



OFFICE OF ADMINISTRATIVE LAW JUDGE

12 05 2016
584865

In the Matter of

Docket

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

Deborah L. Feinstein
Director

Daniel J. Matheson
Kathleen M. Clair

Dated: December 5, 2016

COMPLAINT AND COUNSEL ASSESSMENT TO CONSIDER [REDACTED]

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

[REDACTED]

therein. A Proposed Order is attached.

Respectfully submitted,

/s/ Daniel J. Matheson

Daniel J. Matheson
Geoffrey M. Green
Barbara Blank
Charles A. Loughlin
Thomas H. Brock
Kathleen M. Clair
Gustav P. Chiarello
Joshua B. Gray
Nathaniel M. [REDACTED]

Charlotte S. Slaiman
Mika Ikeda

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20547
[REDACTED]

Dated: December 5, 2016

UNITED STATES OF AMERICA

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

Deborah L. Feinstein
Director

Markus H. Meier
Deputy Director

Geoffrey M. Green

Daniel J. Matheson
Kathleen M. Clair
Thomas H. Brock
Gustav P. Chiarello
Joshua B. Gray
Nathaniel M. Hopkin
Mike Ikeda

Assistant Director

Barbara Blank
Deputy Assistant Director

Charlotte S. Slaiman
Attorneys

Richard M. ...

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

[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 products. [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. C' 1 1 1

[REDACTED]

FACTUAL BACKGROUND

[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 meeting and on

[REDACTED]

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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 against the public interest.”

[REDACTED]

II. ARGUMENT

As explained below, each RFP at issue seeks information that “may be reasonably

expected to yield information that is in the public interest.”

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

[REDACTED]

