PUBLIC

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

In the Matter of

1-800 CONTACTS, INC.,
a corporation,

Respondent

DOCKET NO. 9372

COMPLAINT COUNSEL'S
MOTION TO COMPEL RESPONSE TO INTERROGATORY NO. 8

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Dated: December 22, 2016

COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONSE TO INTERROGATORY NO. 8

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 provide a full and complete response to Complaint Counsel's Interrogatory No. 8. 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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BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of **1-800 CONTACTS, INC.,** **a corporation,** **Respondent**	**DOCKET NO. 9372**

MEMORANDUM OF LAW IN SUPPORT OF COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONSE TO INTERROGATORY NO. 8

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Dated: December 22, 2016

Complaint Counsel respectfully requests that this Court, pursuant to Rule 3.38(a), order 1-800 Contacts ("Respondent") to provide a full and complete response to Interrogatory No. 8, which seeks the identity of the advertisements that 1-800 identified as allegedly infringing in communications with rivals, the process by which 1-800 determined that those advertisements were infringing, and the factual basis for those determinations.

The principal question presented by this Motion is whether 1-800 may respond by referring Complaint Counsel to its document production generally, including files not yet produced. Complaint Counsel submits that the answer to this question is no and Respondent must either provide a narrative response or identify with reasonable specificity the documents from which its answer may be ascertained.

Further, Respondent claims privilege over any responsive information not included in the ill-defined set of documents to which Respondent referred in its response, including unspecified materials in existing and forthcoming productions. While it is Respondent's right to assert appropriate privilege claims, a blanket claim of privilege over an unspecified set of materials leaves Complaint Counsel and this Court with no way to know what portion of the response Respondent purports to be providing and what portion it is withholding. Complaint Counsel is unable to ascertain Respondent's answer to the interrogatory based on the information provided.

The information sought by Interrogatory 8 is indisputably relevant: Respondent justifies its restraints because the advertisements at issue purportedly infringed its trademark rights. The interrogatory is also reasonable in scope, seeking this information only about the allegedly infringing advertisements that Respondent previously *specifically identified* in communications with rivals—rather than about *all* allegedly infringing advertisements. Thus, Respondent should be ordered to provide a full response to Interrogatory 8 to ensure that the parties are able to

identify to the Court at least some of the advertisements that supposedly infringed Respondent's trademark rights and therefore supposedly justify the challenged restraints.

I. FACTUAL BACKGROUND

Complaint Counsel served Interrogatory 8 on September 8. *See* Ex. A (Declaration of Kathleen Clair) Tab 1. Thirty-three days later, 1-800 provided its Responses and Objections. Ex. A-Tab 2. On October 17, 2016, the parties met and conferred, and Complaint Counsel expressed its position that "[r]eferring in general terms to a voluminous document production fails to 'specify the records from which the response may be derived or ascertained' as required by Rule 3.35(c)." Ex. A-Tab 3 (Oct. 18, 2016 D. Matheson Ltr. to G. Stone, et. al. at 5-6). On October 21, the parties met and conferred again regarding 1-800's interrogatory responses, including Complaint Counsel's concerns regarding "the specificity with which [1-800] identif[ied] the records from which a response can be derived" for Interrogatory 8, among others. *See* Ex. A-Tab 4 (Oct. 21, 2016 D. Matheson Email to G. Stone, et al.). Respondent promised to provide amended responses that would "endeavor to address all of these issues." *Id.* (G. Stone Email). Yet in its October 31, 2016 Amended Responses, the substance of the Interrogatory 8 response was unchanged. Ex. A-Tab 5 at 20-21. On November 7, the parties met and conferred about Respondent's Amended Responses, and Complaint Counsel reiterated its concerns about their specificity and confirmed that if further specificity were not provided, Complaint Counsel would seek relief from the Court. Respondent's further amended responses, served November 22, 2016, provided no further specificity in response to Interrogatory 8. Ex. A-Tab 6.

