**PUBLIC** 

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

12 09 2016

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| In the Matter of      |   | -               |        |  |
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| 1-800 CONTACTS, TNC., |   |                 |        |  |
| a corporation,        | ) | DOCKET NO. 9372 |        |  |
|                       | ) |                 |        |  |
| Respondent            | ) |                 |        |  |
|                       |   |                 |        |  |

## COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO COMPEL COMPLAINT COUNSEL TO ANSWER RESPONDENT'S INTERROGATORIES NOS. 10 AND 11

Complaint Counsel submits this Opposition to Respondent 1-800 Contacts, Inc.'s Motion to Compel Complaint Counsel to Answer Respondent's Interrogatories Nos. 10 and 11 ("Motion").

Respondent's Motion should be denied. First, Respondent seeks the analysis of Respondent's own sales data. This data is plainly within Respondent's custody and control, and

At issue are interrogatories that seek a detailed analysis regarding the dollar sales

years:

<u>Interrogatory 10</u> directs Complaint Counsel to "[i]dentify the dollar volume of online retail sales in the United States of contact lenses for each Person who is or was an 'online seller

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to these interrogatories.

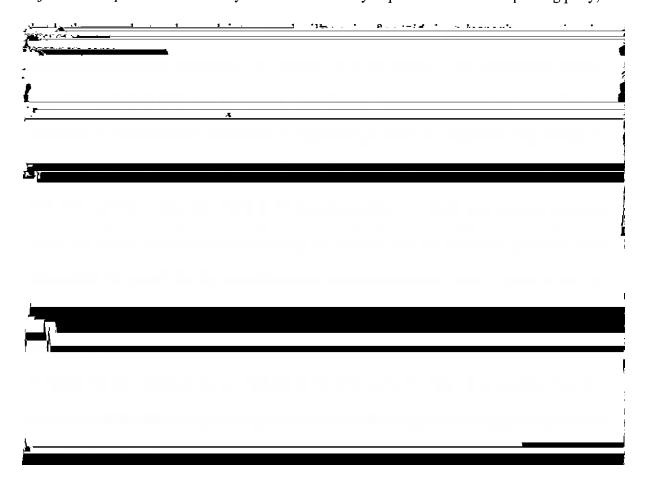
#### **ARGUMENT**

|                | I. | Interrogatories Seek Analysis of Respondent's Own Data, and the Burden of Performing this Application for Complete Compl |  |  |  |  |  |  |
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At least a portion of the underlying data that would be responsive to such an analysis comes from Respondent itself, since it is by far the largest online retailer of contact lenses in the United States. Rule 3.31 provides that discovery may be limited where "[t]he discovery sought

from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. . . . "16 C.F.R. § 3.31(c)(2)(i).

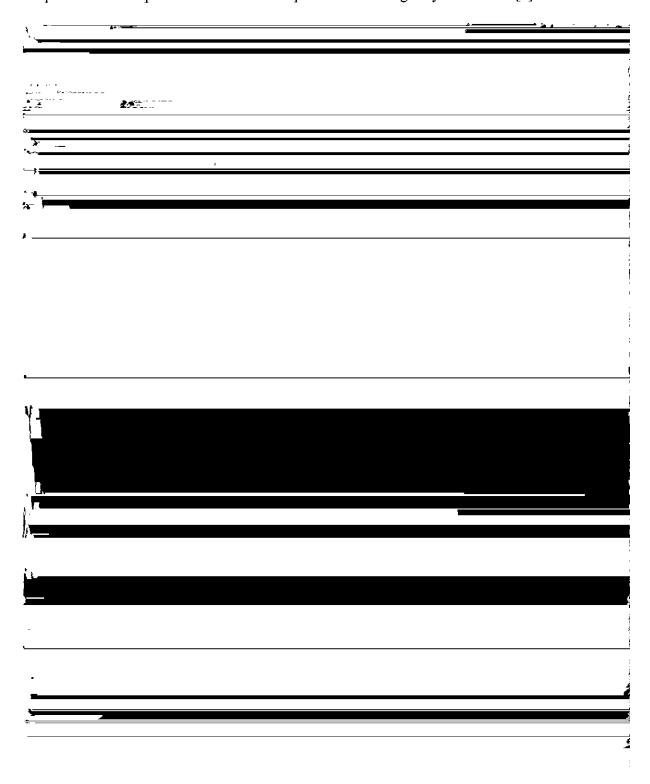
Here, of course, the application of that rule is self-evident when some part of the information Respondent seeks is already in its own hands. Indeed, this Court has previously rejected attempts to seek discovery of materials already in possession of the requesting party, or



