

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



In the Matter of

1-800 CONTACTS, INC.,
a corporation

PUBLIC

Docket No. 9372

ORIGINAL

RESPONDENT'S RENEWED MOTION FOR DISCOVERY FROM THE COMMISSION
PURSUANT TO RULE 3.36

I. INTRODUCTION

Pursuant to Rules 3.22 and 3.36 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 3.22, 3.36, Respondent 1-800 Contacts, Inc. moves for an order authorizing the issuance of a subpoena duces tecum to the Commission for discovery of reports, studies and analyses of (1) competitive conditions in the market for contact lenses or (2) the effects of paid search advertising on consumers, as well as documents or data on which the Commission relied in making a small number of specific public statements on these subjects.¹

The Court denied Respondent's prior motion for issuance of a subpoena for similar discovery without prejudice by Order dated October 28, 2016 ("Order"). The Court concluded that reports, studies and analyses of competition in the contact lens market and the effects of paid search advertising on consumers were relevant and that Respondent cannot reasonably obtain such documents by other means. Order at 5, 7. The Court, however, denied Respondent's motion on the ground that "Respondent has not demonstrated that its document requests are reasonable in scope and stated with reasonable particularity." *Id.* at 7.

The Court's Order states that "[s]hould Respondent wish to file a new motion, Respondent shall prepare a narrower subpoena, shall meet-and-confer with Complaint Counsel, and may file a new motion pursuant to Rule 3.36 in conformity with this Order." Order at 7. Respondent has prepared a narrower subpoena and met and conferred with Complaint Counsel. The subpoena has been narrowed in the following ways:

First, Respondent no longer seeks all documents related to reports, studies and analyses of competition in the contact lens market and the effects of paid search advertising on consumers. *Cf.* Order at 6-7 (finding requests for documents "relating" to specified subjects

¹ The form of the requested subpoena is attached as Exhibit A to the accompanying Declaration of Justin P. Raphael.

lacking “reasonable particularity”). Rather, the proposed subpoena calls for a limited subset of data and documents on which the Commission relied in making a handful of public statements. The subpoena specifically quotes these statements and seeks only the factual information that the Commission relied upon in making them. The proposed subpoena expressly excludes draft reports, studies or analyses as well as Commission Staff’s e-mail communications.

Second, the revised subpoena is directed only to certain specified offices and divisions within the Office of Policy Planning and the Bureaus of Competition, Economics and Consumer Protection. *Cf.* Order at 6 (holding that prior proposed subpoena’s definition of responding party was “not reasonable in scope”).

Third, the revised subpoena expressly does not call upon the Commission to search any investigative files or Staff Attorneys’ litigation files, which will minimize any burden of reviewing documents protected by the attorney-client privilege, the work product doctrine or the investigative privilege.²

Fourth, the revised subpoena calls only for documents created on or after January 1, 2006. *Cf.* Order at 5 (“it is not clear that documents that are over a decade old are relevant”).

Despite these significant changes to the proposed subpoena, Complaint Counsel continue to oppose all of the requested discovery. Pursuant to the Court’s Order, Respondent twice engaged with Complaint Counsel in an attempt to narrow the disputed issues and minimize the burden of motion practice on the parties and the Court. Raphael Decl. ¶¶ 6-10. Complaint Counsel, however, maintained that they would be unable to determine how to search for

² The draft subpoena that Respondent sent to Complaint Counsel proposed excepting *all* Staff Attorney files. *See* Raphael Decl. Ex. D. Respondent has modified the subpoena to avoid excluding reports or supporting materials created or gathered by Staff Attorneys acting outside of and unrelated to litigation that are responsive to the proposed subpoena and properly discoverable.

documents called for by any of the requests in the proposed subpoena. *Id.* Respondent made two further modifications to the proposed subpoena during meet-and-confer, but Complaint Counsel stood on its objections and declined to propose how Respondent could narrow its proposed subpoena still further to avoid this motion. *Id.* ¶ 10.

As explained below, the proposed subpoena requests a clearly defined group of documents on core issues in this case. Respondent has made a good faith effort to minimize the burden on the Commission to do what is only fair: disclose analyses and studies of the markets that it alleges Respondent has harmed. The requested discovery should be authorized.

II. THE COMMISSION SHOULD PRODUCE DOCUMENTS RELATED TO STUDIES OF THE MARKETS AND CONSUMER EFFECTS AT ISSUE

Rule 3.36 authorizes a subpoena to the Commission upon a showing that the requested discovery is (1) reasonable in scope; (2) “reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent”; (3) cannot reasonably be obtained by other means; and (4) has been specified with “reasonable particularity.” Order at 3-4; *see also* 16 C.F.R. § 3.36(b); *id.* §§ 3.31(c), 3.37(a).

The proposed subpoena satisfies each of these requirements.

1. Studies of Competition in the Contact Lens Market & Effects of Paid Search Advertising on Consumers

Respondent requests “[a]ll reports, studies and analyses of competition in the market for contact lenses” and “[a]ll reports, studies and analyses of Paid Search Advertising’s effect on consumers, including the potential for consumer confusion, deception or false advertising in such advertising.” The Court’s Order concluded that such documents are relevant. *See* Order at 5 (“the Commission’s reports, studies, and analyses of competition in the market for contact lenses are relevant”); *id.* (“the Commission’s reports, studies, and analyses of paid search advertising’s effect on consumers, including the potential of such advertising to cause confusion,

deception, and dilution, are relevant.”). The Court’s Order also found that these (and other) documents “cannot reasonably be obtained by other means.” *Id.* at 7.

Respondent’s proposed subpoena also describes the requested discovery with reasonable particularity. 16 C.F.R. §§ 3.36(b)(1), 3.37(a). Complaint Counsel cannot claim to lack guidance on what documents would be responsive, for Complaint Counsel themselves demanded that 1-800 Contacts to produce “analyses” and “reports.” Raphael Decl. Ex. C at 2 (Request 10); *id.* at 8 (Definition No. 24). The Commission’s public documents confirm that it has studied competitive conditions in the market for contact lenses and the effects of paid search advertising on consumers and provide exemplars for locating similar documents called for by the proposed subpoena. Respondent has simplified the search by limiting it to specified offices and divisions likely to have produced reports, studies and analyses on these issues and by absolving Complaint Counsel from any obligation to search e-mail correspondence, investigative files or litigation files belonging to Staff Attorneys. Complaint Counsel’s position that it does not know how to find the Commission’s own analyses of subjects that they have put at issue at the core of this proceeding, Raphael Decl. ¶ 9, lacks credence.

Frankly, it is somewhat surprising that Complaint Counsel has not already searched for such documents. Complaint Counsel’s position suggests that they filed suit against Respondent alleging that Respondent harmed consumers of contact lenses and paid search advertising for contact lenses without seeking to learn what the Commission’s staff specialists had learned about those subjects or whether these findings supported the allegations against Respondent. At bottom, Complaint Counsel’s resistance reflects the untenable position that Complaint Counsel can preclude Respondent from discovering whether the Commission’s own staff economists have analyzed the issues in this case and arrived at conclusions that support

Respondent's defense. That may be good strategy, but it is bad policy and fundamentally unfair.³

2. Documents and Data that the Commission Relied Upon in Making Specific Public Statements

Respondent also seeks documents or data on which the Commission relied in making a small number of public statements about competitive conditions in the market for contact lenses and the effects of paid search advertising on consumers. There is no dispute that Respondent lacks the ability to obtain information supporting the Commission's own statements from any source other than the Commission. The requested discovery also is relevant and reasonable in scope. 16 C.F.R. § 3.36(b)(2); *id.* §§ 3.31(c), 3.37(a).

(a) The Requested Discovery is Relevant

The Court's Order found that it was "not clear at this time whether the documents upon which [the Commission's public] reports, studies or analyses were based are relevant" and stated that "should Respondent include a request for such documents in a future motion, Respondent shall make a showing of relevance at that time." Order at 5. The proposed subpoena seeks discovery of documents and data that the Commission relied upon to make

³ The Commission's 2005 report on *Strength of Competition in the Sale of Rx Contact Lenses*, https://www.ftc.gov/sites/default/files/documents/advocacy_documents/possible-anticompetitive-barriers-e-commerce-contact-lenses-report-staff-ftc/040329clreportfinal.pdf, suggests that the Commission's work supports Respondent's position. According to the 2005 report, Commission staff collected price data on 10 different contact lenses from 20 online and 14 offline retailers. Staff's analysis of sales and prices across retail channels demonstrates that the relevant market is the broad retail market for contact lenses and that online retailers account for only a small fraction of sales, *id.* at 12, which could be used to refute Complaint Counsel's contention that the settling parties have market power. Tr. of Pretrial Conf., Sept. 7, 2016, at 20:9-17. Further, the Commission's use of the generic search "contact lenses" rather than "1-800 Contacts" to gather online contact lens prices, *id.* at 36-37, confirms that the most intuitive and useful searches for price-comparing consumers do not involve Respondent's trademark and are unaffected by the challenged agreements.

specific statements in its public reports that touch upon core issues in this case. The requested supporting materials fall into two categories:

First, Respondent seeks data on contact lens pricing and availability that the Commission relied upon in its 2005 report on *Strength of Competition in the Sale of Rx Contact Lenses*, *see supra* n.2, and a related working paper.⁴ According to the 2005 report, Commission staff collected price data on 10 different contact lenses from 20 online and 14 offline retailers and concluded that “contact lenses are on average \$15.48 less expensive online than offline.” *Id.* at 42. Staff also found that Respondent was the only online retailer that carried all 10 lenses studied. *Id.* at 38. The data underlying these findings could be used directly to refute the Commission’s allegations that Respondent harmed competition in an alleged market for “the retail sale of contact lenses” by, among other things, increasing contact lens prices. *Cmplt.*, ¶¶ 29, 31(i).⁵

In January 2011, the Commission told the North Carolina Board of Opticians that “[t]here was no indication” that its 2005 findings “ha[d] changed in the intervening years.”⁶ Respondent also seeks all information that the Commission relied upon in making that statement. This information could be used to show that facts about prices and availability that appear to support Respondent’s position have remained the same over time, refuting any effort by the Commission to dismiss its 2005 study as outdated.