II. ARGUMENT

A. Interrogatory 8 Seeks Relevant Information

Interrogatory 8 seeks information relevant to 1-800's anticipated defense that the challenged agreements block confusing advertisements, and to Complaint Counsel's allegations that one "purpose . . . and likely effect" of the challenged agreements was to "[d]epriv[e] consumers of truthful and non-misleading information about the prices, products, and services offered by online sellers of contact lenses." (Compl. ¶¶ 31-32). Specifically, the interrogatory seeks the identification of advertisements 1-800 determined were sufficiently convincing examples of trademark infringement to merit being pointed out to rivals and the facts underlying those determinations, as well as a description of the process used to make those determinations—that is, what steps were taken, by whom, and in what order, in determining that the advertisements should be challenged as trademark infringement. This information is relevant to understanding the extent to which 1-800 targeted competitors' advertisements to squelch competition, rather than as a result of its genuine belief that any challenged advertisement created consumer confusion. The relevance of this information is underscored by other evidence showing that 1-800's communications and agreements with competitors to restrict advertising were, at their core, business arrangements, designed to exclude competitive threats. *E.g.*, Ex. A-Tab 7 ({ [redacted] }).

B. 1-800's Response Lacks the Specificity Required by Rule 3.35(c)

In response to Interrogatory 8, 1-800 invoked Rule 3.35(c), identifying "{ }" Ex. A-Tab 6, at 23 (emphasis added).

By parroting back the language of the interrogatory, this response essentially tells Complaint Counsel that the documents containing responsive information are the documents that contain responsive information. It does nothing more than refer Complaint Counsel to the entirety of Respondent's document production. This is not sufficient.

If a party wishes to respond to an interrogatory by "specify[ing] the records from which the answer may be derived or ascertained," it must first meet two prerequisites—the answer to the interrogatory must be able to "be derived or ascertained from the records of the party . . . and the burden of deriving or ascertaining the answer [must be] substantially the same for the party serving the interrogatory as for the party served"—and it must include in its specification of records "***sufficient detail*** to permit the interrogating party to identify ***readily*** the ***individual documents*** from which the answer may be ascertained." Rule 3.35(c) (emphasis added). Even where those prerequisites are met, the responding party must still specify the records in "sufficient detail." The plain language of Rule 3.35(c) requires both.[1]

[1] Sufficient specificity as to the documents relied upon is necessary to evaluate whether Respondent has answered the interrogatory "fully," as is required. *See, e.g.*, *In re ECM BioFilms, Inc.*, Docket No. 9358, 2014 FTC LEXIS

Courts applying Rule 3.35(c)'s federal court analog, Federal Rule of Civil Procedure 33(d), have held that non-specific references to voluminous document collections constitute "an abuse of the option." *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 325-26 (N.D. Ill. 2005).[2] In *Sulfuric Acid*, a defendant responded to an interrogatory regarding information about certain meetings and communications by referring plaintiffs to its document production generally and claiming that the burdens of deriving the answers from the production would be substantially the same for each party. *Id.* at 325. The court held that this response "did not discharge [defendant's] obligations under Fed.R.Civ.P. 33(d)" because under the Rule, "the burden of deriving or ascertaining the answer must be substantially equivalent ***and*** there must be a sufficiently detailed specification of the records to permit the interrogating party to find the document as readily as can the party served. ***These are not optional requirements***." *Id.* at 325-26 (emphasis added). To rely on documents to respond to interrogatories, the responding party must "specify, by category and location, the records from which the answers to the interrogatories can be derived." *Id.* at 326.

While 1-800 identified, as examples, rough categories of the types of documents that likely contain responsive information, its use of the word "including" undoes any specificity that might have otherwise been provided by the identification of categories. The response thus fails to sufficiently specify responsive records, even by category or location. *See, e.g., Rainbow Pioneer*

171, at *9-12 (Feb. 4, 2014) (examining document specified under Rule 3.35(c) response to determine sufficiency of response).

