

BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF THE



In the Matter of  
1-800 CONTACTS  
a corporation

Docket No. 035

RESPONDENT 1-800 CONTACTS



II. FACTUAL

1-800 Contacts has already u

and

covering approximately

collecting how totals nearly

understanding and imposing a significant burden on 1-800 Contacts

has taken these efforts in order to respond to nearly every request for documents

throughout these proceedings.

The requests now at issue were served on October 19, 2016.

*Third Set of Requests for Production.* Requests 22 and 24 seek “regularly prepared weekly

reports (“Weekly”

Commerce Dashboard”) spanning a period of nearly 13 years through the present.

Counsel for 1-800 Contacts voluntarily offered to limit the scope of those requests into the

week.

Complaint Counsel claims that 1-800 Contacts “produced a handful of the

reports sought by” these requests. MTC of 1-800 Contacts produced over

1,000 documents consisting of “copies of the reports and any other documents

related to the reports.”

Contacts has agreed to search its existing comprehensive collection for any additional

documents that contain the name of any of the companies in the

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<sup>1</sup> The Third Set of Requests for Production states that it is seeking documents from “January 1, 2002, to the present,” but Counsel for 1-800 Contacts understands the Complaint Counsel ask to limit that time period to 2004 through the present.

name [REDACTED] Ex. 1

that search (along with any cover email or other attachments to those documents).

The scope of what 1-800 Contacts has produced to date is [REDACTED].  
reviewing nearly 3,500 additional documents. See [REDACTED]. Much of that work has now been  
completed and the documents are expected to be produced within the next few days. [REDACTED].  
has required [REDACTED].  
a privilege [REDACTED].  
documents into a production. See [REDACTED].  
enough. Complaint [REDACTED] (1-800 Contacts' production of the documents is potentially extremely enormous)  
expense of ensuring that it has produced a "complete set" of each and every weekly report [REDACTED] from  
the past 12 years, regardless of where [REDACTED] any particular version [REDACTED] from,  
and regardless of the burden associated with finding any particular version. See MTC, Proposed  
Order, section [REDACTED].

Requests [REDACTED] for "all documents relating to" the [REDACTED]  
prepared a weekly report [REDACTED] and [REDACTED] 800 Contacts to [REDACTED] these reports on the  
grounds that they are "overly broad, unduly burdensome, vague, and ambiguous." See  
MTC, [REDACTED] Matheson Decl., Ex. 5. 1-800 Contacts, however, [REDACTED].  
Complaint [REDACTED] would be able to narrow the scope to a search that [REDACTED] would be reasonable."  
*Id.* Complaint [REDACTED] Counsel refused to do so. Instead, [REDACTED].  
burden [REDACTED].  
requests in a manner that Complaint Counsel find satisfactory.

[REDACTED] 1-800 Contacts [REDACTED] 1-800 Contacts [REDACTED].  
agreed to review nearly 3,500 [REDACTED].

reports, the name, or attachment name fields. In order to respond to Requests 23 and 25, Complaint Counsel's Proposed Order would have 1,000 contacts collect the entire collection for any of the reports—anywhere in the text of that document—the name of one of the four weekly reports, or the name "Web Channel Trend," MTC, Proposed Order, section 2(a). This alone will require 1,000 Contacts to incur the burden and expense of reviewing thousands of additional documents. See *id.*,<sup>3</sup> Part a sampling of the documents:

Complaint Counsel's approach to these documents, such as: (1) task lists that merely note an employee's responsibility for the report, e.g., Clark Decl., Tab 1 (noting weekly report "Version Dashboard Channel Trend," and "Weekly Account Overview"); (2) e-mail reminders to pay invoices related to these weekly reports, e.g., Clark Decl., 7 and (and (3) many more resource records not.

### III. ARGUMENT

FTC Rule 30.3(e)(1) provides that "Parties may obtain discovery of any nonprivileged matter that is relevant to any party's claim or defense, provided that the discovery is not unduly burdensome or expensive, taking into account the needs of the parties, the amount in controversy, the parties' access to the information, the importance of the issues at stake in the litigation, and the benefits to the parties of the proposed relief, or to the discovery of any responsive information. This permitted discovery, however, shall not be reasonably expected to result in the production of documents, information, or answers that are irrelevant, immaterial, or unnecessary." This permitted discovery, however, shall not be reasonably expected to result in the production of documents, information, or answers that are irrelevant, immaterial, or unnecessary.