Second, Respondent seeks documents that the Commission relied upon in

⁴ “Prices and Price Dispersion in Online and Offline Markets for Contact Lenses,” Working Paper No. 283 (2006), https://www.ftc.gov/sites/default/files/documents/reports/prices-and-price-dispersion-online-and-offline-markets-contact-lenses/wp283revised_0.pdf.

⁵ The Commission has sought similar data from Respondent. Raphael Decl. Ex. C at 2 (Request No. 9.).

⁶ https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-north-carolina-state-board-opticians-concerning-proposed-regulations-optical-goods/1101ncopticiansletter.pdf, at 5 n.35.

reaching several public conclusions about the effects of paid search advertising on consumers:

- in its 2015 Enforcement Policy Statement on Deceptively Formatted Advertisements, the Commission stated that “consumers ordinarily would expect a search engine to return results based on relevance to a search query, as determined by impartial criteria, not based on payment from a third party”;⁷
- in the same Statement, the Commission further stated that “[k]nowing when search results are included or ranked higher based on payment and not on impartial criteria likely would influence consumers’ decisions with regard to a search engine and the results it delivers”;⁸
- in a June 24, 2013 letter to search engines, Associate Director Mary K. Engle wrote that Commission Staff had “observed a decline in compliance with a [2002 letter’s] guidance” and that “the features traditional search engines use to differentiate advertising from natural search results have become less noticeable to consumers.”⁹

One assumes that the Commission conducted surveys, focus groups or other consumer research before making these public statements about consumers’ expectations and paid search advertising’s effects on them. Any such consumer research is clearly relevant to the Commission’s allegations that Respondent’s settlement agreements “[i]mpair[ed] the quality of the service provided to consumers by search engine companies,” “[p]revent[ed]” retailers from providing “non-confusing information” about their products and prices, and “[i]ncreas[ed] consumers’ search costs relating to the online purchase of contact lenses.” Cmplt., ¶¶ 31(d), (g), (h). Indeed, Complaint Counsel has demanded that Respondent produce “any study, analysis, or evaluation of search advertising,” Raphael Decl. Ex. B (Specification No. 6), “all documents relating to, or evidencing, consumer confusion in connection with any Competitor’s use of 1-800’s trademarks as keywords in a search advertising,” *id.* (Specification No. 13) and “[a]ll

⁷https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf, at 6.

⁸ *Id.*

⁹ <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industryon-need-distinguish/130625searchenginegeneralletter.pdf>.

documents Relating to surveys conducted of customers and potential customers, and comments provided by customers or potential customers.” Raphael Decl. Ex. C (Request No. 19).

(b) *The Requested Discovery Is Reasonable in Scope*

During meet-and-confer, Complaint Counsel objected that Respondent’s requests for narrow classes of supporting materials lacked reasonable particularity and did not provide sufficient guidance to locate and produce responsive documents. Raphael Decl. ¶¶ 6-10. This position strains credulity and ignores the substantial efforts that Respondent made to narrow the proposed subpoena. Respondent’s proposed subpoena does not seek all documents that the Commission relied upon in writing public documents. Rather, the proposed subpoena identifies and quotes specific statements and seeks only factual information supporting those statements. Respondent’s proposed subpoena expressly *does not* call for the Commission to produce draft reports or review e-mail correspondence of the staff involved in drafting the quoted statements.¹⁰

The way for the Commission to respond to these limited requests is simple and straightforward: identify the persons involved in drafting the statements at issue and search their files, or shared file repositories, for supporting information. Complaint Counsel’s position that this task is too difficult or burdensome amounts to a blanket objection to imposing any discovery obligation whatsoever on the Commission.

III. CONCLUSION

An order should issue authorizing a subpoena in the form attached as Exhibit A to the accompanying Declaration of Justin P. Raphael.

¹⁰ The deliberative process privilege does not protect the requested supporting materials. *See, e.g., FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (“Purely factual material that does not reflect deliberative processes is not protected.”).

DATED: November 28, 2016

Respectfully submitted,

/s/ Justin P. Raphael

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CERTIFICATE OF CONFERENCE

Pursuant to Paragraph 4 of the Scheduling Order entered in this matter on September 7, 2006, I hereby certify that counsel for Respondent 1-800 Contacts, Inc., the moving party, conferred by telephone with Complaint Counsel on November 15, 2016 and November 18, 2016 in an effort to resolve the issues raised by Respondent's Motion for Discovery from the Commission. Counsel for Respondent and Complaint Counsel were unable to reach an agreement to resolve the motion.

DATED: November 28, 2016

Respectfully submitted,

/s/ Justin P. Raphael

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

In the Matter of

1-800 CONTACTS, INC.,
a corporation

PUBLIC

Docket No. 9372

**DECLARATION OF JUSTIN P. RAPHAEL IN SUPPORT OF
RESPONDENT'S RENEWED MOTION FOR DISCOVERY FROM THE COMMISSION
PURSUANT TO RULE 3.36**

I, Justin P. Raphael, declare as follows:

1. I am an attorney at the law firm of Munger, Tolles & Olson LLP, counsel for Respondent 1-800 Contacts, Inc. in this matter. I am duly licensed to practice law before the courts of the State of California and have appeared in the action pursuant to Rule 4.1 of the Commission's Rules of Practice.

2. I submit this Declaration in Support of Respondent's Renewed Motion for Discovery From the Commission Pursuant to Rule 3.36. I have personal knowledge of the facts stated in this declaration and, if called as a witness, could competently testify to them.

3. Attached hereto as Exhibit A is a proposed subpoena directed to the Commission. Respondent's Renewed Motion for Discovery From the Commission Pursuant to Rule 3.36 respectfully requests an order authorizing issuance of this subpoena to the Commission.

4. Attached as Exhibit B is a true and correct copy of the Federal Trade Commission's Civil Investigative Demand to 1-800 Contacts, Inc., dated January 20, 2015.

5. Attached as Exhibit C is a true and correct copy of Complaint Counsel's First Set of Requests for Production to Respondent 1-800 Contacts, Inc. in this matter, dated September 8, 2016.

6. By letter dated November 9, 2016, I sent Complaint Counsel a copy of a proposed subpoena to the Commission, explaining that Respondent had made substantial efforts to narrow the subpoena whose issuance it had previously moved this Court to authorize. I requested a meet-and-confer regarding Complaint Counsel's position regarding a motion for the issuance of such a subpoena pursuant to Rule 3.36 of the Rules of Practice. A true and correct copy of my letter to Complaint Counsel is attached hereto as Exhibit D.

7. On November 15, 2016, I spoke by telephone with Complaint Counsel Dan Matheson regarding Respondent's proposed subpoena. Mr. Matheson stated that Complaint Counsel objected that the proposed subpoena as drafted was overbroad and did not provide the Commission with sufficient guidance to locate responsive documents. I answered Mr. Matheson's questions about each of the proposed requests, explaining the information that Respondent is seeking and why Respondent is doing so. Mr. Matheson indicated that Complaint Counsel would revert back with their position regarding the proposed discovery.

8. Mr. Matheson responded by e-mail on November 17, 2016 saying only the following: "Thank you for meeting and conferring with us regarding Respondent's contemplated Motion seeking a subpoena under Rule 3.36. Based on the subpoena attached to your letter of November 9, Complaint Counsel intends to oppose such a Motion." I responded to Mr. Matheson by e-mail the same day, asking whether "Complaint Counsel opposes every single one

of the proposed requests in its entirety and has no suggestions about how the subpoena could be narrowed or modified to resolve any objections.” Mr. Matheson responded that this was not accurate and that Complaint Counsel would “consider any proposals to narrow or modify the requests in a manner that would render the proposed subpoena consistent with the requirements of the aforementioned Rules.” A true and correct copy of my November 17, 2016 e-mail correspondence with Complaint Counsel is attached hereto as Exhibit E.

9. I spoke by telephone with Mr. Matheson again on November 18, 2016 regarding the proposed subpoena. I explained that Respondent had already made significant efforts to narrow its proposed subpoena. As to Requests 1 and 2 for “reports, studies and analyses,” Mr. Matheson again stated that Complaint Counsel did not know how the Commission would search for responsive documents. I asked Mr. Matheson what was unclear about these requests, explaining that they called for documents similar to those that the Commission had issued to the public, and asked whether Respondent could revise the description of the documents in any way that would resolve Complaint Counsel’s objection. Mr. Matheson responded that the requested discovery was both irrelevant and disproportionate and declined to propose any clarification that would resolve Complaint Counsel’s objection.

10. During our November 18, 2016 telephone call, Mr. Matheson also stated that he did not know how the Commission would search for responsive documents in response to Requests 3, 4, 5, 6 and 7. I asked Mr. Matheson whether Respondent could further clarify or narrow the requests for supporting materials. As to Request 3 for data supporting the Commission’s 2005 report and a related working paper, *see* Mot. nn. 3-4, Mr. Matheson said that Complaint Counsel’s position was that the information “within the four corners” of the reports was all that Respondent needed or would be permitted to discovery. As to Respondent’s

Requests 3 through 7 for information supporting statements regarding paid search advertising's effects on consumers, I agreed to limit Requests 4 and 6 to information that the Commission "relied upon" to make the quoted statements (as opposed to any information supporting those statements). I also indicated that Respondent would abandon Request No. 7. (Respondent's proposed subpoena does not include this Request.) Mr. Matheson stated that these changes would not resolve Complaint Counsel's objections. Mr. Matheson declined my invitation to propose any other modification to the subpoena that would do so.

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

Executed on November 28, 2016, in San Francisco, California.

