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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS:      Editc4S1e66    <</MCID 13 >>BDC T\* (1)Tj (-)Tj 0.83 0 Td (800)Tj

### Respondent

4. Respondent 1-800 Contacts is a corporation organized, existing, and doing business under and by virtue of the laws of the United States with its office and principal place of business located at 261 Data Drive Draper, Utah, 84020.

### Jurisdiction

5. At all times relevant herein, 1-800 Contacts has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
6. The acts and practices of 1-800 Contacts, including the acts and practices alleged herein, are in commerce or affect commerce, as commerce is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

### Overview of Online Search Advertising

7. Search engines including Google and Bing are available to users of the internet without

- a. Advertisers submit to the search engine companies "bids" specifying the maximum price they are willing to pay to place a particular advertisement on the results page
  - b. An advertiser may identify the auctions that it wishes to enter by bidding on particular words, referred to as "keywords," contained in a given query. Alternatively, the advertiser may allow the search engine company, through its algorithm, to identify relevant auctions for the advertiser (thus participating in auctions for relevant queries even without having bid on the precise terms in those queries).
  - c. When a consumer enters a search query, an algorithm instantly evaluates the relevant bids. The winner or winners of the auction will have their advertisements displayed to the user. If the user clicks on an advertisement and visits the advertiser's website then the advertiser pays a fee to the search engine company.
11. Search engine companies do not simply place advertisements on the search engine results page in the order of the price bid by the advertiser. Rather, in determining whether and in what order to place advertisements, search engines employ sophisticated algorithms that consider the quality of the advertisement. Quality, in this context, refers to the search engine's assessment of whether the advertisement will be relevant and useful to the user. The search engine makes this assessment based largely on the search engine's continual analysis of user feedback (such as clickthrough data) which is incorporated, in real-time, into the algorithms that determine which advertisements, if any, will be shown. The search engine demotes or eliminates advertisements that prove, based on user feedback, not to be relevant or useful to users.
  12. Computer users sometimes enter a search query that contains a trademarked word or phrase (e.g., "1-800 Contacts," "Mattress Discounters," "POLARIS"). In response, the search engine may present the user with relevant advertisements on behalf of multiple companies including but not limited to the owner of the trademark.
  13. An advertiser also may specify to the search engine one or more "negative keywords." This is an instruction that the company's advertisement should not appear in response to a search query that contains a particular term or term. For example, a business that sells eyeglasses and bids on the term "glasses" in search advertising auctions may specify a negative keyword (e.g., "wine") to prevent its advertisement from appearing in response to a search query that contains the word "wine".

## Competition in the Online Retail Sale of Contact Lenses

14. 1-800 Contacts has long been the largest online seller of contact lenses in the United States. In 2015, 1-800 Contacts had revenues of approximately \$1.2 billion. This represents approximately 50 percent of the online retail sales of contact lenses. The combined share of 1-800 Contacts and the fourteen firms that executed the Bidding Agreements is approximately 80 percent.
15. 1-800 Contacts was a pioneer in the online sale of contact lenses. However, by the early 2000s, a number of competing online retailers had emerged and expanded rapidly. Online rivals invested in search advertising and competed directly against 1-800 Contacts in search advertising auctions. These online rivals undercut 1-800 Contacts' prices for contact lenses, many by a substantial amount.
16. As early as 2003, 1-800 Contacts recognized that it was losing sales to lower-priced online competitors. However, 1-800 Contacts did not want to lower its prices to compete with these rivals, and devised a plan to avoid doing so. To this day, 1-800 Contact prices for contact lenses remain consistently higher than the prices of its online rivals.

## The Bidding Agreements

17. In or around 2004, 1-800 Contacts began sending cease-and-desist letters to rival online sellers of contact lenses whose search advertisements appeared in response to user queries containing the term "1-800 Contacts" (or variations thereof). 1-800 Contacts accused its rivals of infringing its trademarks.
18. 1-800 Contacts claimed—inaccurately—that the mere fact that a rival's advertisement appeared on the results page in response to a query containing a 1-800 Contacts trademark constituted infringement. 1-800 Contacts threatened to sue rivals that did not agree to cease participating in these search advertising auctions.
19. Most often, rivals quickly acceded to 1-800 Contacts' demands in order to avoid prolonged and costly litigation. Only one competitor refused to settle and proceeded to litigation.
20. Between 2004 and 2013, 1-800 Contacts entered at least fourteen agreements with rival online sellers of contact lenses settling 1-800 Contacts' purported trademark claims by restricting bidding in search advertising auctions. The competitors that agreed not to bid against 1-800 Contacts include:

