



**COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONSE TO  
INTERROGATORY NO. 8**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that, pursuant to Federal Trade Commission Rule of Practice 3.38(a), Complaint Counsel hereby respectfully requests an order compelling Respondent to provide a full and complete response to Complaint Counsel's Interrogatory No. 8. For the reasons set forth in the accompanying Memorandum, this motion should be granted.

This Motion is supported by the accompanying Memorandum and the authorities cited 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  
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*Counsel Supporting the Complaint*

Dated: December 22, 2016

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

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**In the Matter of** )  
 )  
 )  
**1-800 CONTACTS, INC.,** )  
**a corporation,** )  
 )  
**Respondent** )

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**DOCKET NO. 9372**

Complaint Counsel respectfully requests that this Court, pursuant to Rule 3.38(a), order 1-800 Contacts ( “Respondent”) to provide a full and complete response to Interrogatory No. 8, which seeks the identity of the advertisements that 1-800 identified as allegedly infringing in communications with rivals, the process by which 1-800 determined that those advertisements were infringing, and the factual basis for those determinations.

The principal question presented by this Motion is whether 1-800 may respond by referring Complaint Counsel to its document production generally, including files not yet produced. Complaint Counsel submits that the answer to this question is no and Respondent must either provide a narrative response or identify with reasonable specificity the documents from which its answer may be ascertained.

Further, Respondent claims privilege over any responsive information not included in the ill-defined set of documents to which Respondent referred in its response, including unspecified materials in existing and forthcoming productions. While it is Respondent’s right to assert appropriate privilege claims, a blanket claim of privilege over an unspecified set of materials leaves Complaint Counsel and this Court with no way to know what portion of the response Respondent purports to be providing and what portion it is withholding. Complaint Counsel is unable to ascertain Respondent’s answer to the interrogatory based on the information provided.

The information sought by Interrogatory 8 is indisputably relevant: Respondent justifies its restraints because the advertisements at issue purportedly infringed its trademark rights. The interrogatory is also reasonable in scope, seeking this information only about the allegedly infringing advertisements that Respondent previously *specifically identified* in communications with rivals—rather than about *all* allegedly infringing advertisements. Thus, Respondent should be ordered to provide a full response to Interrogatory 8 to ensure that the parties are able to

identify to the Court at least some of the advertisements that supposedly infringed Respondent's trademark rights and therefore supposedly justify the challenged restraints.

**I. FACTUAL BACKGROUND**



**B. 1-800's Response Lacks the Specificity Required by Rule 3.35(c)**

In response to Interrogatory 8, 1-800 invoked Rule 3.35(c), identifying “[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]” Ex. A-Tab 6, at 23 (emphasis added).

By parroting back the language of the interrogatory, this response essentially tells Complaint Counsel that the documents containing responsive information are the documents that contain responsive information. It does nothing more than refer Complaint Counsel to the entirety of Respondent’s document production. This is not sufficient.

If a party wishes to respond to an interrogatory by “specify[ing] the records from which the answer may be derived or ascertained,” it must first meet two prerequisites—the answer to the interrogatory must be able to “be derived or ascertained from the records of the party . . . and the burden of deriving or ascertaining the answer [must be] substantially the same for the party serving the interrogatory as for the party served”—and it must include in its specification of records “*sufficient detail* to permit the interrogating party to identify

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*No. 44-18-04A v. Hawaii-Nevada Inv. Corp.*, 711 F.2d 902, 906 (9th Cir. 1983) (a response that “merely recited that the answers could be found ‘in partnership books of account, banking accounts, records, computer printouts, ledgers and other documents’ “did not specify where in the records the answers could be found”). Indeed, responses far more specific than Respondent’s have been ruled insufficient for Rule 33(d). *E.g.*, *United States ex rel. Landis v. Tailwind Sports Corp.*, No. 1:10-cv-00976, 2016 WL 2944648, at \*2 (D.D.C. 2016) (list of several hundred specific documents held insufficiently specific as an interrogatory response).