/s/Justin P. Raphael
Justin P. Raphael

PUBLIC

EXHIBIT A



SUBPOENA DUCES TECUM

Provided by the Secretary of the Federal Trade Commission, and Issued Pursuant to Rule 3.34(a), 16 C.F.R. § 3.34(a) (2010)

<p>1. TO Federal Trade Commission 600 Pennsylvania Ave., NW, Suite 172 Washington, DC 20580</p>	<p>2. FROM Munger Tolles & Olson LLP, Counsel for Respondent 1-800 Contacts, Inc.</p>
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This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

<p>3. PLACE OF PRODUCTION Munger Tolles & Olson LLP c/o Gregory Stone, Esq. 355 South Grand Ave, 35th Floor Los Angeles, CA 90071</p>	<p>4. MATERIAL WILL BE PRODUCED TO Gregory P. Stone, Esq.</p> <hr/> <p>5. DATE AND TIME OF PRODUCTION TBD</p>
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6. SUBJECT OF PROCEEDING
In the Matter of 1-800 Contacts, Inc., Docket No. 9372

7. MATERIAL TO BE PRODUCED
Documents & materials responsive to the attached Subpoena Duces Tecum Requests for Production

<p>8. ADMINISTRATIVE LAW JUDGE The Honorable D. Michael Chappell Federal Trade Commission Washington, D.C. 20580</p>	<p>9. COUNSEL AND PARTY ISSUING SUBPOENA Justin Raphaeli, or designee Munger Tolles & Olson LLP 560 Mission Street, 27th Floor San Francisco, CA 94105 (415) 512-4085</p>
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<p>DATE SIGNED TBD</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p>
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GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCsRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1995.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

via FedEx

on the person named herein on:

TBD

(Month, day, and year)

Gregory Stone

(Name of person making service)

Attorney

(Official title)

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

**RESPONDENT'S SUBPOENA *DUCES TECUM* ATTACHMENT TO
THE FEDERAL TRADE COMMISSION**

Pursuant to the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 3.34 and 3.36, and the Definitions and Instructions set forth below, Respondent hereby requests that the Commission produce all documents, electronically stored information, and other things in its possession, custody, or control responsive to the following requests:

1. All reports, studies or analyses of competition in the market for contact lenses.
2. All reports, studies, or analyses of Paid Search Advertising's effect on consumers, including the potential for consumer confusion, deception, or false advertising in such advertising.
3. The contact lens pricing and availability data relied upon in *Prices and Price Dispersion in Online and Offline Markets for Contact Lenses*, WORKING PAPER NO. 283 (Original Version: April 2006 Revised: November 2006) and the Commission's 2005 report on *Strength of Competition in the Sale of Rx Contact Lenses*.
4. All data, studies, and information relied upon to support the statement in footnote 35 of the *FTC Staff Comment Before the North Carolina State Board of Opticians Concerning Proposed Regulations for Optical Goods and Optical Goods Businesses* (Jan. 13, 2011; V110002) that "[t]here [wa]s no indication that" the Commission's 2005 findings about pricing and availability of contact lenses "ha[d] changed in the intervening years."

5. All data, surveys, studies, and information relied upon to support the statements in the Commission's 2015 Enforcement Policy Statement on Deceptively Formatted Advertisements that "consumers ordinarily would expect a search engine to return results based on relevance to a search query, as determined by impartial criteria, not based on payment from a third party" and that "[k]nowing when search results are included or ranked higher based on payment and not on impartial criteria likely would influence consumers' decisions with regard to a search engine and the results it delivers."

6. All documents, data, information, or studies relied upon to support the statements in the June 24, 2013 letters from Associate Director Mary K. Engle to Search Engines that Commission Staff had "observed a decline in compliance with the [2002 Search Engine Letter's] guidance" and that "the features traditional search engines use to differentiate advertising from natural search results have become less noticeable to consumers."

* * * *

For the purpose of this subpoena, 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 "Commission" "You," and "Your" as used herein mean only the Office of Policy Planning, the Bureau of Competition, the Bureau of Economics and the Bureau of Consumer Protection of the Federal Trade Commission and all employees, agents, attorneys, representatives, and all other persons acting or purporting to act or that have acted or purported to have acted on behalf of any of the foregoing.
2. The terms "and" and "or" have both conjunctive and disjunctive meanings.
3. The term "Computer Files" includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Commission should produce Documents that exist in machine-readable form, including Documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off Commission premises. If the Commission believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with Respondent's need for Documents and information, you are encouraged to discuss a possible modification to this instruction with Counsel for Respondent identified on the last page of this subpoena. Counsel for Respondent will consider modifying this instruction to:
 - a. exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers,

- mainframes, and servers searched by the Respondent;
- b. limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain specifications identified by Counsel for Respondent; or
 - c. include other proposals consistent with the facts of the case.
4. The term “Documents” means all Computer Files and written, recorded, and graphic materials of every kind in the possession, custody, or control of the Commission. The term “Documents” includes, without limitation: electronic mail messages; electronic correspondence and drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed on computer systems; copies of documents that are not identical duplicates of the originals in that Person’s files; and copies of documents the originals of which are not in the possession, custody, or control of the Commission.
 5. The terms “each,” “any,” and “all” mean “each and every.”
 6. “Paid Search Advertising” means advertising generated on a Search Engine Results Page.
 7. “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.
 8. “Search Engine Results Page” means a webpage displayed by a Search Engine in response to a User Query.
 9. “User Query” means data entered into a computer by an end user of a Search Engine for the purpose of operating the Search Engine.

INSTRUCTIONS

1. Unless otherwise indicated, each request covers documents and information dated, generated, received, or in effect from January 1, 2006 to the present.
2. Your response to this Subpoena shall require a search only of files maintained by the following offices at the Commission:
 - a. the Office of Policy Planning
 - b. the Office of Policy & Coordination, Health Care Division and Anticompetitive Practices Division of the Bureau of Competition;
 - c. the Division of Advertising Practices and Division of Marketing Practices of the Bureau of Consumer Protection; and
 - d. the Office of Applied Research, Antitrust Division I, Antitrust Division II, and Consumer Protection Division of the Bureau of Economics.
3. Nothing in this Subpoena shall be construed to require a search of the Commission's investigative files or the litigation files of any Staff Attorney.
4. Nothing in this Subpoena shall be construed to require production of draft reports, studies or analyses or e-mail correspondence between Commission employees involved in the preparation of reports, studies or analyses.
5. This subpoena shall be deemed continuing in nature so as to require production of all documents responsive to any request included in this subpoena produced or obtained by the Commission up to fifteen (15) calendar days prior to the date of the Commission's full compliance with this subpoena.
6. Except for privileged material, the Commission will produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. The Commission should submit any appendix, table, or other attachment by either attaching it to the responsive document or clearly marking it to indicate the responsive document to which it corresponds. Except for privileged material, the Commission will not redact, mask, cut, expunge, edit, or delete any responsive document or portion thereof in any manner.
7. If any person is unwilling to have his or her files searched, or is unwilling to produce responsive documents, the Commission must provide Counsel for Respondent with the following information as to each such person: his or her name, address, telephone number, and relationship to the Commission. In addition to hard copy documents, the search must include all of the Commission's electronically stored information.
8. Form of Production. The Commission shall submit all documents as instructed below absent written consent signed by Counsel for Respondent.
 - a. Documents stored in electronic or hard copy formats in the ordinary course of

business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original documents:

- i. Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and applicable metadata and information as described in subparts (a)(iii) and (a)(iv).
- ii. Submit emails in image format with extracted text and the following metadata and information:

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 email.
From	The person who authored the email.
CC	Person(s) copied on the email.
BCC	Person(s) blind copied on the email.
Subject	Subject line of the email.
Date Sent	Date the email was sent.
Time Sent	Time the email was sent.
Date Received	Date the email was received.
Time Received	Time the email was received.
Attachments	The Document ID of attachment(s).
Mail Folder Path	Location of email in personal folders, subfolders, deleted items or sent items.
Message ID	Microsoft Outlook Message ID or similar value in other message systems.

- iii. Submit email attachments in image format, or native format if the file is one of the types identified in subpart (a)(i), with extracted text and the following metadata and information:

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.
Parent ID	The Document ID of the parent email.
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

- iv. Submit all other electronic documents in image format, or native format if the file is one of the types identified in subpart (a)(i), accompanied by extracted text and the following metadata and information:

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.
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.

Originating Path	File path of the file as it resided in its original environment.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

- v. Submit documents stored in hard copy in image format accompanied by OCR with the following information:

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.

- vi. Submit redacted documents in image format accompanied by OCR with the metadata and information required by relevant document type in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above. Additionally, please provide a basis for each privilege claim as detailed in Instruction 6.
- b. Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats such as CSV files, with all underlying data un-redacted and all underlying formulas and algorithms intact.
 - c. If the Commission intends to utilize any electronic search terms, de-duplication or email threading software or services when collecting or reviewing information that is stored in the Commission's computer systems or electronic storage media, or if the Commission's computer systems contain or utilize such software, the Commission must contact Counsel for Respondent to discuss whether and in what manner the Commission may use such software or services when producing materials in response to this subpoena.
 - d. Produce electronic file and image submissions as follows:
 - i. For productions over 10 gigabytes, use IDE, EIDE, and SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data

- in a USB 2.0 external enclosure;
- ii. For productions under 10 gigabytes, CD-R CD-ROM optical disks formatted to ISO 9660 specifications, DVD-ROM optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats; and
 - iii. All documents produced in electronic format shall be scanned for and free of viruses prior to submission. Counsel for Respondent will return any infected media for replacement, which may affect the timing of the Commission's compliance with this subpoena.
 - iv. Encryption of productions using NIST FIPS-compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.¹¹
 - e. Each production shall be submitted with a transmittal letter that includes the FTC matter number; production volume name; encryption method/software used; passwords for any password protected files; list of custodians and document identification number range for each; total number of documents; and a list of load file fields in the order in which they are organized in the load file.¹¹
9. All documents responsive to this subpoena:
- a. Shall be produced in complete form, unredacted unless privileged, and in the order in which they appear in the Commission's files;
 - b. Shall be marked on each page with identification and consecutive document control numbers when produced in image format;
 - c. Shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black and white photocopying or conversion to TIFF format of any document (e.g., a chart or graph) makes any substantive information contained in the document unintelligible, the Commission must submit the original document, a like-color photocopy, or a JPEG format image);
 - d. Shall be accompanied by an affidavit of an officer of the Commission stating that the copies are true, correct, and complete copies of the original documents;

