of Dr. Neil Wieloch.

Respondent’s Opposition represents that “Respondent identified Dr. Wieloch as a custodian.” (Opp. at 2). This is incorrect. The 1-800 Contacts custodians whose files were searched for responsive materials in this matter were specifically identified by Respondent in an October 19, 2016 email to Complaint Counsel, which lists 20 individual custodians and three centralized servers. *See* Ex. A. Dr. Wieloch was not identified by Respondent. Complaint Counsel and Respondent’s counsel agreed that Respondent would “apply[] search terms to and review[] . . . the files of each of the 20 individual custodians and 3 centralized servers listed in [Respondent’s] October 19, 2016 email....” *See* Motion *In Limine*, Ex. E at 1.

In its Opposition, Respondent does not assert that it conducted a search of Dr. Wieloch’s files for materials responsive to the document requests in this litigation, as would have been required had Dr. Wieloch been identified as a custodian. Rather, Respondent produced a handful

of PowerPoint presentations from Dr. Wieloch's files. The selection criteria is unknown, but presumably these documents further Respondent's litigation objectives. In any event, Respondent did not produce any of the ordinary-course business documents, such as emails and other documents authored by Dr. Wieloch, that would have allowed Complaint Counsel to probe the conclusions or the methodology of the studies included in the presentations. Nor did Respondent produce any drafts of or internal correspondence relating to the the PowerPoint presentations, which would have provided useful information for deposition or cross examination. Selectively producing a handful of documents from one individual, without affirmatively identifying that individual as a custodian or performing the required search of that person's files, does not make that person a "custodian."

Moreover, in its document production, Respondent misidentified the "custodian" for these files, as Respondent concedes in its Opposition, because it misspelled his name as Neil "Weiloch," rather than the correctly spelled "Wieloch." Opp. at 2 ("the custodian was identified as "Neil Weiloch" [sic]).¹ Due to Respondent's error, Complaint Counsel was unable to identify a single document from the files of Dr. Wieloch prior to Dr. Wieloch's deposition. *See* Ex. B (Declaration of Mika Ikeda). Indeed, until Complaint Counsel received Respondent's Opposition on March 28, 2017, Complaint Counsel was wholly unaware that a handful of the 40,000 documents produced by Respondent were attributed to "Neil Weiloch" [sic], as Complaint Counsel had no reason to search its databases for mis-spellings of Dr. Wieloch's name. While Respondent's misidentification of the source of the handful of documents attributed to "Neil Weiloch" was surely innocent, this does nothing to diminish the prejudice Complaint Counsel suffered from being unable to prepare to depose Dr. Wieloch.

¹ Moreover, the Declaration of Lisa Clark, attached to Respondent's Opposition, variously refers to Dr. Wieloch as "Neil Weiloch" [sic] (¶¶ 2, 5, 8, 10), and "Neil Wieloch" (¶¶ 7, 10)).

Respondent's other arguments in opposition to Complaint Counsel's Motion *In Limine* are without merit. Respondent argues that Dr. Wieloch testified regarding work he had done that was "relevant to the noticed topic" of Complaint Counsel's Rule 3.33(c)(1) notice. Opp. at 2. The topic of Complaint Counsel's 3.33(c) notice for which Dr. Wieloch appeared sought testimony regarding the effect of UPPs on 1-800 Contacts' financial performance. Respondent's opposition brief expands that topic to include *any* effect of UPPs "on 1-800 Contacts." Opp. at 4. Yet Dr. Wieloch's testimony fails to satisfy even this expansive reading of the relevant topic. As Respondent admits, Respondent elicited testimony from Dr. Wieloch regarding surveys he conducted to study the effect of UPPs on 1-800's *customers*, not on 1-800 Contacts. *Id.* Indeed, Dr. Wieloch testified that the only two documents that he reviewed in preparation for the deposition did *not* address the effect of UPPs on 1-800 Contacts. *See* Motion Ex. B (Wieloch Dep. Tr. 23:22-24:5) (Q. "So what I'm trying to understand is what -- what did the -- the two reports that you reviewed to prepare for today's deposition, what did those two reports reveal about the impact of UPP on 1-800 Contacts actually as opposed to the impact on customers' perceptions?" A. "As opposed to the impact on customers' perceptions? It wasn't anything directly beyond the impact on customers' perception.").