Even to the extent some lack of specificity might be permitted in a preliminary response, the need for 1-800 to provide a complete response prior to trial is acute in this case.<sup>3</sup> While Respondent referenced all documents in its productions as potentially containing responsive information, Complaint Counsel has no way to know which of these documents (or others) contain advertisements that were identified as infringing in *oral* communications or any written communications lost or deleted years ago, nor any way to know which documents, if any, provide the process for or facts supporting the determinations that rival advertisements were infringing.

### **C. Respondent’s Lack of Specificity Renders its Privilege Claim Inscrutable**

After identifying, in essence, its entire production as containing information responsive to the interrogatory, 1-800’s response went on to contend that [REDACTED]

[REDACTED]

[REDACTED]

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<sup>3</sup> See *Cambridge Elecs. Corp. v. MGA Elecs., Inc.*, 227 F.R.D. 313, 320-23 (C.D. Cal. 2004) (holding that “litigants have a continuing duty ‘seasonably’ to supplement all interrogatory responses”; barring plaintiff from offering at trial evidence responsive to an interrogatory that was “[n]either [provided] in its original interrogatory answers, nor in any . . . supplement”). Respondent has shown no inclination to supplement its response. It has not done so through three amendments to its responses, and there is no reason that information about its prior communications and decision-making process was not fully available at the time of its initial response.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }” Ex. A-Tab 6  
 at 24 (emphasis added).

“Such a blanket claim of privilege is improper.” *In re Shopping Carts Antitrust Litig.*, 95 F.R.D. 299, 305 (S.D.N.Y. 1982). In *Shopping Carts*, defendants objected to each of several interrogatories “*to the extent* that it attempts to compel them to disclose the contents of confidential communications between attorney and client or among attorneys engaged in the joint defense.” *Id.* (emphasis added). The court rejected this approach. “The extent to which any conversation or document is privileged must be determined on an individual case-by-case basis and not based on a blanket assertion by the party claiming the privilege. The burden is on the party claiming the privilege to present the underlying circumstances or facts demonstrating the existence of the privilege to the court.” *Id.* 1-800 has not come close to doing so here. Most notably, it has not even made clear *what* it is withholding, much less the basis for withholding it. This is inappropriate, particularly because Interrogatory 8 seeks nonprivileged information beyond that which could be reasonably expected to be located in “[REDACTED]” and “[REDACTED].” *See* Ex. A-Tab 6, at 23.

For instance, describing the *process* used to determine that the advertisements were allegedly infringing need not reveal counsel’s thought processes or mental impressions. The response may be that a particular individual within the company ran a particular search and sent all resulting advertisements to outside counsel, who sent each of those advertisements, appended to cease-and-desist lettersems--Tesandproh of those ah0.0003 Tc -7.60.0003 Twh of thosr64 lt

advertisement that appeared as a result of those searches was sent to other retailers, the description of the process would identify at what stage(s) and by whom decisions were made about which advertisers and which particular advertisements to include. Such a high-level description need not reveal privileged information. Yet 1-800's response makes it unclear whether and to what extent 1-800 is withholding this information as privileged and the basis for any privilege claim.

Nor can 1-800 ignore that the interrogatory seeks information known by 1-800 itself, including numerous non-legal personnel. Contrary to 1-800's assertion, no privilege protects the “[REDACTED]” itself—as opposed to its attorneys. *See* Ex. A-Tab 6, at 24. As the *Shopping Carts* court also pointed out, the interrogatories there “were directed at the corporate defendants and not to their attorneys” and “[t]he privilege . . . does not protect disclosure of the underlying facts by those who communicated

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. Hopkin  
Charlotte S. Slaiman  
Mika Ikeda