er things,

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. For A Tab C, B Tab C, D Tab C, E Tab C, F Tab C, G Tab C, H Tab C, I Tab C, J Tab C, K Tab C, L Tab C, M Tab C, N Tab C, O Tab C, P Tab C, Q Tab C, R Tab C, S Tab C, T Tab C, U Tab C, V Tab C, W Tab C, X Tab C, Y Tab C, Z Tab C, AA Tab C, AB Tab C, AC Tab C, AD Tab C, AE Tab C, AF Tab C, AG Tab C, AH Tab C, AI Tab C, AJ Tab C, AK Tab C, AL Tab C, AM Tab C, AN Tab C, AO Tab C, AP Tab C, AQ Tab C, AR Tab C, AS Tab C, AT Tab C, AU Tab C, AV Tab C, AW Tab C, AX Tab C, AY Tab C, AZ Tab C, BA Tab C, BB Tab C, BC Tab C, BD Tab C, BE Tab C, BF Tab C, BG Tab C, BH Tab C, BI Tab C, BJ Tab C, BK Tab C, BL Tab C, BM Tab C, BN Tab C, BO Tab C, BP Tab C, BQ Tab C, BR Tab C, BS Tab C, BT Tab C, BU Tab C, BV Tab C, BW Tab C, BX Tab C, BY Tab C, BZ Tab C, CA Tab C, CB Tab C, CC Tab C, CD Tab C, CE Tab C, CF Tab C, CG Tab C, CH Tab C, CI Tab C, CJ Tab C, CK Tab C, CL Tab C, CM Tab C, CN Tab C, CO Tab C, CP Tab C, CQ Tab C, CR Tab C, CS Tab C, CT Tab C, CU Tab C, CV Tab C, CW Tab C, CX Tab C, CY Tab C, CZ Tab C, DA Tab C, DB Tab C, DC Tab C, DD Tab C, DE Tab C, DF Tab C, DG Tab C, DH Tab C, DI Tab C, DJ Tab C, DK Tab C, DL Tab C, DM Tab C, DN Tab C, DO Tab C, DP Tab C, DQ Tab C, DR Tab C, DS Tab C, DT Tab C, DU Tab C, DV Tab C, DW Tab C, DX Tab C, DY Tab C, DZ Tab C, EA Tab C, EB Tab C, EC Tab C, ED Tab C, EE Tab C, EF Tab C, EG Tab C, EH Tab C, EI Tab C, EJ Tab C, EK Tab C, EL Tab C, EM Tab C, EN Tab C, EO Tab C, EP Tab C, EQ Tab C, ER Tab C, ES Tab C, ET Tab C, EU Tab C, EV Tab C, EW Tab C, EX Tab C, EY Tab C, EZ Tab C, FA Tab C, FB Tab C, FC Tab C, FD Tab C, FE Tab C, FF Tab C, FG Tab C, FH Tab C, FI Tab C, FJ Tab C, FK Tab C, FL Tab C, FM Tab C, FN Tab C, FO Tab C, FP Tab C, FQ Tab C, FR Tab C, FS Tab C, FT Tab C, FU Tab C, FV Tab C, FW Tab C, FX Tab C, FY Tab C, FZ Tab C, GA Tab C, GB Tab C, GC Tab C, GD Tab C, GE Tab C, GF Tab C, GG Tab C, GH Tab C, GI Tab C, GJ Tab C, GK Tab C, GL Tab C, GM Tab C, GN Tab C, GO Tab C, GP Tab C, GQ Tab C, GR Tab C, GS Tab C, GT Tab C, GU Tab C, GV Tab C, GW Tab C, GX Tab C, GY Tab C, GZ Tab C, HA Tab C, HB Tab C, HC Tab C, HD Tab C, HE Tab C, HF Tab C, HG Tab C, HH Tab C, HI Tab C, HJ Tab C, HK Tab C, HL Tab C, HM Tab C, HN Tab C, HO Tab C, HP Tab C, HQ Tab C, HR Tab C, HS Tab C, HT Tab C, HU Tab C, HV Tab C, HW Tab C, HX Tab C, HY Tab C, HZ Tab C, IA Tab C, IB Tab C, IC Tab C, ID Tab C, IE Tab C, IF Tab C, IG Tab C, IH Tab C, II Tab C, IJ Tab C, IK Tab C, IL Tab C, IM Tab C, IN Tab C, IO Tab C, IP Tab C, IQ Tab C, IR Tab C, IS Tab C, IT Tab C, IU Tab C, IV Tab C, IW Tab C, IX Tab C, IY Tab C, IZ Tab C, JA Tab C, JB Tab C, JC Tab C, JD Tab C, JE Tab C, JF Tab C, JG Tab C, JH Tab C, JI Tab C, JJ Tab C, JK Tab C, JL Tab C, JM Tab C, JN Tab C, JO Tab C, JP Tab C, JQ Tab C, JR Tab C, JS Tab C, JT Tab C, JU Tab C, JV Tab C, JW Tab C, JX Tab C, JY Tab C, JZ Tab C, KA Tab C, KB Tab C, KC Tab C, KD Tab C, KE Tab C, KF Tab C, KG Tab C, KH Tab C, KI Tab C, KJ Tab C, KK Tab C, KL Tab C, KM Tab C, KN Tab C, KO Tab C, KP Tab C, KQ Tab C, KR Tab C, KS Tab C, KT Tab C, KU Tab C, KV Tab C, KW Tab C, KX Tab C, KY Tab C, KZ Tab C, LA Tab C, LB Tab C, LC Tab C, LD Tab C, LE Tab C, LF Tab C, LG Tab C, LH Tab C, LI Tab C, LJ Tab C, LK Tab C, LL Tab C, LM Tab C, LN Tab C, LO Tab C, LP Tab C, LQ Tab C, LR Tab C, LS Tab C, LT Tab C, LU Tab C, LV Tab C, LW Tab C, LX Tab C, LY Tab C, LZ Tab C, MA Tab C, MB Tab C, MC Tab C, MD Tab C, ME Tab C, MF Tab C, MG Tab C, MH Tab C, MI Tab C, MJ Tab C, MK Tab C, ML Tab C, MM Tab C, MN Tab C, MO Tab C, MP Tab C, MQ Tab C, MR Tab C, MS Tab C, MT Tab C, MU Tab C, MV Tab C, MW Tab C, MX Tab C, MY Tab C, MZ Tab C, NA Tab C, NB Tab C, NC Tab C, ND Tab C, NE Tab C, NF Tab C, NG Tab C, NH Tab C, NI Tab C, NJ Tab C, NK Tab C, NL Tab C, NM Tab C, NN Tab C, NO Tab C, NP Tab C, NQ Tab C, NR Tab C, NS Tab C, NT Tab C, NU Tab C, NV Tab C, NW Tab C, NX Tab C, NY Tab C, NZ Tab C, OA Tab C, OB Tab C, OC Tab C, OD Tab C, OE Tab C, OF Tab C, OG Tab C, OH Tab C, OI Tab C, OJ Tab C, OK Tab C, OL Tab C, OM Tab C, ON Tab C, OO Tab C, OP Tab C, OQ Tab C, OR Tab C, OS Tab C, OT Tab C, OU Tab C, OV Tab C, OW Tab C, OX Tab C, OY Tab C, OZ Tab C, PA Tab C, PB Tab C, PC Tab C, PD Tab C, PE Tab C, PF Tab C, PG Tab C, PH Tab C, PI Tab C, PJ Tab C, PK Tab C, PL Tab C, PM Tab C, PN Tab C, PO Tab C, PP Tab C, PQ Tab C, PR Tab C, PS Tab C, PT Tab C, PU Tab C, PV Tab C, PW Tab C, PX Tab C, PY Tab C, PZ Tab C, QA Tab C, QB Tab C, QC Tab C, QD Tab C, QE Tab C, QF Tab C, QG Tab C, QH Tab C, QI Tab C, QJ Tab C, QK Tab C, QL Tab C, QM Tab C, QN Tab C, QO Tab C, QP Tab C, QQ Tab C, QR Tab C, QS Tab C, QT Tab C, QU Tab C, QV Tab C, QW Tab C, QX Tab C, QY Tab C, QZ Tab C, RA Tab C, RB Tab C, RC Tab C, RD Tab C, RE Tab C, RF Tab C, RG Tab C, RH Tab C, RI Tab C, RJ Tab C, RK Tab C, RL Tab C, RM Tab C, RN Tab C, RO Tab C, RP Tab C, RQ Tab C, RR Tab C, RS Tab C, RT Tab C, RU Tab C, RV Tab C, RW Tab C, RX Tab C, RY Tab C, RZ Tab C, SA Tab C, SB Tab C, SC Tab C, SD Tab C, SE Tab C, SF Tab C, SG Tab C, SH Tab C, SI Tab C, SJ Tab C, SK Tab C, SL Tab C, SM Tab C, SN Tab C, SO Tab C, SP Tab C, SQ Tab C, SR Tab C, SS Tab C, ST Tab C, SU Tab C, SV Tab C, SW Tab C, SX Tab C, SY Tab C, SZ Tab C, TA Tab C, TB Tab C, TC Tab C, TD Tab C, TE Tab C, TF Tab C, TG Tab C, TH Tab C, TI Tab C, TJ Tab C, TK Tab C, TL Tab C, TM Tab C, TN Tab C, TO Tab C, TP Tab C, TQ Tab C, TR Tab C, TS Tab C, TT Tab C, TU Tab C, TV Tab C, TW Tab C, TX Tab C, TY Tab C, TZ Tab C, UA Tab C, UB Tab C, UC Tab C, UD Tab C, UE Tab C, UF Tab C, UG Tab C, UH Tab C, UI Tab C, UJ Tab C, UK Tab C, UL Tab C, UM Tab C, UN Tab C, UO Tab C, UP Tab C, UQ Tab C, UR Tab C, US Tab C, UT Tab C, UY Tab C, UZ Tab C, VA Tab C, VB Tab C, VC Tab C, VD Tab C, VE Tab C, VF Tab C, VG Tab C, VH Tab C, VI Tab C, VJ Tab C, VK Tab C, VL Tab C, VM Tab C, VN Tab C, VO Tab C, VP Tab C, VQ Tab C, VR Tab C, VS Tab C, VT Tab C, VU Tab C, VV Tab C, VW Tab C, VX Tab C, VY Tab C, VZ Tab C, WA Tab C, WB Tab C, WC Tab C, WD Tab C, WE Tab C, WF Tab C, WG Tab C, WH Tab C, WI Tab C, WJ Tab C, WK Tab C, WL Tab C, WM Tab C, WN Tab C, WO Tab C, WP Tab C, WQ Tab C, WR Tab C, WS Tab C, WT Tab C, WU Tab C, WV Tab C, WW Tab C, WX Tab C, WY Tab C, WZ Tab C, XA Tab C, XB Tab C, XC Tab C, XD Tab C, XE Tab C, XF Tab C, XG Tab C, XH Tab C, XI Tab C, XJ Tab C, XK Tab C, XL Tab C, XM Tab C, XN Tab C, XO Tab C, XP Tab C, XQ Tab C, XR Tab C, XS Tab C, XT Tab C, XU Tab C, XV Tab C, XW Tab C, XX Tab C, XY Tab C, XZ Tab C, YA Tab C, YB Tab C, YC Tab C, YD Tab C, YE Tab C, YF Tab C, YG Tab C, YH Tab C, YI Tab C, YJ Tab C, YK Tab C, YL Tab C, YM Tab C, YN Tab C, YO Tab C, YP Tab C, YQ Tab C, YR Tab C, YS Tab C, YT Tab C, YU Tab C, YV Tab C, YW Tab C, YX Tab C, YY Tab C, YZ Tab C, ZA Tab C, ZB Tab C, ZC Tab C, ZD Tab C, ZE Tab C, ZF Tab C, ZG Tab C, ZH Tab C, ZI Tab C, ZJ Tab C, ZK Tab C, ZL Tab C, ZM Tab C, ZN Tab C, ZO Tab C, ZP Tab C, ZQ Tab C, ZR Tab C, ZS Tab C, ZT Tab C, ZU Tab C, ZV Tab C, ZW Tab C, ZX Tab C, ZY Tab C, ZZ Tab C