21. The Bidding Agreements go well beyond prohibiting trademark infringing conduct. They restrain a broad range of truthful, non-misleading, and non-confusing advertising.
22. All fourteen Bidding Agreements bar 1-800 Contacts competitor from bidding in a search advertising auction for any of 1-800 Contacts' trademarked terms (e.g., "1-800 Contacts") or variations thereof (such as common misspellings).
23. All fourteen Bidding Agreements are reciprocal, barring 1-800 Contacts from bidding for the competitors' trademarked terms or variations thereof. Notably, most of the competitors that entered into these Bidding Agreements had never raised trademark infringement claims or counterclaims against 1-800 Contacts.
24. Thirteen of the Bidding Agreements also require 1-800 Contacts' competitor to employ "negative keywords" directing the search engines not to display the competitor's advertisement in response to a search query that includes any of 1-800 Contacts' trademarked terms or variations thereof, even if the search engine's algorithms determine that the advertisement would be relevant and useful to the user, even if a user enters a query for "1-800 Contacts cheaper competitors" the user will see advertisements only for 1-800 Contacts. (See Exhibit 1.) These undertakings also are reciprocal, requiring 1-800 Contacts to employ its competitor's trade names and variations thereof as negative keywords in its own advertising campaigns.
25. 1-800 Contacts has aggressively keyai

26. Only one online seller of contact lenses—Lens.com—did not settle with 1800 Contacts. Instead, Lens.com litigated against 1800 Contacts at significant expense. Ultimately, the Court of Appeals for the Tenth Circuit rejected 1-800 Contacts' trademark infringement claims. The court found that consumers were not confused when an advertisement for Lens.com appeared on the search results page in response to a user query for "1-800 Contacts." See *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1245 (10th Cir. 2013). And, in the absence of the likelihood of consumer confusion, there can be no infringement of 1800 Contacts' trademarks.
27. 1-800 Contacts targeted rivals whose advertisements appeared on the search engine results page in response to a user query for 1800 Contacts or variations thereof. 1-800 Contacts acted without regard to whether the advertisements were likely to cause consumer confusion or infringed 1-800 Contacts' trademarks.

Amicus Brief of the American Intellectual Property Law Association (AIPAL) in Support of Petitioner's Petition for a Writ of Habeas Corpus, No. 13-1207, 2014 WL 1207 (U.S. Supreme Court, 2014).

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## NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Respondent violated or is violating Section 5 of the FTC Act, as amended, as alleged in the complaint, the Commission may order such relief against Respondent as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Ordering Respondent to cease and desist from the conduct alleged in the complaint to violate Section 5 of the FTC Act, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of, the anticompetitive practices engaged in by Respondent and similar practices.
2. Prohibiting Respondent from, directly or indirectly, maintaining, entering into, or attempting to enter into, an agreement with any contact lens retailer that restrains participation in or otherwise restrains competition in any search advertising auction.
3. Prohibiting Respondent from, directly or indirectly, maintaining, entering into, or attempting to enter into, an agreement with any contact lens retailer to forbear from disseminating information and non-searching advertising.
4. Prohibiting Respondent from, directly or indirectly, enforcing or attempting to enforce or threatening to enforce any provision of agreement that restricts bidding for search advertising or restricts the display of advertisements in response to certain user search queries, or any provision of agreement.

8. Ordering Respondent, for a period of time, to file annual compliance reports to the Commission describing its compliance with the requirements of the order. The order would terminate twenty years from the date it becomes final.
9. Requiring that Respondent's compliance with the order may be monitored at Respondent's expense by an independent monitor, for a term to be determined by the Commission.
10. Any other relief appropriate to prevent, correct or remedy the anticompetitive effects in their incipiency of any or all of the conduct alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighth day of August, 2016 issues its complaint against Respondent.

By the Commission.

Donald S. Clark  
Secretary

SEAL:

# **Exhibit 1**

All News Shopping Images Videos More Search

About 1,150,000 results (0.63 seconds)

### 1800 CONTACTS - Lenses

**Ad** [www.1800contacts.com](http://www.1800contacts.com)  
 4.7 ★★★★★ rating for 1800contacts.com  
 We Have Your Lenses in Stock & Ready to Ship - Crazy Fast Delivery  
 Free lens replacement · 24/7 Customer service · We price match  
 Ratings: Shipping 10/10 - Website 10/10 - Prices 10/10 - Customer service 9.5/10

- Air Optix
- Easy Re-Order
- Use Your Vision Insurance

### Where To Buy Contact Lenses - AllAboutVision.com

[www.allaboutvision.com](http://www.allaboutvision.com) vision.com contact lenses  
 But many eye doctors offer contact lens services. The supply of lenses at one ... 1-800 Contacts, \$67.50, \$135.00.

### Unbeatable Price Guarantee | 1-800 CONTACTS

<https://www.1800contacts.com> unbeatable price guarantee  
 With the 1-800 CONTACTS unbeatable price guarantee, you can be sure you're getting the lowest price on your contact lenses. Competitors' promo codes are not valid for

### Fairness to Contact Lens Consumers Act - 1-800 Contacts

[www.1800contacts.com](http://www.1800contacts.com) /.../1-800-contacts-opposes-legislation-introdu... 1-800 Contacts  
 Apr 12, 2016 - "This anti-consumer bill would stifle competition in the contact lens market, drive up prices on many contact lenses and effectively eliminating

### The U.S. CA Becomes Law | 1-800 CONTACTS

[www.1800contacts.com](http://www.1800contacts.com) /connect/articles/ca-becomes-law 1-800 Contacts  
 Further, the law eliminates barriers to