*Counsel Supporting the Complaint*

Dated: December 22, 2016

**STATEMENT REGARDING MEET AND CONFER**

The undersigned counsel certifies that Complaint Counsel conferred with Respondent's counsel in a good faith effort to resolve by agreement the issues raised by Respondent's Objections and Responses to Complaint Counsel's First Set of Interrogatories. On October 17, 2016 and October 21, 2016, Complaint Counsel (Dan Matheson, Barbara Blank, and Kathleen Clair) and Respondent's Counsel (Gregory Stone and Gregory Sergi) communicated by telephone. On October 18, 2016 and October 21, 2016, Complaint Counsel (Dan Matheson) and Respondent's Counsel (Gregory Stone) communicated by letter and by email. And on November 7, 2016, Complaint Counsel (Dan Matheson and Kathleen Clair) and Respondent's Counsel (Gregory Stone and Gregory Sergi) communicated by telephone.

Dated: December 22, 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**

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|                              |   |                        |
|------------------------------|---|------------------------|
| <b>In the Matter of</b>      | ) |                        |
|                              | ) |                        |
| <b>1-800 CONTACTS, INC.,</b> | ) |                        |
| <b>a corporation,</b>        | ) | <b>DOCKET NO. 9372</b> |
|                              | ) |                        |
| <b>Respondent</b>            | ) |                        |

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**[PROPOSED] ORDER**

Having carefully considered Complaint Counsel’s Motion to Compel Response to Interrogatory No. 8, 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 Response to Interrogatory No. 8 is GRANTED and it is hereby ORDERED that, no later than January 4, 2017, Respondent shall:

1. Identify with specificity, either by clearly described category or by Bates



# Ex. A



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

|                              |   |                        |
|------------------------------|---|------------------------|
| _____                        | ) |                        |
| <b>In the Matter of</b>      | ) |                        |
|                              | ) |                        |
| <b>1-800 CONTACTS, INC.,</b> | ) |                        |
| <b>a corporation,</b>        | ) | <b>DOCKET NO. 9372</b> |
|                              | ) |                        |
| <b>Respondent</b>            | ) |                        |
| _____                        | ) |                        |

**DECLARATION OF KATHLEEN M. CLAIR**

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 proceeding. Attached to this declaration are the exhibits submitted in support of Complaint Counsel’s Memorandum in Support of its Motion to Compel Response to Interrogatory 8.

3. Tab 1 is a true and correct copy of Complaint Counsel’s First Set of Interrogatories to Respondent 1-800 Contacts, Inc., dated September 8, 2016.

4. Tab 2 is a true and correct copy of the Responses of Respondent 1-800 Contacts, Inc. to Complaint Counsel’s First Set of Interrogatories, dated October 11, 2016. Rather than

45 Tab 2 is a true and correct copy of the Responses of Respondent 1-800 Contacts, Inc. to Complaint Counsel’s First Set of Interrogatories, dated October 11, 2016. Rather than  
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7. Tab 5 is a true and correct copy of the Amended Responses of Respondent 1-800 Contacts, Inc. to Complaint Counsel's First Set of Interrogatories, dated October 31, 2016.
8. Tab 6 is a true and correct copy of the Amended Responses of Respondent 1-800 Contacts, Inc. to Complaint Counsel's First Set of Interrogatories, dated November 22, 2016.
9. Tab 7 is a true and correct copy of a document produced by Respondent, consisting of an April 9, 2007 email from Brandon Dansie to Dave Zeidner and Bryan Pratt, on which Amy Larson and Bryce Craven are carbon copied, and an attachment thereto, bearing the Bates numbers 1-800F\_00010365-001 through 1-800F\_00010365-002.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 22nd day of December, 2016 at Washington, DC.