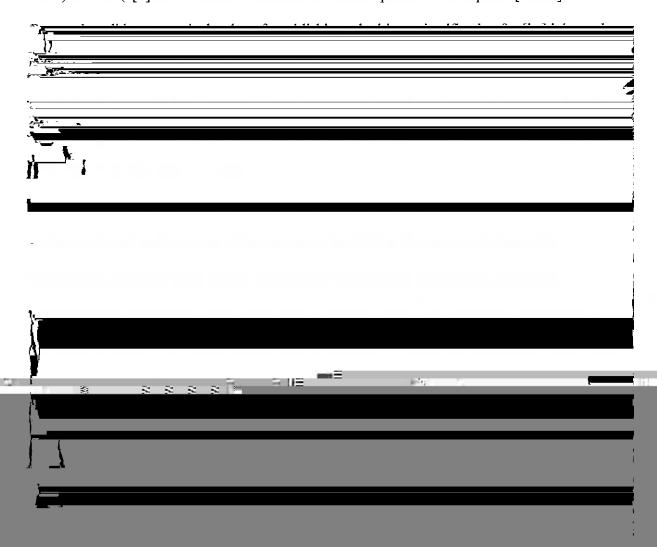
<sup>&</sup>lt;sup>1</sup> Respondent is also in possession of both internal and external market or revenue estimates for most or all of its major competitors.

| II.         | Interrogatories Seek Analysis Not Performed by Complaint Counsal Whor  |
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|             | y event, Complaint Counsel has not refused to respond to Interrogatories 10 and 11   |
| In an       |  |
| In an       | y event, Complaint Counsel ultimately performs an analysis of the relevant market date   |
| In an       |  |

FTC LEXIS 210 (Nov. 4, 2004), at \*8-9 (rejecting motion to compel fuller interrogatory response from complaint counsel where respondent's interrogatory "undermine[d] the schedule



are no cognizable procompetitive justifications, the Commission can condemn it "without proof of market power or actual effects"), *aff'd*, *Realcomp II*, *Ltd. v. FTC*, 635 F.3d 815, 825 (6th Cir. 2011); *In re North Texas Specialty Physicians*, 140 F.T.C. 715, 2005 FTC LEXIS 173 (F.T.C. 2005) at \*771 ("[P]roof of market definition and market power is not required [where]



by Respondent itself.

#### **CONCLUSION**

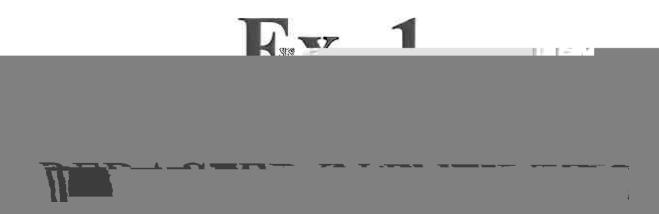
For the foregoing reasons, the Court should deny Respondent's Motion to Compel Complaint Counsel to Answer Respondent's Interrogatories Nos. 10 and 11.

Dated: December 9, 2016

#### Respectfully submitted,

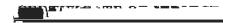
/s/ Daniel J. Matheson
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Counsel Supporting the Complaint



# Ex. 2

## REDACTED IN ENTIRETY



I hereby certify that on December 9, 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:

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Counsel for Respondent 1-800 Contacts, Inc.

Dated: December 9, 2016 By: /s/ Daniel J. Matheson

Attorney

### CERTIFICATE FOR EL ECTRONICATI INC.

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.

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