¹¹ The National Institute of Standards and Technology (NIST) issued Federal Information Processing Standard (FIPS) Publications 140-1 and 140-2, which detail certified cryptographic modules for use by the U.S. Federal government and other regulated industries that collect, store, transfer, share, and disseminate sensitive but unclassified information. More information about FIPS 140-1 and 140-2 can be found at <http://csrc.nist.gov/publications/PubsFIPS.html>.

and

- e. Shall be accompanied by an index that identifies (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's documents. Respondent will provide a sample index upon request.
10. If any documents are withheld from production based on a claim of privilege, the Commission shall provide, pursuant to 16 C.F.R. § 3.38A, a schedule which describes the nature of documents, communications, or tangible things not produced or disclosed, in a manner that will enable Counsel for Respondent to assess the claim of privilege.
 11. If documents responsive to a particular request no longer exist for reasons other than the ordinary course of business or the implementation of the Commission's document retention policy but the Commission has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the request(s) to which they are responsive, and identify Persons having knowledge of the content of such documents.
 12. The Commission must provide Counsel for Respondent with a statement identifying the procedures used to collect and search for electronically stored documents and documents stored in paper format. The Commission must also provide a statement identifying any electronic production tools or software packages utilized by the Commission in responding to this subpoena for: keyword searching, Technology Assisted Review, email threading, de-duplication, global de-duplication or near- de-duplication, and
 - a. if the Commission utilized keyword search terms to identify documents and information responsive to this subpoena, provide a list of the search terms used for each custodian;
 - b. if the Commission utilized Technology Assisted Review software;
 - i. describe the collection methodology, including: how the software was utilized to identify responsive documents; the process the Commission utilized to identify and validate the seed set documents subject to manual review; the total number of documents reviewed manually; the total number of documents determined nonresponsive without manual review; the process the Commission used to determine and validate the accuracy of the automatic determinations of responsiveness and nonresponsiveness; how the Commission handled exceptions ("uncategorized documents"); and if the Commission's documents include foreign language documents, whether reviewed manually or by some

- technology-assisted method; and
 - ii. provide all statistical analyses utilized or generated by the Commission or its agents related to the precision, recall, accuracy, validation, or quality of its document production in response to this subpoena; and identify the person(s) able to testify on behalf of the Commission about information known or reasonably available to the organization, relating to its response to this subpoena.
 - c. if the Commission intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Commission's computer systems or electronic storage media in response to this subpoena, or if the Commission's computer systems contain or utilize such software, the Commission must contact Counsel for Respondent to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Commission may use such software or services when producing materials in response to this subpoena.
13. Any questions you have relating to the scope or meaning of anything in this subpoena or suggestions for possible modifications thereto should be directed to Justin Raphael or designee at (415) 512-4085, Justin.Raphael@mto.com. The response to the subpoena shall be addressed to the attention of Gregory Stone, Munger Tolles & Olson LLP, 355 South Grand Avenue, 35th Floor, Los Angeles, CA 90071, and delivered between 8:30 a.m. and 5:00 p.m. on any business day.

EXHIBIT B



United States of America
Federal Trade Commission

CIVIL INVESTIGATIVE DEMAND

1. TO

1-800 Contacts, Inc.
c/o Garth Vincent, Esq.
Munger, Tolles & Olson LLP
355 South Grand Avenue, Los Angeles, CA 90071

This demand is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, in the course of an investigation to determine whether there is, has been, or may be a violation of any laws administered by the Federal Trade Commission by conduct, activities or proposed action as described in Item 3.

2. ACTION REQUIRED

You are required to appear and testify.

LOCATION OF HEARING

Federal Trade Commission
400 Seventh Street, SW
Room: GG-5538
Washington, DC 20540

YOUR APPEARANCE WILL BE BEFORE

Gustav P. Chiarello, Esq.

DATE AND TIME OF HEARING OR DEPOSITION

February 17, 2015

You are required to produce all documents described in the attached schedule that are in your possession, custody, or control, and to make them available at your address indicated above for inspection and copying or reproduction at the date and time specified below.

You are required to answer the interrogatories or provide the written report described on the attached schedule. Answer each interrogatory or report separately and fully in writing. Submit your answers or report to the Records Custodian named in Item 4 on or before the date specified below.

DATE AND TIME THE DOCUMENTS MUST BE AVAILABLE

February 17, 2015

3. SUBJECT OF INVESTIGATION

1-800 Contacts, Inc., File No. 141-0200

4. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN

Geoffrey Green, Custodian
Barbara Blank, Deputy Custodian

5. COMMISSION COUNSEL

Gustav P. Chiarello, Esq.

DATE ISSUED

1/20/15

COMMISSIONER'S SIGNATURE

INSTRUCTIONS AND NOTICES

The delivery of this demand to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. The production of documents or the submission of answers and reports in response to this demand must be made under a sworn certificate, in the form printed on the second page of this demand, by the person to whom this demand is directed. It is not a general purpose, by a certain number of persons having knowledge of the facts and circumstances of such production or responses for answering each interrogatory or report required. This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this demand be filed within 20 days after service, or if the return date is less than 20 days after service, prior to the return date. The original and seven copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 5.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business under Small Business Administration standards, you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of this agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC recovers its regulatory costs by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

If you are asked to travel to a hearing or deposition to which you are invited as a witness for the Commission, the computed travel voucher and this demand should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this demand and if you require excessive travel for you to appear, you must first provide approval from Commission Counsel.

2 copy of the Commission's Rules of Practice is available online at www.ftc.gov. Paper copies are available upon request.

Form of Certificate of Compliance*

We do certify that all of the documents and information required by the attached Civil Investigative Demand which are in the possession, custody, control, or knowledge of the person to whom the demand is directed have been submitted to a custodian named herein.

If a document responsive to this Civil Investigative Demand has not been submitted, the objections to its submission and the reasons for the objection have been stated.

If an interrogatory or a portion of the request has not been fully answered or a portion of the report has not been completed, the objections to such interrogatory or uncompleted portion and the reasons for the objections have been stated.

Signature _____

Title _____

Sworn to before me this day

Notary Public

*In the event that more than one person is responsible for complying with this demand, the certificate shall identify the documents for which each certifying individual was responsible. In place of a sworn statement, the above certificate of compliance may be supported by an unsworn declaration as provided for by 26 U.S.C. § 1746.

CIVIL INVESTIGATIVE DEMAND ISSUED TO 1-800 CONTACTS, INC.

File No. 141-0200

SCHEDULE

For the purpose of this Civil Investigative Demand ("CID"), the following definitions and instructions apply:

DEFINITIONS

1. **"Company," "1-800," and "you" or "your"** shall mean 1-800 Contacts, Inc., its directors, officers, trustees, employees, attorneys, agents, 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, partnerships and joint ventures.
2. **"Agreement" or "contract"** shall mean any oral, written, or implied contract, arrangement, understanding, or plan, whether formal or informal, between two or more persons, together with all modifications or amendments thereto.
3. **"And,"** as well as **"or,"** shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any Specification in the Schedule all information that otherwise might be construed to be outside the scope of the Specification.
4. **"Any"** shall be construed to include **"all,"** and **"all"** shall be construed to include **"any."**
5. **"Communication"** shall mean any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
6. **"Competitor"** includes the Company, and shall mean any person engaged in the business of selling contact lenses to consumers.
7. **"Containing"** shall mean containing, describing, or interpreting, in whole or in part.
8. **"Discuss" or "discussing"** shall mean, in whole or in part, constituting, containing, describing, analyzing, explaining, or addressing the designated subject matter, regardless of the length of the treatment or detail of analysis of the subject matter, but not merely referring to the designated subject matter without elaboration. A document that "discusses" another document includes the other document itself.
9. **"Documents"** shall mean all written, recorded, transcribed, or graphic matter of every

type and description, however and by whomever prepared, produced, reproduced, disseminated, or made, including, but not limited to, analyses, letters, telegrams, memoranda, reports, bills, receipts, telexes, contracts, invoices, books, accounts, statements, studies, spreadsheets, presentations, surveys, pamphlets, notes, charts, maps, plats, tabulations, graphs, tapes, data sheets, data processing cards, printouts, net sites, microfilm, indices, calendar or diary entries, manuals, guides, outlines, abstracts, histories, agendas, minutes or records of meetings, conferences, electronic mail, and telephone or other conversations or communications, as well as films, tapes, or slides, and all other data compilations in the possession, custody, or control of the Company, or to which the Company has access. The term "documents" includes the complete original document (or a copy thereof if the original is not available), all drafts (whether or not they resulted in a final document), and all copies that differ in any respect from the original, including any notation, underlining, marking, or information not on the original. The term "other data compilations" includes information stored in, or accessible through, computer or other information retrieval systems, together with instructions and all other material necessary to use or interpret such data compilations. If the name of the person or persons who prepared, reviewed, or received the document and the date of preparation, review, or receipt are not clear on the face of any document, such information should be provided separately.

10. "Documents sufficient to show" and "documents sufficient to identify" shall mean both documents that are necessary and documents that are sufficient to provide the specific information. If summaries, compilations, lists, or synopses are available that provide the information being requested, these may be provided in lieu of the underlying documents.
11. "Each" shall be construed to include "every," and "every" shall be construed to include "each."
12. "Effect" shall mean the actual, intended, forecast, desired, or contemplated consequence or result of an action or plan.
13. "Person" includes the Company, and shall mean any natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or any other organization or entity engaged in commerce.
14. "Plan" or "plans" shall mean tentative and preliminary proposals, strategies, recommendations, analyses, reports, or considerations, whether or not precisely formulated, finalized, authorized, or adopted.
15. "Referring to," "relating to," "regarding" or "about" shall mean, in whole or in part.

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constituting, containing, concerning, embodying, reflecting, discussing, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to.

16. "Settlement Agreement" or "Settlement Agreements" shall mean, in whole or in part, in singular or plural, any agreement entered into by or between 1-800 and any other person to resolve any allegation, dispute, litigation, or other matter concerning any of 1-800's trademarks.