/s/ Kathleen M. Clair  
Kathleen M. Clair  
Federal Trade Commission  
Bureau of Competition  
600 Pennsylvania Ave., NW  
Washington, DC 20580  
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*Counsel Supporting the Complaint*

# Tab 1

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

**In the Matter of**

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

**Docket No. 9372**

**COMPLAINT COUNSEL'S FIRST SET OF INTERROGATORIES TO  
RESPONDENT 1-800 CONTACTS, INC.**

Pursuant to the Federal Trade Commission's Rule of Practice, 16 C.F.R. §§ 3.31 and 3.35, Complaint Counsel hereby requests that the Respondent answer the following Interrogatories within 30 days from the date of service thereof or in such lesser time as the Administrative Law Judge may allow pursuant to Rule of Practice 3.35(a)(2):

1. Identify each benefit that 1-800 Contacts received as a result of a Settlement Agreement, and identify each Settlement Agreement that resulted in 1-800 Contacts receiving such a benefit.
2. Identify each Settlement Partner which, prior to the execution of the relevant Settlement Agreement, communicated to 1-800 Contacts that the Settlement Partner did not use as a Keyword any term on which 1-800 Contacts owned a trademark.
3. Identify each Person, other than 1-800 Contacts or an Affiliate of 1-800 Contacts, that used as a Keyword a term on which 1-800 Contacts owned a trademark.
4. For each Person identified in response to Interrogatory 3, identify the period during which the Person used as a Keyword a term on which 1-800 Contacts owned a trademark.
5. Identify each Person other than an Affiliate which, at the request of 1-800 Contacts, informed 1-800 Contacts that the Person stopped using as a Keyword a term on which 1-800 Contacts owned a trademark.
6. Identify each Person other than an Affiliate which, at the request of 1-800 Contacts, informed 1-800 Contacts that the Person implemented as a Negative Keyword a term on which 1-800 Contacts owned a trademark.
7. Identify each Negative Keyword 1-800 Contacts has used on any search engine, and for each Negative Keyword identify: (a) the search engine 1-800 Contacts instructed to



**DEFINITIONS**

1. The terms “1-800 Contacts,” “1-800,” “Company,” “Respondent” or “You” mean Respondent 1-800 Contacts, Inc., its directors, officers, trustees, employees, attorneys, agents, accountants, consultants, and representatives, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, consultants, and representatives of its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, and partnerships and joint ventures.
2. The term “Affiliate” means any Person other than 1-800 Contacts which attempts to

9. The term “each,” “any,” and “all” mean “each and every.”
  10. The term “Effect” means the actual, intended, forecast, desired, predicted, or contemplated consequence or result of an action or Plan.
  11. The term “Identify” means to state:
    - a) in the case of a natural person, his or her name, employer, business address and telephone number, title or position, and dates the person held that position(s);
    - b) in the case of a Person other than a natural person, its name and principal address, telephone number, and name of a contact person;
    - c) in the case of a document, the title of the document, the author, the title or position of the author, the addressee, each recipient, the type of document, the subject matter, the date of preparation, and its number of pages; and
    - d) in the case of a communication, the date of the communication, the parties to the communication, the method of communication (oral, written, etc.), and a description of the substance of the information exchanged during the communication.
  12. The term “Keyword” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its AdWords product: “[w]oc)/a,
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16. The term “Price-Match Sale” means a sale of contact lenses to a customer pursuant to any 1-800 Contacts policy offering a customer a discounted price equal to or less than a competitor’s price when the customer identifies a competitor’s price.
17. The term “relating to” means in whole or in part constituting, containing, concerning, embodying, reflecting, discussing, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to.
18. “Search Engine” means a computer program, available to the public without charge, to search for and identify websites on the World Wide Web based on a User Query.
19. The terms “Settlement Agreement” or “Settlement Agreements” mean any agreement, whether formal or informal, including oral and written agreements, entered into by or between 1-800 Contacts and a Compy p(nalyz14Q6(s STJ-0.0011et /Lb0/T litipplodyl.Tw Ton a User C