[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

[REDACTED]

CONCLUSION

Complaint Counsel's Motion should be granted with respect to each of these RFPs,

[REDACTED]

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
Nathaniel M. Hopkin
Mika Ikeda
Charlotte S. Slaiman
Charles Loughlin
Geoffrey M. Green

Counsel Supporting the Complaint

STATEMENT CONCERNING MEET AND CONFER

The undersigned counsel certifies that Complaint Counsel conferred with Respondent's

[REDACTED]

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

"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

[REDACTED]

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

Ex. A

In the Matter of

Docket No. 9372

1-800 CONTACTS, INC.,
a corporation

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

[REDACTED]

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

[REDACTED]

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.

[REDACTED]

I declare under the penalty of perjury that the foregoing is true and correct. Executed this

5th day of December 2016 at Washington, DC

/s/ Daniel J. Matheson
Daniel J. Matheson
Federal Trade Commission

[REDACTED]

600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2075
Facsimile: (202) 326-3496
Email: dmatheson@ftc.gov

TAB 1

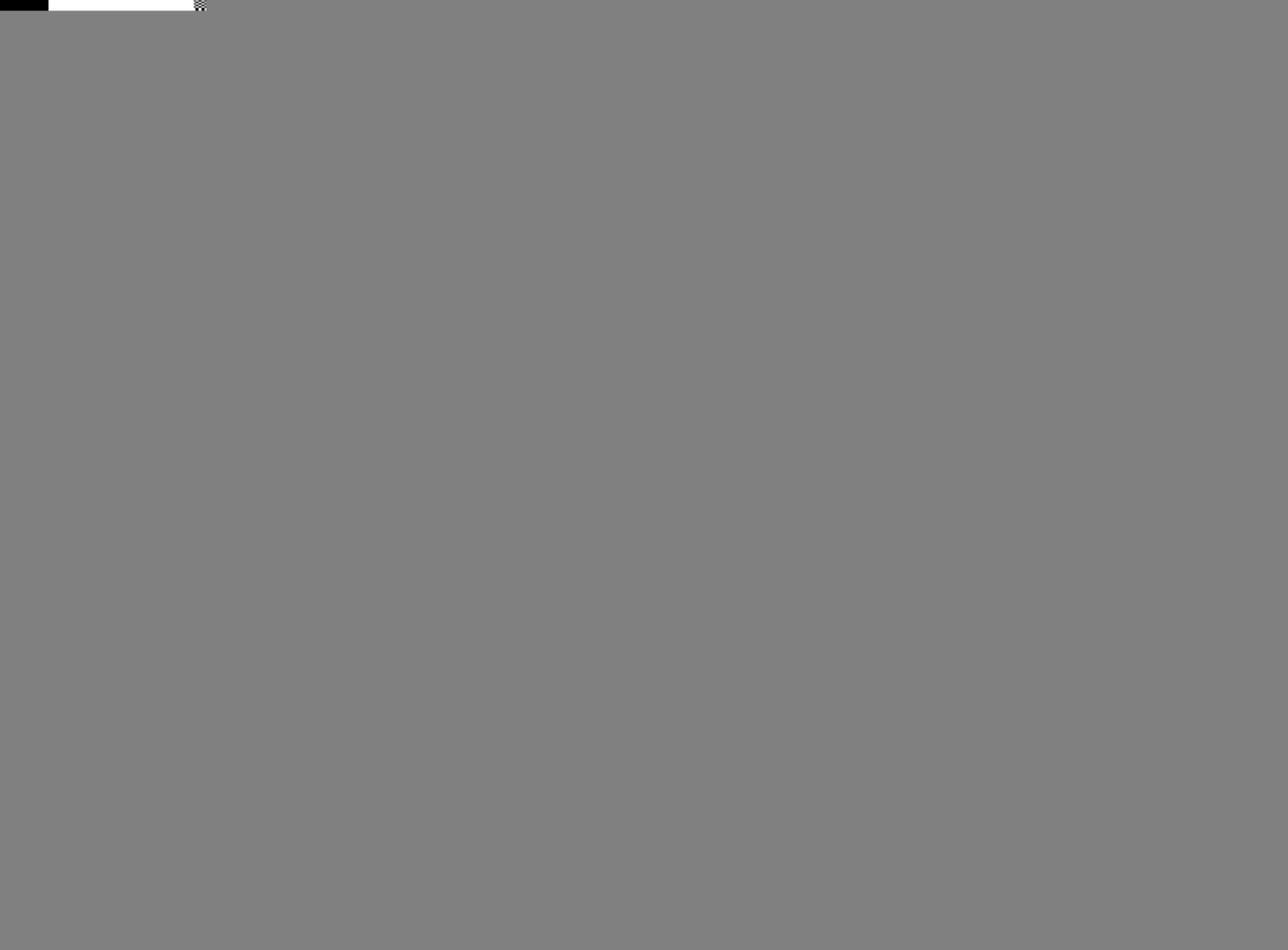
REDACTED IN ENTIRETY

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TAB 4



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

In the Matter of

Docket No. 9372

1-800 CONTACTS, INC.,
a corporation

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-

[REDACTED]

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

[REDACTED]

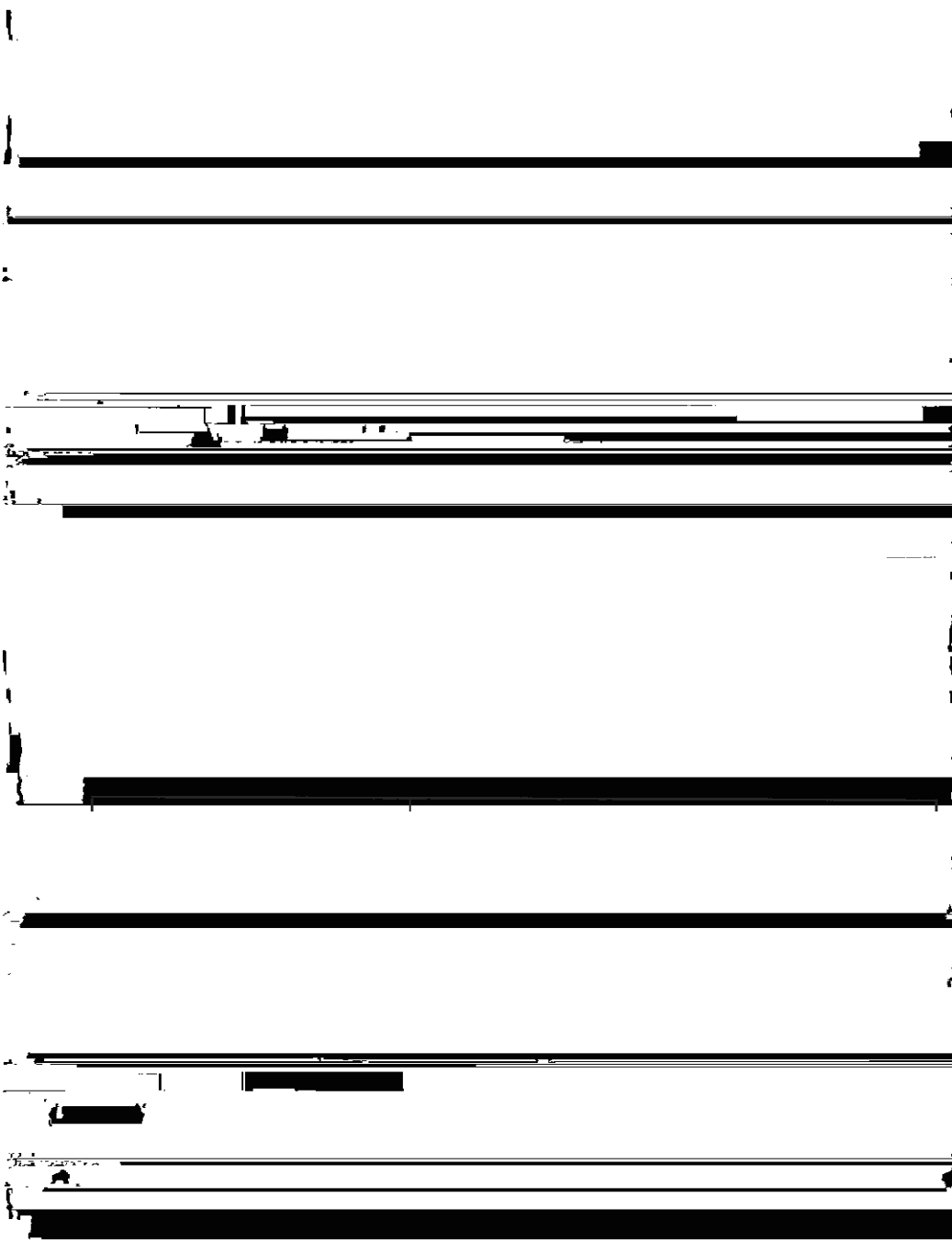
[Redacted]	[Redacted]
[Redacted]	[Redacted]
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[Redacted]	[Redacted]
[Redacted]	[Redacted]
[Redacted]	[Redacted]