INSTRUCTIONS

The response to this CID shall be submitted in the following manner:

1. Unless otherwise indicated, each specification in this CID covers documents and information dated, generated, received, or in effect from January 1, 2002, to thirty days before the day when the Company provides the Commission with its final document submission, the executed certification form, and other compliance-related documents described in Instruction 12 ("Request Period"). The Company shall preserve documents responsive to the CID created or received after the Request Period until a Commission representative notifies the Company that the investigation has ended.
2. Except for privileged material, the Company will produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. The Company should submit any appendix, table, or other attachment by either attaching it to the responsive document or clearly marking it to indicate the responsive document to which it corresponds. Except for privileged material, the Company will not redact, mask, cut, expunge, edit, or delete any responsive document or portion thereof in any manner.
3. Compliance with this CID requires a search of all documents in the possession, custody, or control of the Company including, without limitation, those documents held by any of the Company's officers, directors, employees, agents, representatives, or legal counsel, whether or not such documents are on the premises of the Company. If any person is unwilling to have his or her files searched, or is unwilling to produce responsive documents, the Company must provide the Commission with the following information as to each such person: his or her name, address, telephone number, and relationship to the Company. In addition to hard copy documents, the search must include all of the Company's Electronically Stored Information.
4. Form of Production. The Company shall submit all documents as instructed below absent written consent signed by the Assistant Director.

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- a. Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original documents:
- i. Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and applicable metadata and information as described in subparts (a)(iii) and (a)(iv).
 - ii. Submit emails in image format with extracted text and the following metadata and information:

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 original custodian of the file.
To	Recipient(s) of the email.
From	The person who authored the email.
CC	Person(s) copied on the email.
BCC	Person(s) blind copied on the email.
Subject	Subject line of the email.
Date Sent	Date the email was sent.
Time Sent	Time the email was sent.
Date Received	Date the email was received.
Time Received	Time the email was received.
Attachments	The Document ID of attachment(s).
Mail Folder Path	Location of email in personal folders, subfolders, deleted items or sent items.
Message ID	Microsoft Outlook Message ID or similar value in other message systems.

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- iii. Submit email attachments in image format, or native format if the file is one of the types identified in subpart (a)(f), with extracted text and the following metadata and information:

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 original custodian of the file.
Parent Email	The Document ID of the parent email.
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

- iv. Submit all other electronic documents in image format, or native format if the file is one of the types identified in subpart (a)(i), accompanied by extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.

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Ending Bates number	The last bates number of the document
Custodian	The name of the original custodian of the file.
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Originating Path	File path of the file as it resided in its original environment
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file

- v. Submit documents stored in hard copy in image format accompanied by OCR with the following information:

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 original custodian of the file

- vi. Submit redacted documents in PDF format accompanied by OCR with the metadata and information required by relevant document type in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified

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in subpart (a)(iii) above. Additionally, please provide a basis for each privilege claim as detailed in Instruction 6.

- b. Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats such as CSV files, with all underlying data un-redacted and all underlying formulas and algorithms intact.
- c. If the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media, or if the Company's computer systems contain or utilize such software, the Company must contact the Commission to determine, with the assistance of the appropriate Commission representative, whether and in what manner the Company may use such software or services when producing materials in response to this CID.
- d. Produce electronic file and image submissions as follows:
 - i. For productions over 10 gigabytes, use IDE, EIDE, and SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure;
 - ii. For productions under 10 gigabytes, CD-R CD-ROM optical disks formatted to ISO 9660 specifications, DVD-ROM optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats; and
 - iii. All documents produced in electronic format shall be scanned for and free of viruses prior to submission. The Commission will return any infected media for replacement, which may affect the timing of the Company's compliance with this CID.
 - iv. Encryption of productions using NIST FIPS-compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.¹

¹ The National Institute of Standards and Technology (NIST) issued Federal Information Processing Standard (FIPS) Publications 140-1 and 140-2, which detail certified cryptographic modules for use by the U.S. Federal government and other regulated industries that collect, store, transfer, share, and disseminate sensitive but unclassified information. More information about FIPS 140-1 and 140-2 can be found at <http://csrc.nist.gov/publications/PubsFIPS.html>.

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- e. Each production shall be submitted with a transmittal letter that includes the FTC matter number; production volume name; encryption method/software used; passwords for any password protected files; list of custodians and document identification number range for each; total number of documents; and a list of load file fields in the order in which they are organized in the load file.
5. All documents responsive to this CID:
 - a. Shall be produced in complete form, unredacted unless privileged, and in the order in which they appear in the Company's files;
 - b. Shall be marked on each page with corporate identification and consecutive document control numbers when produced in image format;
 - c. Shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black and white photocopying or conversion to TIFF format of any document (e.g., a chart or graph) makes any substantive information contained in the document unintelligible, the Company must submit the original document, a like-color photocopy, or a JPEG format image);
 - d. Shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original documents; and
 - e. Shall be accompanied by an index that identifies (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's documents. The Commission representative will provide a sample index upon request.
6. If the Company withholds any responsive document or masks or redacts any portion of any responsive document based on a claim of privilege or work-product immunity, the Company must provide the Commission with a log describing the privilege claim and all facts supporting the claim sufficient to comply with Federal Trade Commission Rule of Practice § 2.8A, 16 C.F.R. § 2.8A. For each document withheld, masked, or redacted, the log shall list the following: (a) specific grounds for claim of privilege or immunity, (b) type of document, (c) title, (d) author(s), (e) date, (f) addressees and recipients of the original document or any copy thereof (including persons "cc'd" or "blind cc'd"), (g) a description of the subject matter, with sufficient detail to assess the claim of privilege, (h) a description identifying each attachment to the document, (i) the page length of the document, (j) the relevant specification(s), and (k) for redacted documents, the document control number (as described in Instruction 5). Additionally, for each document withheld under a claim of attorney work-product immunity, the log will list: (l) whether the document was prepared in anticipation of litigation or for trial, (m) the other parties or

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expected other parties to the litigation and whether that party is adverse, (n) case number, (o) complaint filing date, and (p) court name. For each person listed, the log will include the person's full name, address, job title, and employer or firm; for each non-Company recipient, include such additional description sufficient to show that individual's need to know the information contained in the document. Please denote all attorneys with an asterisk ("**").

The privilege log shall be submitted as a Microsoft Excel or other native file.

An attachment to a document must be entitled to privilege in its own right. If an attachment is responsive and not entitled to privilege in its own right, it must be provided. The Company must provide all non-privileged portions of any responsive document for which a claim of privilege is asserted, noting where redactions in the document have been made. With respect to documents withheld on grounds of privilege that discuss or describe any U.S. or foreign patent, each individual patent identified in the withheld document must be specified by its patent number.

7. Documents written in a language other than English shall be translated into English, with the English translation attached to the foreign language document.
8. Do not destroy or dispose of documents responsive to this CID, or any other documents relating to the subject matter of this CID. The destruction or disposal of such documents during the pendency of this investigation might constitute a felony in violation of 18 U.S.C. §1505 and 18 U.S.C. §1512.
9. Do not produce any Sensitive Personally Identifiable Information ("Sensitive PII") or Sensitive Health Information ("SHI") prior to discussing the information with a Commission representative. If any document responsive to a particular specification contains unresponsive Sensitive PII or SHI, redact the unresponsive Sensitive PII or SHI prior to producing the document. The term "Sensitive PII" means an individual's Social Security Number alone or an individual's name, address or phone number in combination with one or more of the following: date of birth; driver's license number or other state identification number, or a foreign country equivalent; passport number; financial account number; or credit or debit card number. The term "SHI" includes medical records and other individually identifiable health information, whether on paper, in electronic form, or communicated orally. SHI relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.
10. The Company must provide the Commission with the following: (a) a statement identifying the procedures used to search for Electronically Stored Information documents; and (b) a statement identifying the procedures used to search for documents

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stored in paper format, including for each document custodian, identification of individuals who provided information on the location of responsive documents.

11. The Company must comply with this CID by submitting all documents and information responsive to it on or before the dates identified in this CID. In addition, when it has completed production, the Company must also submit the executed and notarized certification form (attached). In order for the Company's response to this CID to be complete, the attached certification form must be executed by the official supervising compliance with this CID, notarized, and submitted along with the responsive materials. The Company should submit responsive documents to Gustav P. Chiarello, Esq., Federal Trade Commission, Bureau of Competition, Constitution Center, 400 7th St., SW, Room 5508, Washington, DC 20580.
12. Compliance with this CID requires the Company to submit to the Commission, on or before the due dates indicated, all responsive documents, data, information and the following:
 - a. Executed and notarized certification form, which is included herewith;
 - b. Privilege Log according to Instruction 6, if any responsive documents are withheld or redacted;
 - c. List of any persons (by name, address, telephone number, and relationship to the Company) whose files have not been searched according to Instruction 3;
 - d. For each document submitted, information sufficient to identify the name of the person from whose files the document was obtained (document custodian), according to Instruction 5; and
 - e. Statement of the procedures used by the Company to comply with this CID, according to Instruction 10.
13. If the Company believes that this CID's specifications can be narrowed consistent with the Commission's need for information, we encourage it to discuss possible modifications with a Commission representative at the earliest possible date. Note that an authorized Commission representative, the Assistant Director, must agree in writing to any modifications to this CID. All inquiries about this CID and modification requests should be directed to Gustav P. Chiarello, Attorney, at (202) 326-2633.