**INSTRUCTIONS**

1. The relevant period for each Interrogatory is January 1, 2002 to the present.
2. Provide separate and complete sworn responses for each Interrogatory and subpart. Please note that under 16 C.F.R. §3.35, interrogatories directed to a corporation shall be answered by an “officer or agent,” “[e]ach interrogatory shall be answered separately and fully in writing under oath,” and “[t]he answers are to be signed by the person making them, and the objections signed by the attorney making them.” See 16 C.F.R. §§3.35(a), (b), (c).
3. State if You are unable to answer any of the Interrogatories herein fully and completely after exercising due diligence to secure the information necessary to make full and complete answers. Specify the reason(s) for Your inability to answer any portion or aspect of such Interrogatory, including a description of all efforts You made to obtain the information necessary to answer the Interrogatory fully.
4. Answer each Interrogatory fully and completely based on the information and knowledge currently available to You, regardless of whether You intend to supplement Your response upon the completion of discovery. See *North Texas Specialty Physicians*, FTC Docket No. 9312 (April 11, 2002) (Complaint Counsel must provide “full and complete responses . . . with the information and facts it currently has available”) (Chappell, A.L.J.).
5. If You object or otherwise decline to set forth in Your response any of the information requested by any Interrogatory, set forth the precise grounds upon which You rely with specificity so as to permit the Administrative Law Judge or other administrative or judicial entity to determine the legal sufficiency of Your objection or position, and provide the most responsive information You are willing to provide without an order.
6. Your answers to any Interrogatory herein must include all information within Your possession, custody or control, including information reasonably available to You and Your agents, attorneys or representatives.
7. If in answering any of the Interrogatories You claim any ambiguity in either the Interrogatory or any applicable definition or instruction, identify in Your response the language You consider ambiguous and state the interpretation You are using in responding.
8. Each Interrogatory herein is continuing and requires prompt amendment of any prior response if You learn, after acquiring additional information or otherwise, that the response is in some material respect incomplete or incorrect. See 16 C.F.R. § 3.31(e).
9. If You object to any Interrogatory or any portion of any Interrogatory on the ground that it requests information that is privileged (including the attorney-client privilege) or falls within the attorney work product doctrine, state the nature of the privilege or doctrine You claim and provide all other information as required by 16 C.F.R. § 3.38A.



**CERTIFICATE OF SERVICE**

I hereby certify that on SEPTEMBER 8, 2016 I served COMPLAINT COUNSEL'S FIRST SET OF INTERROGATORIES via electronic mail on the following counsel for Respondents:

Steven Perry, [Steven.Perry@mto.com](mailto:Steven.Perry@mto.com)  
Justin Raphael, [Justin.Raphael@mto.com](mailto:Justin.Raphael@mto.com)  
Stuart Senator, [Stuart.Senator@mto.com](mailto:Stuart.Senator@mto.com)  
Gregoy Stone, [Gregory.Stone@mto.com](mailto:Gregory.Stone@mto.com)  
Gregory Sergi, [Gregory.Sergi@mto.com](mailto:Gregory.Sergi@mto.com)  
Garth Vincent, [Garth.Vincent@mto.com](mailto:Garth.Vincent@mto.com)

Date: September 8, 2016

By: /s/Dan Matheson  
Dan Matheson

# Tab 2

REDACTED IN ENTIRETY

# Tab 3

REDACTED IN ENTIRETY

# Tab 4

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# Tab 5

REDACTED IN ENTIRETY

# Tab 6

REDACTED IN ENTIRETY

# Tab 7

REDACTED IN ENTIRETY

**CERTIFICATE OF SERVICE**

I hereby certify that on December 22, 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:

Gregory P. Stone  
Steven M. Perry  
Garth T. Vincent  
Stuart N. Senator  
Gregory M. Sergi  
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*Counsel for Respondent 1-800 Contacts, Inc.*

Dated: December 22, 2016

By: /s/ Daniel J. Matheson  
Attorney

**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 possess a paper original of the signed document that is available for review by the parties and the adjudicator.

December 22, 2016

By: /s/ Daniel J. Matheson  
Attorney