

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

02 09 2017  
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In the Matter of

Docket No. 9372

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**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 GRANTING COMPLAINT COUNSEL'S MOTION FOR LEAVE  
TO FILE REPLY TO RESPONDENT'S OPPOSITION TO  
COMPLAINT COUNSEL'S MOTION TO BAR PRESENTATION OF TESTIMONY  
AND ARGUMENTS CONTRADICTING CERTAIN ISSUES  
RESPONDENT LITIGATED AND LOST IN *1-800 CONTACTS V. LENS.COM***

On February 9, 2017, Complaint Counsel filed a Motion for Leave to File a Reply to

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
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**In the Matter of**

**1-800 CONTACTS, INC.,  
a corporation**

**Docket No. 9372**

**COMPLAINT COUNSEL’S REPLY BRIEF IN FURTHER SUPPORT OF ITS  
MOTION TO BAR PRESENTATION OF TESTIMONY AND ARGUMENTS  
CONTRADICTING CERTAIN ISSUES RESPONDENT  
LITIGATED AND LOST IN *1-800 CONTACTS V. LENS.COM***

Complaint Counsel respectfully submits this brief in order to address two issues raised by Respondent’s Opposition: (1) Respondent’s mischaracterization of the *Lens.com* decision; and (2) Respondent’s mischaracterization of the issues presented by Complaint Counsel’s motion for issue preclusion.

*First*, Respondent mischaracterized the central holding of *Lens.com*. Respondent *twice* quotes the Tenth Circuit as stating: “[O]ne who searches for a particular business with a strong mark and sees an entry on the results page will naturally infer that the entry is for that business.” Opp. at 2 (quoting *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1245 (10<sup>th</sup> Cir. 2013)); *id* at 8.<sup>1</sup> The Tenth Circuit actually stated:

*Perhaps in the abstract*, one who searches for a particular business with a strong mark and sees an entry on the results page will naturally infer that the entry is for

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<sup>1</sup> The only statement made regarding Respondent’s agreements with rivals was the District Court of Utah’s observation: “Were this actually an ag

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for Respondent’s mark is not always or inherently likely to cause consumer confusion”), asserting that Complaint Counsel seeks a “general finding” that *no ad* could be confusing. *See* Opp. at 8. This argument attacks a straw man.

Complaint Counsel has never suggested that it would be impossible for Respondent to prove that *any* rival ad is confusing. *See* Motion at 8 (explicitly recognizing that motion would “not preclude Respondent from presenting any such evidence”). Rather, Complaint Counsel contends – based on the explicit and central holding of *Lens.com* – that the appearance of a rival ad against a query for “1-800 Contacts” is not

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Respectfully submitted,

/s/ Daniel J. Matheson  
Daniel J. Matheson  
Geoffrey M. Green  
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*Counsel Supporting the Complaint*

Dated: February 9, 2017

**CERTIFICATE OF SERVICE**

I hereby certify that on February 9, 2017, 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, R5 -2.3 Td6

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