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SPECIFICATIONS OF INFORMATION AND DOCUMENTS TO BE PRODUCED

1. Submit a current organization chart and the most recent telephone and other personnel directories for 1-800.
2. In spreadsheet form, state in dollars the Company's annual and monthly sales revenue during the Request Period for contact lenses in total, and separately, for each of the following consumer channels:
 - a. Online;
 - b. Telephone-order;
 - c. Mail-order; and
 - d. Other (and identify "Other" channels).
3. In spreadsheet form, state in dollars the Company's annual and monthly expenditure on advertising during the Request Period for contact lenses in total, and separately for each of the following advertising channels:
 - a. Television;
 - b. Radio;
 - c. Billboard;
 - d. Print;
 - e. Search advertising;
 - f. Online advertising that is not search advertising; and
 - g. Other (and identify "Other" channels).
4. Submit all documents that discuss or analyze competition in the sale of contact lenses, including without limitation, all documents that discuss or analyze: (i) the market share or competitive position of any Competitor; (ii) the relative strength or weakness of any Competitor; (iii) market supply and demand conditions; and (iv) efforts to win sales or customers from any Competitor, and losses of sales or customers to any Competitor.

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5. Submit all documents relating to 1-800's plans or strategy for the sale of contact lenses, including, but not limited to, all: strategic plans; business plans; marketing plans; advertising plans; pricing plans; forecasts; strategies and decisions; market studies; and presentations to management committees, executive committees, and boards of directors.
6. Submit all documents relating to 1-800's or any other person's plans or strategy relating to search advertising, including, but not limited to, all documents relating to: any study, analysis, or evaluation of search advertising, the value of search advertising; the value of bidding on Competitors' trademarks as keywords in auctions; and the effect of bidding on Competitors' trademarks as keywords in auctions.
7. Describe in detail how 1-800 implemented its search advertising strategy, including the following information:
 - a. A list of all keywords bid upon during the Request Period, with trademarked keywords identified;
 - b. A list of all negative keywords implemented during the Request Period, with trademarked negative keywords identified, and an explanation of how the negative keywords were selected, and how they have been implemented;
 - c. In spreadsheet form, state the dollar amount paid per click, by search advertising platform, by keyword, during the Request Period;
 - d. In spreadsheet form, state the monthly sales (in dollars and units) generated by each search advertising platform, by keyword, during the Request Period, and
 - e. How 1-800 defines a "conversion" from a search advertisement, along with 1-800's conversion rate on each search advertising platform.
8. Describe, and submit all documents relating to, the effect of any Competitor's bid on 1-800's trademarks as keywords in any search advertising auction on:
 - a. 1-800's search advertising strategy;
 - b. 1-800's strategy for non-search advertising;
 - c. 1-800's retail sales strategy; and
 - d. 1-800's sales or revenues, including, but not limited to, estimated lost sales (in dollars and units).

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9. Describe, and submit all documents relating to, the effect of a bid by 1-800 on any Competitor's trademarks as keywords in any search advertising auction on:
 - a. 1-800's search advertising strategy;
 - b. 1-800's strategy for non-search advertising;
 - c. 1-800's retail sales strategy; and
 - d. 1-800's sales or revenues.
10. Identify every employee or other person who has worked on behalf of 1-800 on brand marketing and/or advertising campaigns, and identify the relevant marketing or advertising channel (breaking out search advertising as a separate advertising category or sub-category).
11. Describe, and submit all documents relating to, the origin, purpose, intent, and effect of 1-800's trademark protection and enforcement strategy, including, but not limited to: (i) 1-800's plans, decisions, and strategies to file trademark infringement lawsuits or seek settlements with Competitors; (ii) how 1-800 identified alleged infringers; (iii) how 1-800 determined that infringement had occurred; (iv) what actions 1-800 took to protect or enforce its trademarks; (v) the effect of 1-800's strategy on competition, prices, output, or costs of search advertising; (vi) the effect of 1-800's strategy on competition, prices, output, or costs of contact lenses; and (vii) the effect of 1-800's strategy on 1-800, consumers of contact lenses, any Competitor, or any search advertising platform.
12. Submit all documents relating to any Settlement Agreement, including, without limitation, all documents relating to: (i) the origin, purpose, objective, or intent of any Settlement Agreement; (ii) the effect of any Settlement Agreement on competition, prices, output, or costs of contact lenses; (iii) the effect of any Settlement Agreement on competition, prices, output, or costs of search advertising; (iv) the enforcement of any Settlement Agreement; (v) the breach of any Settlement Agreement; (vi) the effect of any Settlement Agreement on 1-800, consumers of contact lenses, any Competitor, or any search advertising platform; and (vii) the actual, contemplated, forecast, or intended cost or benefits of any Settlement Agreement.
13. Submit all documents relating to, or evidencing, consumer confusion in connection with any Competitor's use of 1-800's trademarks as keywords in a search advertising auction.
14. Submit all documents produced in connection with any trademark or antitrust litigation to which 1-800 has been (or is currently) a party, including, but not limited to, all

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pleadings, correspondence, discovery requests and responses, expert reports, studies or analyses, and deposition transcripts.

15. Submit all documents relating to any Communication between 1-800 and any Competitor relating to any:
 - a. Trademark litigation or threatened trademark litigation;
 - b. Settlement Agreement; or
 - c. Agreement not to bid on keywords, or to implement negative keywords, in any search advertising auction.
16. Identify, and provide all documents relating to, any procompetitive justifications or efficiencies for any Settlement Agreement.
17. Submit documents sufficient to show 1-800's document retention and document destruction policies.

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CERTIFICATION

**1-800 Contacts, Inc.
FTC File No. 141-0200**

The response to this Civil Investigative Demand, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required information, the information is, to the best of my knowledge, true, correct, and complete.

Where copies rather than original documents have been submitted, the copies are true, correct, and complete. If the Commission uses such copies in any court or administrative proceeding, the Company will not object on the basis that the Commission has not offered the original document.

(Type or Print Signature)

(Type or Print Title)

(Company)

Subscribed and sworn to before me at the City of _____

State of _____, this _____ day of _____, 20_____.

(Notary Public)

My commission expires: _____

EXHIBIT C

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 FIRST SET OF REQUESTS
FOR PRODUCTION TO RESPONDENT 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 requests:

1. All Documents Relating to correspondence between 1-800 Contacts and any other Person related to Negative Keywords. *See, e.g.*, 1-800F_00033564 (referring to a "recommended list" of negative keywords provided in 2011 to Ciba and Vistakon).
2. For each Negative Keyword 1-800 Contacts has implemented during the Relevant Period, Documents Sufficient to Show the first date on which 1-800 Contacts instructed a Search Engine to implement such a Negative Keyword.
3. For each Negative Keyword 1-800 Contacts has implemented during the Relevant Period, Documents Sufficient to Show any dates on which 1-800 Contacts instructed a Search Engine to cease implementing such a Negative Keyword.
4. All documents submitted to the Federal Trade Commission and/or the Department of Justice in connection with any filing made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 relating to a transaction to which 1-800 Contacts was a party. This request includes documents submitted by 1-800 Contacts, as well as documents submitted by any other person who made a filing relating to a transaction to which 1-800 Contacts was a party.
5. All documents submitted to the Federal Trade Commission and/or the Department of Justice in connection with any Request for Additional Information made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 relating to a transaction to which 1-800 Contacts was a party.

6. All Documents Relating to any Unilateral Pricing Policy adopted by a manufacturer of contact lenses, such as the Unilateral Pricing Policies adopted by Johnson & Johnson Vision Care, Alcon, Bausch + Lomb, and CooperVision, beginning on or about July 2014, including but not limited to: (a) Documents discussing the impact of a Unilateral Pricing Policy on 1-800 Contacts; and (b) Documents discussing the impact of a Unilateral Pricing Policy on any Competitor, Affiliate, or group of Competitors or Affiliates of 1-800 Contacts.

7. All documents related to correspondence between any employee, agent, or representative of 1-800 Contacts and any employee, agent, or representative of any other seller of contact lenses regarding: trademarks, litigation, advertising (including but not limited to search advertising), or a contractual relationship between 1-800 Contacts and any other seller of contact lenses (including but not limited to actual, potential, or claimed breaches of existing contracts).

8. All Documents Relating to contact lens purchases by customers or former customers of 1-800 Contacts from any retailer seller of contact lenses other than 1-800 Contacts, including documents analyzing switching by 1-800 Contacts' customers and former customers and/or switching by customers of other contact lens retailers.

9. All data used, presented, or summarized by Bain and Company in connection with due diligence or competitive analysis of Vision Direct on behalf of 1-800 Contacts, including but not limited to responses to surveys of contact lens consumers such as the data summarized in the draft presentation "Vision Direct Competitive Positioning," dated May 2015. See Bates number 1-800F_00056323.

10. All analyses comparing 1-800 Contacts' prices to the prices of a Competitor.

11. All documents analyzing the effect of increased price visibility on 1-800 Contacts' sales, pricing, or profitability. This request includes, but is not limited to, all documents created in response to Tim Roush's request for analysis in 1-800F_00055885. The term "price visibility" has the same meaning as in 1-800F_00055885.

12. All documents, except for documents which have already been produced to the Federal Trade Commission, responsive to Specifications 1, 4, 5, 6, 11, 12, 13, and 15 of the Civil Investigative Demand issued to 1-800 Contacts on January 20, 2015, in connection with the Commission investigation of 1-800 Contacts, FTC No. 141-0200, found in the following locations:

- a. the files of former 1-800 Contacts employee Josh Aston, including but not limited to shared file locations Mr. Aston accessed in the ordinary course of business; and
- b. backup tapes which were restored in connection with the Civil Investigative Demand issued to 1-800 Contacts on January 20, 2015 or in connection with the Commission investigation of 1-800 Contacts, FTC No. 141-0200.

13. All documents relating to the existence, terms, scope, or implementation of any Price Match Policy including but not limited to:

- a. Documents distributed to 1-800 Contacts employees with responsibility for speaking with customers or potential customers, including but not limited to scripts or other guidance provided to employees working within a call center;
- b. Documents created to inform any customer or potential customer about the existence or terms of any Price Match Policy, including but not limited to copies of all advertising relating to any Price Match Policy;
- c. Documents tracking, analyzing, or discussing the implementation, use, or effectiveness of any Price Match Policy, including, but not limited to, any log(s) that record price-match requests and fulfillment; and
- d. Documents Sufficient to Show the following information relating to 1-800's Price-Match Policies: (i) the inception date and reasons for implementing each Price Match Policy; (ii) any periods of time during which any Price Match Policy was terminated, suspended, paused, not honored, or otherwise not in effect; (iii) any actual or considered modifications in advertising policies related to the Price Match Policy, and the reasons therefor, (iv) the process required for consumers to take advantage of each Price Match Policy; and (v) the identity of the contact lens sellers whose prices were matched each time a 1-800 Contacts customer paid a price pursuant to any Price Match Policy.
- e. Documents Sufficient to Show the following information for each sale made since January 1, 2004 pursuant to any Price Match Policy: (1) SKU or UPC of product; (2) shipped date; (3) type of Competitor;¹ (4) discount provided due to price match; (5) order revenues after price match; (6) identity of Competitor; (7) whether Competitor was an internet seller; (8) customer ID number; (9) Order Number.