<sup>2</sup> Complaint Counsel's Motion includes the report titled "Web Channel Trend." It was not mentioned in any of the Requests for Production or previously identified by Complaint Counsel as part of the documents produced by the Respondent. The Respondent's 1,000 Contacts long ago produced hundreds of documents, including the Web Channel Trend report.

<sup>3</sup> The burden is further increased by Complaint Counsel's demand that 1,000 Contacts collect the "e-mail and other documents" from five specific contacts. MTC, Proposed Order, section 2(a)(1). Complaint Counsel previously argued that 1,000 Contacts, for purposes of responding to other requests, need only review e-mail files for those contacts. This demand is not reasonable because document collections to take place at this rate date, will not reasonably be done in the short time period contemplated by Complaint Counsel's Proposed Order.



preceding [redacted] Complaint Counsel [redacted] made [redacted] Cmpnt to [redacted] determine which [redacted] this date they already [redacted]

Despite the marginal relevance and low probability of finding additional [redacted] 1-800 Contacts has agreed [redacted] to produce as many additional [redacted] versions of these weekly reports (including cover emails or attachments to those reports) as it is able to locate through this additional search. [redacted] But Complaint Counsel insist that this additional search is not sufficient [redacted] perform [redacted] weekly reports generated during a nearly 12-year period has been produced. [redacted] This is plainly [redacted] reasonable [redacted]

1-800 Contacts should not [redacted] required to find every conceivable responsive document wherever it may exist and whatever the cost may [redacted] Complaint Counsel cite sites no precedent or authority [redacted] ago) to conduct a search that is more than reasonable and comprehensive to identify the documents sought by Requests 22 and 24. Anything further would impose a burden and expense that far outweighs [redacted] likely benefit [redacted]

<sup>4</sup> The document [redacted] attached to the Motion as Matheson Declaration, Tab 2, for example includes an attachment titled "DJ [redacted] Commerce Dash [redacted] CY [redacted] W [redacted] 31.xlsx," that includes all of the reported metrics [redacted] for the 31st week of 2013 and those same metrics for every single preceding week back to the beginning of 2010.

<sup>5</sup> Complaint Counsel apparently attempts to justify these demands [redacted] the commentary included in one weekly report [redacted] Contacts has responded to many other requests in the underlying investigation and this litigation that specifically sought documents of that nature. Moreover, [redacted] Complaint Counsel has not suggested [redacted] any specific type of commentary or analyses associated with the weekly reports.

B. Requests 23 and 25 Are Plainly Overbroad

The principal dispute here is whether Respondent's requests are overbroad. Respondent's objection to the requests is that they are overbroad. Counsel itself vigorously argued when the shoe was on the other foot that Respondent should broadly seek "[a]ll documents relating to" the various weekly reports described above. Less than two months ago in opposing Respondent's requests for documents from the Commission relating to the various weekly reports, Respondent argued that the requests lack the reasonable particularity regarding what materials Respondent seeks, and whether, or how, such materials relate to Respondent's defenses." CC Opp. to R. 23, 25 (Oct. 14, 2016). This Court held that Respondent's requests are overbroad. Respondent's requests that "seek '[a]ll Documents' from 2002 to [the] present 'relating to' specific identified studies," this Court held that "*requests that seek documents 'concerning' or 'relating to' have been held to be overbroad.*" CC Opp. to R. 23, 25 (Oct. 28, 2016) (emphasis added). Respondent's requests do not merely seek documents "relating to" a few specified reports; they seek all documents "relating to" numerous regularly prepared weekly reports over a course of 12 years.

Indeed, Requests 23 and 25 are prime examples of the impermissible "fishing expedition." See *Henry v. Microsoft Corp.*, 2016 WL 1000000 (D. Md. 2016) (describing similar document requests as "merely trying to engage in a fishing expedition"); *Kice v. Kenastar Insurance Co.*, 2011 WL 1000000 (D. Md. 2011) (describing similar document requests as "merely trying to engage in a fishing expedition"). The overbreadth of Respondent's requests is apparent from the suggestion that the flaws in Requests 23 and 25 are not merely that they require searching the entire collection of nearly [redacted] documents.



the text is "untenable." As shown above, 1-80

Contacts has determined that Complaint Counsel's approach  
thousands of additional documents, many of which are plainly irrelevant. In light of the  
exte  
and 24  
incur the added expense and burden  
and 25.