[2] *See also, e.g., In re G–I Holdings, Inc.,* 218 F.R.D. 428, 438 (D.N.J. 2003) ("The responding party may not avoid answers by imposing on the interrogating party a mass of business records from which the answers cannot be ascertained by a person unfamiliar with them . . ."); *Pulsecard, Inc. v. Discover Card Servs.,* 168 F.R.D. 295, 305 (D. Kan. 1996) ("Under the guise of Fed.R.Civ.P. 33(d) defendants may not simply refer generically to past or future production of documents. They must identify in their answers to the interrogatories specifically which documents contain the answer. Otherwise they must completely answer the interrogatories without referring to the documents."); *Walt Disney Co. v. DeFabiis,* 168 F.R.D. 281, 284 (C.D. Cal. 1996) (interrogatory responses that "did not specify where in the records the answer could be found" were "not in sufficient detail to comply with Rule 33(d)").

No. 44-18-04A v. Hawaii-Nevada Inv. Corp., 711 F.2d 902, 906 (9th Cir. 1983) (a response that "merely recited that the answers could be found 'in partnership books of account, banking accounts, records, computer printouts, ledgers and other documents" "did not specify where in the records the answers could be found"). Indeed, responses far more specific than Respondent's have been ruled insufficient for Rule 33(d). *E.g.*, *United States ex rel. Landis v. Tailwind Sports Corp.*, No. 1:10-cv-00976, 2016 WL 2944648, at *2 (D.D.C. 2016) (list of several hundred specific documents held insufficiently specific as an interrogatory response).

Even to the extent some lack of specificity might be permitted in a preliminary response, the need for 1-800 to provide a complete response prior to trial is acute in this case. [3] While Respondent referenced all documents in its productions as potentially containing responsive information, Complaint Counsel has no way to know which of these documents (or others) contain advertisements that were identified as infringing in ***oral*** communications or any written communications lost or deleted years ago, nor any way to know which documents, if any, provide the process for or facts supporting the determinations that rival advertisements were infringing.

C. Respondent's Lack of Specificity Renders its Privilege Claim Inscrutable

After identifying, in essence, its entire production as containing information responsive to the interrogatory, 1-800's response went on to contend that

[3] *See Cambridge Elecs. Corp. v. MGA Elecs., Inc.*, 227 F.R.D. 313, 320-23 (C.D. Cal. 2004) (holding that "litigants have a continuing duty 'seasonably' to supplement all interrogatory responses"; barring plaintiff from offering at trial evidence responsive to an interrogatory that was "[n]either [provided] in its original interrogatory answers, nor in any . . . supplement"). Respondent has shown no inclination to supplement its response. It has not done so through three amendments to its responses, and there is no reason that information about its prior communications and decision-making process was not fully available at the time of its initial response.

}" Ex. A-Tab 6 at 24 (emphasis added).

"Such a blanket claim of privilege is improper." *In re Shopping Carts Antitrust Litig.*, 95 F.R.D. 299, 305 (S.D.N.Y. 1982). In *Shopping Carts*, defendants objected to each of several interrogatories "***to the extent*** that it attempts to compel them to disclose the contents of confidential communications between attorney and client or among attorneys engaged in the joint defense." *Id.* (emphasis added). The court rejected this approach. "The extent to which any conversation or document is privileged must be determined on an individual case-by-case basis and not based on a blanket assertion by the party claiming the privilege. The burden is on the party claiming the privilege to present the underlying circumstances or facts demonstrating the existence of the privilege to the court." *Id.* 1-800 has not come close to doing so here. Most notably, it has not even made clear *what* it is withholding, much less the basis for withholding it. This is inappropriate, particularly because Interrogatory 8 seeks nonprivileged information beyond that which could be reasonably expected to be located in "{ }" and "{ }." *See* Ex. A-Tab 6, at 23.