INSTRUCTIONS

1. Unless otherwise indicated, each request covers documents and information dated,

[REDACTED]

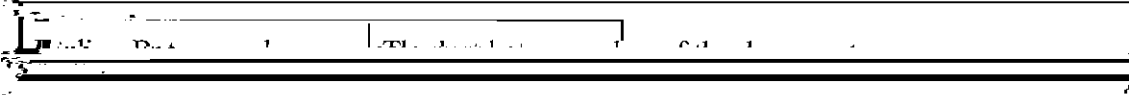
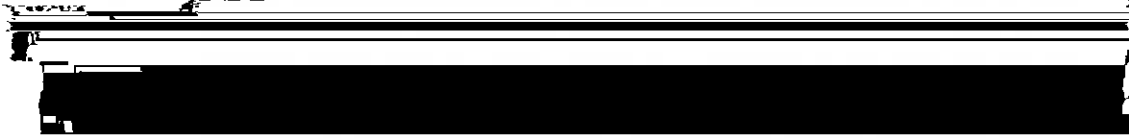
Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.
To	Recipient(s) of the record _____



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
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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.

[REDACTED]

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 of the information requested.

[REDACTED]

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 surrounding their non-existence.

[REDACTED]

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

[REDACTED]

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

[REDACTED]

CERTIFICATE OF SERVICE

I hereby certify that on OCTOBER 19, 2016 I served COMPLAINT COUNSEL'S

[REDACTED]

[REDACTED]

Date: October 19, 2016

[REDACTED]

7
t.

Matheson, Daniel

From: Sergi, Gregory <gregory.sergi@mto.com>
Sent: Friday, November 18, 2016 12:06 AM

Subject: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Cc: Barbara; Chiarello, Gustav; Clair, Kathleen; Gray, Joshua Barton; Green, Geoffrey; Hopkin, Nathaniel; Loughlin, Chuck; Matheson, Daniel; Slaiman, Charlotte; Taylor, Mark ~800CON_FTC_ATTYS

Subject: RE: Dkt 9373: Responses and Objections to Complaint Counsel's Third Set of Requests

[REDACTED]

Respectfully,

Dan

UNITED STATES OF AMERICA

In the Matter of

Docket No. 0372

1-800 CONTACTS, INC.,
a corporation

RESPONDENT 1-800 CONTACTS, INC.'S RESPONSES AND OBJECTIONS TO
COMPLAINT COUNCIL IS THIRD SET OF RESPONSES FOR SET OF THE

[REDACTED]

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

[REDACTED]

to the other Requests.