Respondent also contends that correspondence between the parties prior to Dr. Wieloch's deposition shows that the parties agreed that Dr. Wieloch would also be deposed in his individual capacity. Opp. at 3. This is incorrect. As described in Complaint Counsel's motion, any informal representation by email did not constitute fair notice that Dr. Wieloch would later appear on 1-800's fact witness list. *See* Motion at 6. Respondent never amended that list to include Dr. Wieloch.

CONCLUSION

For the reasons stated above, Complaint Counsel's Motion *In Limine* to Preclude the Testimony of Dr. Neil Wieloch should be granted.

Dated: March 29, 2017

Respectfully Submitted,

/s/ Daniel Matheson

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Barbara Blank
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Counsel Supporting the Complaint

EXHIBIT A

From: Vincent, Garth <Garth.Vincent@mto.com>
Sent: Wednesday, October 19, 2016 9:13 PM
To: Matheson, Daniel
Cc: Sergi, Gregory
Subject: 1-800 Contacts custodial searches

Dan,

As a follow up to our call earlier today regarding 1-800 Contacts' previous document collections and productions, below is the list of 20 custodians from whom we previously collected and produced documents. As I mentioned in our call, although we actually agreed with FTC Staff to collect from only a subset of this list, we ultimately chose to go beyond that agreement and collect and produce documents from each of the custodians listed below.

- Brian Bethers
- Joan Blackwood
- Nathan Blair
- Bryce Craven
- Brandon Dansie
- Jonathan Coon
- Rich Galan
- John Graham
- Kevin Hutchings
- Alan Hwang
- Jordan Judd
- Amy Larson
- Kevin McCallum
- Jay Magure
- Roy Montclair (in-house counsel)
- Brady Roundy
- Tim Roush
- Laura Schmidt
- Dave Zeidner (in-house counsel)
- Joe Zeidner (in-house counsel including personal email)

In addition to the above list of 20 custodians, and also beyond what we agreed with FTC Staff to collect and search previously, we also included in the scope of our prior searches the following sources:

- Marketing Server
- Corporate Server
- Legal Server

I will plan on speaking with you on Friday about 1-800 Contacts' responses to Complaint Counsel's first and second requests for production.

Garth

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EXHIBIT B

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
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In the Matter of)	
)	
1-800 CONTACTS, INC.,)	
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Respondent)	

DECLARATION OF MIKA IKEDA

I, Mika Ikeda, declare as follows:

1. I am an attorney at the Federal Trade Commission and Complaint Counsel in this proceeding.
2. 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.
3. On December 28, 2016, Complaint Counsel noticed a corporate deposition of Respondent, pursuant to Rule 3.33(c)(1).
4. On January 9, 2017, Respondent identified “Neil Wieloch” as a corporate witness designated to testify as to topic 9 of Complaint Counsel’s Rule 3.33(c)(1) deposition notice.
5. On January 18, 2017, I took the deposition of Dr. Neil Wieloch.
6. In preparation for the January 18, 2017 deposition of Dr. Neil Wieloch, I searched for relevant documents in Complaint Counsel’s document databases.
7. Complaint Counsel’s database of all documents received from Respondent during this litigation (“Part 3 Database”) contains a total of 11,509 documents. Each document

produced by Respondent contains metadata that provides additional information about the document, such as the custodian, alternate custodian, and author of the document.

There are no documents in the Part 3 database listing “Neil Wieloch” as a custodian.

There are no documents in the Part 3 database listing “Neil Wieloch” as an alternate custodian. There are no documents in the Part 3 database listing “Neil Wieloch” as the author of the document.

8. Complaint Counsel’s database of all documents received from Respondent during the investigation leading to this litigation (“Part 2 Database”) contains 28,568 documents. Each document produced by Respondent contains metadata that provides additional information about the document, such as the custodian, alternate custodian, and author of the document. There are no documents in the Part 2 database listing “Neil Wieloch” as a custodian. There are no documents in the Part 2 database listing “Neil Wieloch” as an alternate custodian. There are no documents in the Part 2 database listing “Neil Wieloch” as the author of the document.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 29th day of March, 2017 in Washington, DC.

/s/ Mika Ikeda

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Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2017, 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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Counsel for Respondent 1-800 Contacts, Inc.

Dated: March 29, 2017

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.

March 29, 2017

By: /s/ Daniel J. Matheson
Attorney