For instance, describing the *process* used to determine that the advertisements were allegedly infringing need not reveal counsel's thought processes or mental impressions. The response may be that a particular individual within the company ran a particular search and sent all resulting advertisements to outside counsel, who sent each of those advertisements, appended to cease-and-desist letters, to each pertinent advertiser. Alternately, if not every single

advertisement that appeared as a result of those searches was sent to other retailers, the description of the process would identify at what stage(s) and by whom decisions were made about which advertisers and which particular advertisements to include. Such a high-level description need not reveal privileged information. Yet 1-800's response makes it unclear whether and to what extent 1-800 is withholding this information as privileged and the basis for any privilege claim.

Nor can 1-800 ignore that the interrogatory seeks information known by 1-800 itself, including numerous non-legal personnel. Contrary to 1-800's assertion, no privilege protects the "{ }" itself—as opposed to its attorneys. *See* Ex. A-Tab 6, at 24. As the *Shopping Carts* court also pointed out, the interrogatories there "were directed at the corporate defendants and not to their attorneys" and "'[t]he privilege . . . does not protect disclosure of the underlying facts by those who communicated with the attorney.'" *Id.* at 306 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981)). It held: "[t]o the extent that these interrogatories sought facts or information within the knowledge of the defendants and not facts or information obtained by the defendants solely from their attorneys, the interrogatories were proper and must be answered." *Id.* Likewise, here, responsive information within the knowledge of 1-800 itself not obtained *solely* from its attorneys must be provided—and identified with specificity.

CONCLUSION

For the reasons stated above, Complaint Counsel's Motion to Compel should be granted.

Respectfully submitted,

/s/ Daniel J. Matheson

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Counsel Supporting the Complaint

Dated: December 22, 2016

STATEMENT REGARDING 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 First Set of Interrogatories. On October 17, 2016 and October 21, 2016, Complaint Counsel (Dan Matheson, Barbara Blank, and Kathleen Clair) and Respondent's Counsel (Gregory Stone and Gregory Sergi) communicated by telephone. On October 18, 2016 and October 21, 2016, Compliant Counsel (Dan Matheson) and Respondent's Counsel (Gregory Stone) communicated by letter and by email. And on November 7, 2016, Complaint Counsel (Dan Matheson and Kathleen Clair) and Respondent's Counsel (Gregory Stone and Gregory Sergi) communicated by telephone.

Dated: December 22, 2016

Respectfully submitted,

/s/ Daniel J. Matheson

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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,** **Respondent**	**DOCKET NO. 9372**

[PROPOSED] ORDER

Having carefully considered Complaint Counsel's Motion to Compel Response to Interrogatory No. 8, 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 Response to Interrogatory No. 8 is GRANTED and it is hereby ORDERED that, no later than January 4, 2017, Respondent shall:

1. Identify with specificity, either by clearly described category or by Bates numbers, the documents upon which 1-800 Contacts is relying for its response;
2. Identify with particularity what information is responsive to the interrogatory but being withheld on the basis of attorney-client privilege or the work product doctrine, and identify with particularity the circumstances or facts demonstrating the existence of the privilege; and
3. Provide a narrative response to answer any portions of the interrogatory that are not either (1) fully answered by the documents specified or (2) encompassed by an appropriate and supported claim of privilege.

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**
	)	
Respondent	)	

DECLARATION OF KATHLEEN M. CLAIR

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 Memorandum in Support of its Motion to Compel Response to Interrogatory 8.
3. Tab 1 is a true and correct copy of Complaint Counsel's First Set of Interrogatories to Respondent 1-800 Contacts, Inc., dated September 8, 2016.
4. Tab 2 is a true and correct copy of the Responses of Respondent 1-800 Contacts, Inc. to Complaint Counsel's First Set of Interrogatories, dated October 11, 2016.
5. Tab 3 is a true and correct copy of a letter from Daniel Matheson to Gregory Stone and Gregory Sergi, dated October 18, 2016.
6. Tab 4 is a true and correct copy of an email exchange consisting of an email from Gregory Stone to Daniel Matheson and others, and a reply email from Daniel Matheson to Gregory Stone and others, both dated October 21, 2016.