1. 800 Contacts is not a party to this lawsuit and does not have any knowledge of the contents of the [REDACTED]

[REDACTED]

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

[REDACTED]

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.

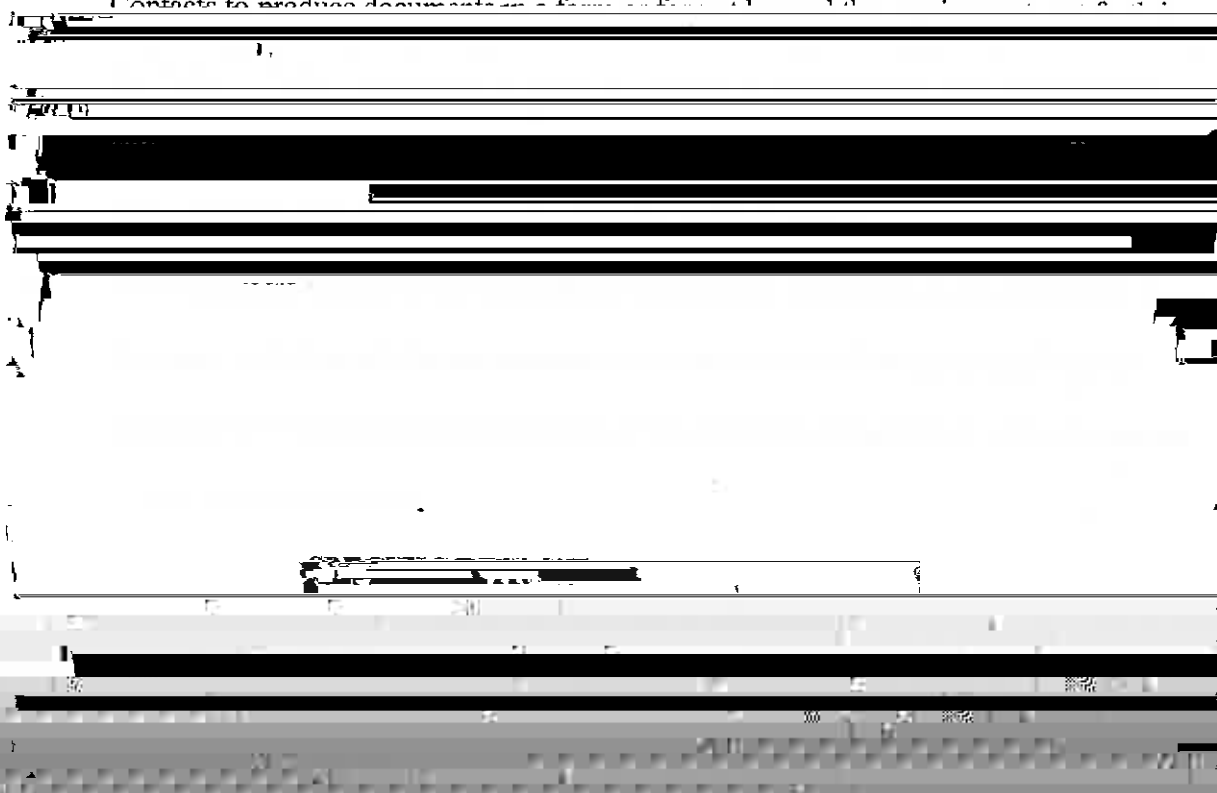
6. 1-800 Contacts objects to the Requests to the extent that they seek the creation of

document or data summaries or compilations that do not exist in the ordinary course of

[REDACTED]

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 that is not reasonably calculated to lead to the discovery of admissible evidence.



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

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 our party's claim.

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

[REDACTED]

RESPONSE TO REQUEST FOR PRODUCTION NO. 24:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

REQUEST FOR PRODUCTION NO. 25:

[REDACTED]

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, Inc., et al. v. ...
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

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*

TAB 6

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

[REDACTED]

10/1/2011

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,

trial.

Per our conversation on Friday afternoon, I include below the terms for withdrawal of the Motion to Compel.

[REDACTED]

- 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

[REDACTED]

PUBLIC

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:

[REDACTED]

Gregory P. Stone
Steven M. Perry
Garth T. Vincent

Justin P. Raphael
Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor

[REDACTED]

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 am a duly licensed member of the bar of the State of California.

December 5, 2016

By: /s/ Daniel J. Matheson
Attorney