14. Documents Sufficient to Show the Company's quarterly and annual sales revenue for contact lenses in total, and separately, for each of the following consumer channels:

- a. Online;
- b. Telephone mail-order;
- c. In-store; and
- d. Other (identify "Other" channels).

15. Documents Sufficient to Show on a quarterly and annual basis, for contact lens sales both in total, and for each channel listed in Specification 14:

- a. Contribution Margins (defined as selling price minus variable cost);
- b. Net revenue (defined as revenue net of discounts and returns);

¹ This Request seeks the most precise available information regarding the Competitor's line of business (e.g., internet seller, Eye Care Professional, mass market retailer, club store).

- e. Cost of goods sold;
- d. Credit card fees;
- e. Variable selling, general and administrative costs.

16. Documents Sufficient to Show, either by transaction or on a weekly basis, for each UPC or SKU number sold by 1-800 Contacts:

- a. Date of sale;
- b. UPC or SKU number;
- c. Description of the product;
- d. All classification variables and product descriptors;
- e. Package size;
- f. Sales revenue;
- g. Total promotional discount;
- h. Unit sales (i.e., quantity of each item sold);
- i. Acquisition cost of the product; and
- j. The distributor from which the item was acquired.

17. Documents Sufficient to Show, on a weekly, quarterly, and annual basis, the number of orders and dollar volume of sales that 1-800 Contacts attributes to each of the following advertising channels:

- a. Paid search advertising attributable to search terms on which 1-800 claims trademark protection;
- b. Paid search advertising attributable to search terms on which 1-800 does not claim trademark protection;
- c. Other online advertising (and identify other online channels);
- d. Television;
- e. Print;
- f. Radio;
- g. In-store advertising;
- h. Other advertising.

18. For each Ad Group 1-800 Contacts has used on any Search Engine, provide Documents Sufficient to Show: the Campaign associated with the Ad Group, each Keyword used in the Ad Group, and for each Keyword, the following data, on a daily basis:

- a. Impressions;
- b. Clicks;
- c. Clickthrough Rate (CTR);
- d. Maximum Cost Per Click Bid;
- e. Keyword Matching Option (e.g., exact match, phrase match, or broad match);
- f. Cost Per Click;
- g. Cost Per Action;
- h. Cost Per Impression;

- i. Cost USD;
- j. Average Ad Rank;
- k. Conversion Rate; and
- l. Conversion Value.

19. All documents Relating to surveys conducted of customers and potential customers, and comments provided by customers or potential customers. *See, e.g.*, 1-800F_00075522; 1-800F_00075523; 1-800F_00075524; 1-800F_00075525.

20. All documents Relating to communications or reports received from Hitwise Pty. Ltd., Experian Hitwise, or any entity referred to as Hitwise in the ordinary course of Your business. *See, e.g.*, 1-800F_00072892; 1-800F_00072921.

For the purpose of these Requests, 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, 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 "Ad Group" has the same meaning set forth by Google in connection with its AdWords product: a collection of advertisements that "contains one or more ads which target a shared set of keywords." See <https://support.google.com/adwords/answer/6298>.
3. The term "Ad Rank" has the same meaning set forth by Google in connection with its AdWords product: "A value that's used to determine [an advertiser's] ad position (where ads are shown on a page) and whether [an advertiser's] ads will show at all." See <https://support.google.com/adwords/answer/1752122?hl=en>.
4. The term "Affiliate" means any Person other than 1-800 Contacts which attempts to generate online sales for 1-800 Contacts in exchange for a commission on such online sales.
5. The terms "and" and "or" have both conjunctive and disjunctive meanings.
6. The term "Campaign" has the same meaning set forth by Google in connection with its AdWords product: "[a] set of ad groups (ads, keywords, and bids) that share a budget, location targeting, and other settings." See <https://support.google.com/adwords/answer/6304?hl=en>.
7. The term "Click" has the same meaning set forth by Google in connection with its AdWords product. See <https://support.google.com/adwords/answer/31799?hl=en>.
8. The term "Clickthrough rate" (CTR) has the same meaning set forth by Google in connection with its AdWords product: "the number of clicks [an] ad receives divided by the number of times [the] ad is shown." See <https://support.google.com/adwords/answer/2615875?hl=en>.
9. The term "Competitor" means any person other than 1-800 Contacts engaged in the business of selling contact lenses to consumers.
10. The term "Computer Files" includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Respondent should produce Documents that exist in machine-readable form, including Documents stored in personal

computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off company premises. If the Respondent believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with Complaint Counsel's need for Documents and information, you are encouraged to discuss a possible modification to this instruction with the Complaint Counsel identified on the last page of this request. Complaint Counsel will consider modifying this instruction to:

- a. exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Respondent;
 - b. limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain specifications identified by Complaint Counsel; or
 - c. include other proposals consistent with Commission policy and the facts of the case.
11. The term "Containing" means containing, describing, or interpreting in whole or in part.
 12. The terms "Conversion Rate" and "Conversion Value" have the same meanings set forth by Google in connection with its AdWords product. See <https://support.google.com/adwords/answer/2684489?hl=en>; <https://support.google.com/adwords/answer/6095947?hl=en>.
 13. The terms "Cost per Click", "Cost Per Action," "Cost Per Impression," and "Cost USD" has the same meaning set forth by Google in connection with its AdWords product.
 14. The terms "Discuss" or "Discussing" mean in whole or in part constituting, containing, describing, analyzing, explaining, or addressing the designated subject matter, regardless of the length of the treatment or detail of analysis of the subject matter, but not merely referring to the designated subject matter without elaboration. A document that "Discusses" another document includes the other document itself.
 15. The term "Documents" means all Computer Files and written, recorded, and graphic materials of every kind in the possession, custody, or control of the Respondent. The term "Documents" includes, without limitation: electronic mail messages; electronic correspondence and drafts of documents; metadata and other bibliographic or historical data describing or Relating to documents created, revised, or distributed on computer systems; copies of documents that are not identical duplicates of the originals in that Person's files; and copies of documents the originals of which are not in the possession, custody, or control of the Respondent.

Unless otherwise specified, the term "Documents" excludes (a) bills of lading, invoices, purchase orders, customs declarations, and other similar documents of a purely

- transactional nature; (b) architectural Plans and engineering blueprints; and (c) documents solely Relating to environmental, tax, human resources, OSHA, or ERISA issues.
16. The term “Documents Sufficient to Show” means both documents that are necessary and documents that are sufficient to provide the specified information. If summaries, compilations, lists, or synopses are available that provide the information being requested, these may be provided in lieu of the underlying documents.
 17. The terms “each,” “any,” and “all” mean “each and every.”
 18. The term “Impression” has the same meaning set forth by Google in connection with its AdWords product. *See* <https://support.google.com/adwords/answer/6320?hl=en>.
 19. The term “Keyword” has the same meaning set forth by Google in connection with its AdWords product: “[w]ords or phrases describing [an advertiser’s] product that [the advertiser] choose[s] to help determine when and where [the advertiser’s] ad can appear” in response to an internet search by an end user. *See* <https://support.google.com/adwords/answer/6323?hl=en>.
 20. The term “Keyword Matching Option” has the same meaning set forth by Google in connection with its AdWords product. *See* <https://support.google.com/adwords/answer/2497836?hl=en>.
 21. The term “Maximum Cost Per Click Bid” has the same meaning set forth by Google in connection with its AdWords product. *See* <https://support.google.com/adwords/answer/6326?hl=en>.
 22. The term “Negative Keyword” has the same meaning set forth by Google in connection with its AdWords product: “[a] type of keyword that prevents [and advertiser’s] ad from being triggered by certain words or phrases.” *See* <https://support.google.com/adwords/answer/105671?hl=en>.
 23. The term “Person” includes the Company, and means any natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or any other organization or entity engaged in commerce.
 24. The terms “Plan” or “Plans” mean proposals, strategies, recommendations, analyses, reports, or considerations, whether or not tentative, preliminary, precisely formulated, finalized, authorized, or adopted.
 25. The term “Price Match Policy” means any 1-800 Contacts Plan, policy, or strategy involving offering customers the opportunity to pay a discounted price determined by the price that a Competitor offers for the same product.
 26. The terms “Relate” or “Relating to” mean in whole or in part Discussing, constituting, commenting, Containing, concerning, embodying, summarizing, reflecting, explaining,

describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to.

27. "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.
28. "Search Engine Results Page" means a webpage displayed by a Search Engine in response to a User Query.
29. The term "Technology Assisted Review" means any process that utilizes a computer algorithm to limit the number of potentially responsive documents subject to a manual review. A keyword search of documents with no further automated processing is not a Technology Assisted Review.
30. The term "Unilateral Pricing Policy" means any policy, practice, or announcement by a manufacturer of contact lenses relating to the price at which retailers sell contact lenses to consumers, in particular the policies adopted by Johnson & Johnson Vision Care, Alcon, Bausch + Lomb, and CooperVision, beginning on or about July 2014. *See, e.g., Contact Lens Makers and Discounters Tussle Over Price Setting, New York Times* (March 26, 2015), available at http://www.nytimes.com/2015/03/27/business/contact-lens-makers-and-discounters-tussle-over-price-setting.html?_r=0 ("[O]pponents [of unilateral pricing policies], which include big discounters such as Costco and 1-800 Contacts as well as the nonprofit group Consumers Union, say the policies amount to illegal price-fixing and are restricting consumer choice in an industry that has long been accused of anticompetitive practices."), *Debate about contact-lens prices revives Florida's eye wars, Tampa Bay Times* (March 24, 2015) ("Influential Tallahassee lobbyist Marc Reichelderfer, a GOP strategist representing 1-800-CONTACTS, is leading the effort to do away with the pricing policies."), available at <http://www.tampabay.com/news/politics/stateroundup/debate-about-contact-lens-prices-revives-floridas-eye-wars/2222578>.
31. "User Query" means data entered into a computer by an end user of a Search Engine for the purpose of operating the Search Engine.