7. Tab 5 is a true and correct copy of the Amended Responses of Respondent 1-800 Contacts, Inc. to Complaint Counsel's First Set of Interrogatories, dated October 31, 2016.
8. Tab 6 is a true and correct copy of the Amended Responses of Respondent 1-800 Contacts, Inc. to Complaint Counsel's First Set of Interrogatories, dated November 22, 2016.
9. Tab 7 is a true and correct copy of a document produced by Respondent, consisting of an April 9, 2007 email from Brandon Dansie to Dave Zeidner and Bryan Pratt, on which Amy Larson and Bryce Craven are carbon copied, and an attachment thereto, bearing the Bates numbers 1-800F_00010365-001 through 1-800F_00010365-002.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 22nd day of December, 2016 at Washington, DC.

/s/ Kathleen M. Clair
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Counsel Supporting the Complaint

Tab 1

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 FIRST SET OF INTERROGATORIES TO RESPONDENT 1-800 CONTACTS, INC.

Pursuant to the Federal Trade Commission's Rule of Practice, 16 C.F.R. §§ 3.31 and 3.35, Complaint Counsel hereby requests that the Respondent answer the following Interrogatories within 30 days from the date of service thereof or in such lesser time as the Administrative Law Judge may allow pursuant to Rule of Practice 3.35(a)(2):

1. Identify each benefit that 1-800 Contacts received as a result of a Settlement Agreement, and identify each Settlement Agreement that resulted in 1-800 Contacts receiving such a benefit.

2. Identify each Settlement Partner which, prior to the execution of the relevant Settlement Agreement, communicated to 1-800 Contacts that the Settlement Partner did not use as a Keyword any term on which 1-800 Contacts owned a trademark.

3. Identify each Person, other than 1-800 Contacts or an Affiliate of 1-800 Contacts, that used as a Keyword a term on which 1-800 Contacts owned a trademark.

4. For each Person identified in response to Interrogatory 3, identify the period during which the Person used as a Keyword a term on which 1-800 Contacts owned a trademark.

5. Identify each Person other than an Affiliate which, at the request of 1-800 Contacts, informed 1-800 Contacts that the Person stopped using as a Keyword a term on which 1-800 Contacts owned a trademark.

6. Identify each Person other than an Affiliate which, at the request of 1-800 Contacts, informed 1-800 Contacts that the Person implemented as a Negative Keyword a term on which 1-800 Contacts owned a trademark.

7. Identify each Negative Keyword 1-800 Contacts has used on any search engine, and for each Negative Keyword identify: (a) the search engine 1-800 Contacts instructed to

implement each Negative Keyword, and (b) the first date on which 1-800 Contacts instructed each such search engine to implement each Negative Keyword.

8. Identify each advertisement that 1-800 Contacts has identified to a Settlement Partner as an advertisement that infringes 1-800 Contacts' trademark rights, and for each advertisement: (a) describe the process used by 1-800 Contacts to determine that the advertisement infringed 1-800 Contacts' trademark rights; and (b) identify the factual basis for 1-800 Contacts' conclusion that the advertisement infringed 1-800 Contacts' trademark rights.

9. Identify each advertisement of a Settlement Partner from 2002 to the present that 1-800 Contacts contends was likely to cause Consumer Confusion.

10. Identify each advertisement of a Settlement Partner from 2002 to the present that 1-800 Contacts contends was likely to cause Trademark Dilution.

11. Identify each of the "procompetitive benefits" referred to in the Fourth Affirmative Defense contained in 1-800 Contacts' Answer to the Complaint in this matter.

12. Identify each Settlement Partner that has been informed by 1-800 Contacts that the Negative Keywords identified in the Settlement Partner's Settlement Agreement should be implemented as Exact-Matched Negative Keywords, and the date of such communication.