#### IV. CONCLUSION

For the  
Counsel's motion to Compel further production of documents in resp

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<sup>6</sup> Complaint Counsel's *in rem* motion, *North Tampa Spinal Physicians, et al. v. [redacted]*, No. 13-13004, 2014 WL 527540, at \*3 (Jan. 30, 2014); 2014 WL 12004. The requests to commercial insurers, mentioning a specific

<sup>7</sup> If this Court were limited to the documents already collected, pursuant to Complaint Counsel's prior agreement. See *supra* n.3; MTC, Matheson Decl., Tab 7 (email detailing scope of "refresh" collection).

DATE: December 7, 2017

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CERTIFICATE

INC.'S OPPOSITE  
PRODUCTION OF DOCUMENTS IN RESPONSE TO REQUESTS FOR PRODUCTION  
22-25 us  
of record as well

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., N.W., Rm. 3000  
Washington, DC 20580

DATED: December 7, 2017  
Gregory M. Sergi

CERTIFICATE FOR ELECTRONIC

I hereby verify that the electronic copy sent to the secretariat  
and correct copy of the documents that is available for review by the parties to the administrative

DATED: December 7, 2017  
Gregory M. Sergi

UNITED STATES  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

1-800 CONTACTS, INC.,  
a corporation

DECLARATION OF LISA A. CLARK IN  
RESPONDENT 1-800 CONTACTS, INC.'S OPPOSITION TO COMPLAINANT  
COUNSEL'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS IN RESPONSE  
TO REQUESTS FOR PRODUCTION 22-25

I, Lisa A. Clark,

Respondent 1-800 Contacts, Inc. in this matter. I am duly licensed to practice law before the courts of the State of California.

2. I submit this Declaration in response to Respondent 1-800 Contacts, Inc.'s Counsel's Motion to Compel Production of Documents in Response to Requests for Production 22-25. I have personal knowledge of the facts stated in this declaration, and I can competently testify to them.

3. In the course of the underlying investigation and the discovery process, Respondent 1-800 Contacts has collected documents from the [redacted] of 1-800 Contacts and from [redacted]. This collection now totals nearly [redacted] documents. 1-800 Contacts has searched this collection of documents in order to [redacted] as it has made to date.

4. In the course of this litigation and the investigation, [REDACTED] produced [REDACTED] Contacts produced [REDACTED] 1,000 documents that contain one or more of the phrases "weekly website overview," "weekly Conversion Overview," "Digital Commerce Dashboard," and "Conversion Dashboard." [REDACTED] all of the accompanying [REDACTED] total exceeds 1,600 documents.

5. A search for [REDACTED] Overview, "Digital Commerce Dashboard," or "Conversion Dashboard" [REDACTED] in the title, filename, or attachment name of the nearly [REDACTED] already collected [REDACTED] approximately 3,500 documents that have not been reviewed.

6. Based on [REDACTED] project [REDACTED] context of litigation, approximately 75-80 hours are required to complete review of the 3,500 documents identified above in paragraph 5. Additional time is required to review [REDACTED] those documents for any [REDACTED] ultimately put the [REDACTED]

7. Setting aside documents already produced and those identified in paragraphs 5 and 6 above, a search for [REDACTED] Overview," "Digital Commerce Dashboard," "Conversion Dashboard," or "Web [REDACTED] in the text of any of the nearly [REDACTED] documents already collected, as suggested in section 2 of Comp [REDACTED] proposed Order, results in thousands of additional documents that [REDACTED] not yet been [REDACTED] these additional documents would require substantial time and expense.

8. Tab 1 is a true and correct copy of a document produced by 1-800 Contacts with Bates number 1-800F\_00025054.

9. Tab 2 is a true and correct copy of a document produced by 1-800 Contacts with Bates number 1-800F\_00025054.

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

Executed on December 18, 2018.

/s/ Lisa A. Clark  
Lisa A. Clark

# Tab 1







Tab 2

What is the...  
Until: Tue, Aug 07, 16:00:00

What is

How long

Phase II calendar

Asking

Ryan's position

on Conversion Dashboard

Not updated

Notice of Electronic Service

I hereby certify that the following persons are the proper contacts for the Commission's Complaint Counsel's Office, 600 Pennsylvania Ave., NW, Suite 110, Washington, DC 20004.

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