13. Identify the factual basis for the assertion in 1-800 Contacts' Answer to the Complaint in this matter, and in its Submission to the Federal Trade Commission dated March 1, 2016, that each litigation that resulted in each Settlement Agreement constituted "a *bona fide* trademark litigation."

14. Identify the manner in which each of the "online sellers of contact lenses" referred to in Paragraph 2 of 1-800 Contacts' Answer to the Complaint in this matter "were using 1-800 Contacts' trademarks in commerce," and provide the factual basis for 1-800 Contacts' belief that such "use" occurred.

DEFINITIONS

1. The terms "1-800 Contacts," "1-800," "Company," "Respondent" or "You" 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 "Affiliate" means any Person other than 1-800 Contacts which attempts to generate online sales for 1-800 Contacts in exchange for a commission on such online sales.

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

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

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

6. The term "Competitor" includes the Company, and means any person engaged in the business of selling contact lenses to consumers.

7. The term "Consumer Confusion" means confusion or mistake "as to the affiliation, connection, or association" of another person with 1-800 Contacts, or as to "the origin, sponsorship, or approval" of another person's "goods, services, or commercial activities" by 1-800 Contacts, as these terms are used in 15 U.S.C. § 1125(a).

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

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

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

11. The term "Identify" means to state:

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

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

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

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

12. The term "Keyword" has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its AdWords product: "[w]ords or phrases describing [an advertiser's] product that [the advertiser] choose[es] to help determine when and where [the advertiser's] ad can appear" in response to a User Query. *See* https://support.google.com/adwords/answer/6323?hl=en. The term "Keyword" is not limited use in connection with Google's AdWords product, but is intended to capture any such words or phrases used in connection with any similar product offered in connection with any other Search Engine.

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

14. 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.

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

16. The term "Price-Match Sale" means a sale of contact lenses to a customer pursuant to any 1-800 Contacts policy offering a customer a discounted price equal to or less than a competitor's price when the customer identifies a competitor's price.

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

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

19. The terms "Settlement Agreement" or "Settlement Agreements" mean any agreement, whether formal or informal, including oral and written agreements, entered into by or between 1-800 Contacts and a Competitor to resolve any allegation, dispute, litigation, or other matter concerning use of 1-800's trademarks as Keywords.

20. The term "Settlement Partner" means any person that has entered into a Settlement Agreement with 1-800 Contacts, including, but not limited to, Arlington Contact Lens Service, Inc., Coastal Contacts, Inc., Contact Lens King, Inc., Empire Vision Center, Inc., Lenses for Less, Lensfast, LLC, Lensworld.com, Inc., Provision Supply, LLC d/b/a EZContactsUSA.com, Standard Optical Company, Tram Data, LLC d/b/a ReplaceMyContacts.com, Vision Direct, Inc., Walgreen Co., and Web Eye Care, Inc.

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

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

INSTRUCTIONS

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

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

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

4. Answer each Interrogatory fully and completely based on the information and knowledge currently available to You, regardless of whether You intend to supplement Your response upon the completion of discovery. *See North Texas Specialty Physicians*, FTC Docket No. 9312 (April 11, 2002) (Complaint Counsel must provide "full and complete responses . . . with the information and facts it currently has available") (Chappell, A.L.J.).

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

6. Your answers to any Interrogatory herein must include all information within Your possession, custody or control, including information reasonably available to You and Your agents, attorneys or representatives.

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

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

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

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

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

12. None of the Definitions or Interrogatories set forth herein shall be construed as an admission relating to the existence of any evidence, to the relevance or admissibility of any evidence, or to the truth or accuracy of any statement or characterization in the Definition or Interrogatory.

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

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

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

Dated: September 8, 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 SEPTEMBER 8, 2016 I served COMPLAINT COUNSEL'S FIRST SET OF INTERROGATORIES 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: September 8, 2016

By: /s/Dan Matheson
Dan Matheson

Tab 2

REDACTED IN ENTIRETY

Tab 3

REDACTED IN ENTIRETY

PUBLIC

Tab 4

From: Matheson, Daniel
Sent: Friday, October 21, 2016 11:40 AM
To: 'Stone, Gregory'; Blank, Barbara; Clair, Kathleen
Cc: BC-1040-1800-Search Ad Team-DL; Vincent, Garth
Subject: RE: Summary of today's meet and confer re interrogatory responses

Greg,

Regarding your Interrogatory responses, Complaint Counsel communicated that none of the responses that refer Complaint Counsel to documents are sufficiently specific to satisfy Rule 3.35(c). To be clear, that includes additional Interrogatory responses that you do not identify specifically below. Our objection to the specificity of the documents identified applies to your responses to Interrogatory Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, and 14. In each case, we object to the specificity with which you identify the records from which a response can be derived, and we object to your efforts to refer to records that are not "records of the party upon whom the interrogatory has been served."

We look forward to reviewing and discussing the sufficiency of your amended responses. We would also like to avoid bringing discovery disputes before the Court where possible.

Regards,

Dan

From: Stone, Gregory [mailto:Gregory.Stone@mto.com]
Sent: Friday, October 21, 2016 11:20 AM
To: Matheson, Daniel; Blank, Barbara; Clair, Kathleen
Cc: BC-1040-1800-Search Ad Team-DL; Vincent, Garth
Subject: Summary of today's meet and confer re interrogatory responses

Dan, Barbara, and Katie,

Thank you for taking the time this morning to complete our meet and confer regarding our client's responses to your first set of interrogatories. Let me summarize that meet and confer, and please let me know if you do not believe my summary accurately reflects our discussion.

- No later than Monday, October 31, and we expect by Friday, October 28, we will provide you with amended responses in which we will seek to address and respond to the concerns you have raised regarding the specificity of our responses and our reliance on documents produced or to be produced by third parties. You have identified Interrogatories 3, 4, 5, 6, 8, and 12 as raising such issues in your mind. On today's call you also indicated that you think the responses do not provide sufficient specificity for Interrogatories 9 and 10 as well.
  - Your concerns focused on the way in which we have described documents from which the information you seek can be obtained or derived.
  - You also focused on the specific identification of third parties and third party communications.

  - We will endeavor to address all of these issues in our amended responses and hope that you will find them satisfactory.
- We will provide you with two versions of our responses. One will be complete and the other will be redacted. If you agree that the redacted version may be shown to our client, we then will have that version verified. We will not have client verification of the redacted portions. This procedure is one that we will follow in the future. Among other things, this procedure will mean that you will not receive verifications at the time our responses are due. You agreed to this procedure.
- We discussed the fact that Brady Roundy was the subject of a full-day IH and that the extent and scope of his knowledge was probed at length in that IH. We also discussed that he came to the company recently, and after the events that are the crux of your complaint. I proposed that we do nothing further regarding Mr. Roundy's prior verification and you indicated that may be the best approach, although you left open the possibility that you will make some other proposal. I also advised you that we have retrieved from Mr. Roundy the copy of the interrogatory responses that he was provided for purposes of enabling him to verify them.
- As I indicated during the call, we are hopefully of avoiding the need for bringing discovery disputes to Chief Judge Chappell, and are approaching the preparation of amended responses with that goal in mind.

Best regards,

Greg

Gregory P. Stone | Munger, Tolles & Olson LLP
355 South Grand Avenue | Los Angeles, CA 90071
Tel: 213.683.9255 | Fax: 213.683.5155 | Cell: 213.309.5999
gregory.stone@mto.com | www.mto.com

Tab 5

REDACTED IN ENTIRETY

Tab 6

REDACTED IN ENTIRETY

Tab 7

REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 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:

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

Sean Gates
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16 N. Marengo Ave.
Suite 300
Pasadena, CA 91101
sgates@charislex.com

Counsel for Respondent 1-800 Contacts, Inc.

Dated: December 22, 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 22, 2016

By: /s/ Daniel J. Matheson
Attorney