INSTRUCTIONS

1. Unless otherwise indicated, each request covers documents and information dated, generated, received, or in effect from January 1, 2002, to the present.
2. Respondent need not produce responsive documents that Respondent has previously produced to the Commission in relation to the prior investigation, FTC No. 141-0200. **Respondent must produce all other responsive documents, including any otherwise responsive documents that may have been produced by Respondent to the Commission in relation to any other investigation conducted by the Commission.**
3. This request for documents shall be deemed continuing in nature so as to require production of all documents responsive to any specification included in this request produced or obtained by the Respondents up to fifteen (15) calendar days prior to the date of the Company's full compliance with this request.
4. Except for privileged material, the Company will produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. The Company should submit any appendix, table, or other attachment by either attaching it to the responsive document or clearly marking it to indicate the responsive document to which it corresponds. Except for privileged material, the Company will not redact, mask, out, expunge, edit, or delete any responsive document or portion thereof in any manner.
5. Unless modified by agreement with Complaint Counsel, these Requests require a search of all documents in the possession, custody, or control of the Company including, without limitation, those documents held by any of the Company's officers, directors, employees, agents, representatives, or legal counsel, whether or not such documents are on the premises of the Company. If any person is unwilling to have his or her files searched, or is unwilling to produce responsive documents, the Company must provide the Complaint Counsel with the following information as to each such person: his or her name, address, telephone number, and relationship to the Company. In addition to hard copy documents, the search must include all of the Company's Electronically Stored Information.
6. Form of Production. The Company shall submit all documents as instructed below absent written consent signed by Complaint Counsel.
 - a. Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original documents:
 - i. Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and applicable metadata and information as described in subparts (a)(iii) and (a)(iv).
 - ii. Submit emails in image format with extracted text and the following metadata and information:

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 email.
From	The person who authored the email.
CC	Person(s) copied on the email.
BCC	Person(s) blind copied on the email.
Subject	Subject line of the email.
Date Sent	Date the email was sent.
Time Sent	Time the email was sent.
Date Received	Date the email was received.
Time Received	Time the email was received.
Attachments	The Document ID of attachment(s).
Mail Folder Path	Location of email in personal folders, subfolders, deleted items or sent items.
Message ID	Microsoft Outlook Message ID or similar value in other message systems.

- iii. Submit email attachments in image format, or native format if the file is one of the types identified in subpart (a)(i), with extracted text and the following metadata and information:

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.
Parent ID	The Document ID of the parent email.

Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

- iv. Submit all other electronic documents in image format, or native format if the file is one of the types identified in subpart (a)(i), accompanied by extracted text and the following metadata and information:

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.
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Originating Path	File path of the file as it resided in its original environment.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.

Hash	The Secure Hash Algorithm (SHA) value for the original native file.
------	---

- v. Submit documents stored in hard copy in image format accompanied by OCR with the following information:

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.

- vi. Submit redacted documents in image format accompanied by OCR with the metadata and information required by relevant document type in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above. Additionally, please provide a basis for each privilege claim as detailed in Instruction 6.

- b. Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats such as CSV files, with all underlying data un-redacted and all underlying formulas and algorithms intact.
- c. If the Company intends to utilize any electronic search terms, de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media, or if the Company's computer systems contain or utilize such software, the Company must contact Complaint Counsel to discuss whether and in what manner the Company may use such software or services when producing materials in response to this subpoena.
- d. Produce electronic file and image submissions as follows:
- i. For productions over 10 gigabytes, use IDE, EIDE, and SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure;
 - ii. For productions under 10 gigabytes, CD-R CD-ROM optical disks formatted to ISO 9660 specifications, DVD-ROM optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats; and

- 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.
 - iv. Encryption of productions using NIST FIPS-compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.¹
 - e. Each production shall be submitted with a transmittal letter that includes the FTC matter number; production volume name; encryption method/software used; passwords for any password protected files; list of custodians and document identification number range for each; total number of documents; and a list of load file fields in the order in which they are organized in the load file.
7. All documents responsive to these requests:
- a. Shall be produced in complete form, unredacted unless privileged, and in the order in which they appear in the Company's files;
 - b. Shall be marked on each page with corporate identification and consecutive document control numbers when produced in image format;
 - c. Shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black and white photocopying or conversion to TIFF format of any document (e.g., a chart or graph) makes any substantive information contained in the document unintelligible, the Company must submit the original document, a like-color photocopy, or a JPEG format image);
 - d. Shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original documents; and
 - e. Shall be accompanied by an index that identifies (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's documents. Complaint Counsel will provide a sample index upon request.
8. If any documents are withheld from production based on a claim of privilege, the Respondent shall provide, pursuant to 16 C.F.R. § 3.38A, a schedule which describes the nature of documents, communications, or tangible things not

¹ The National Institute of Standards and Technology (NIST) issued Federal Information Processing Standard (FIPS) Publications 140-1 and 140-2, which detail certified cryptographic modules for use by the U.S. Federal government and other regulated industries that collect, store, transfer, share, and disseminate sensitive but unclassified information. More information about FIPS 140-1 and 140-2 can be found at <http://csrc.nist.gov/publications/PubsFIPS.html>.

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 and describe how the estimates were derived, 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 under which they were lost or destroyed, describe the documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify Persons having knowledge of the content of such documents.
11. The Company must provide Complaint Counsel with a statement identifying the procedures used to collect and search for electronically stored documents and documents stored in paper format. The Company must also provide a statement identifying any electronic production tools or software packages utilized by the company in responding to this subpoena for: keyword searching, Technology Assisted Review, email threading, de-duplication, global de-duplication or near-de-duplication, and
 - a. if the company utilized keyword search terms to identify documents and information responsive to this subpoena, provide a list of the search terms used for each custodian;
 - b. if the company utilized Technology Assisted Review software;
 - i. describe the collection methodology, including: how the software was utilized to identify responsive documents; the process the company utilized to identify and validate the seed set documents subject to manual review; the total number of documents reviewed manually; the total number of documents determined nonresponsive without manual review; the process the company used to determine and validate the accuracy of the automatic determinations of responsiveness and nonresponsiveness; how the company handled exceptions ("uncategorized documents"); and if the company's documents include foreign language documents, whether reviewed manually or by some technology-assisted method; and
 - ii. provide all statistical analyses utilized or generated by the company or its agents related to the precision, recall, accuracy,

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 stored in the Company's computer systems or electronic storage media in 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 government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this subpoena

- 12. Any questions you have relating to the scope or meaning of anything in subpoena or suggestions for possible modifications thereto should be directed to Katie Clair at (202) 326-3435, kclair@ftc.gov. The response to the request shall be addressed to the attention of Katie Clair, Federal Trade Commission, 400 7th Street SW, Washington, D.C. 20024, and delivered between 8:30 a.m. and 5:00 p.m. on any business day.

Dated: September 8, 2016

Respectfully Submitted:

/s/ Dan Matheson
Dan Matheson
Katie Clair
Barbara Blank
Charlotte Slaiman
Gus Chiarello
Nathaniel Hopkin
Joshua Gray
Thomas Brock
Charles Loughlin
Geoffrey Green

Counsel Supporting the Complaint

PUBLIC

EXHIBIT D

PUBLIC

MUNGER, TOLLES & OLSON LLP

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TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

355 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA 90071-1560
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November 9, 2016

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VIA E-MAIL

Dan Matheson, Esq.
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: In re 1-800 Contacts, Inc., FTC Docket No. 9372

Dear Dan:

I write regarding Judge Chappell's October 28, 2016 Order on Respondent's Motion for Issuance of a Subpoena Under Rule 3.36 in the above-captioned matter (the "Order").

As you know, the Court denied Respondent's motion for a subpoena without prejudice on the ground that "Respondent has not demonstrated that its document requests are reasonable in scope and stated with reasonable particularity." Order at 7. The Court's Order states that "[s]hould Respondent wish to file a new motion, Respondent shall prepare a narrower subpoena, shall meet-and-confer with Complaint Counsel, and may file a new motion pursuant to Rule 3.36 in conformity with this Order." *Id.*

Attached as Exhibit A to this letter is revised subpoena to the Commission pursuant to Rule 3.36 that has been narrowed in conformity with the Court's Order as follows:

First, the subpoena requests "reports, studies, and analyses of competition in the market for contact lenses" and "reports, studies and analyses of paid search advertising's effect on consumers, including the potential of such advertising to cause confusion, deception, and

Dan Matheson, Esq.
November 9, 2016
Page 2

dilution. This no longer seeks all documents related to the foregoing reports, studies and analyses. *Cf.* Order at 6-7 (finding requests for documents “relating” to specified subjects lacking “reasonable particularity”). Rather, the subpoena calls for a limited subset of documents on which the foregoing reports, studies and analyses were based and expressly does not call for draft reports, studies or analyses or e-mail communications among Commission employees involved in creating them.

Second, the revised subpoena is directed not to the entire Commission but only to certain offices and divisions within the Office of Policy Planning, the Bureaus of Competition, Economics and Consumer Protection. *Cf.* Order at 6 (holding that definition of responding party in prior subpoena “was not reasonable in scope”).

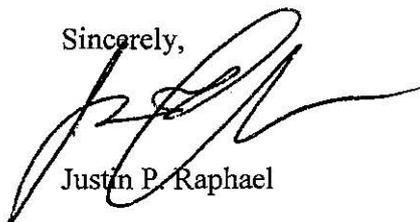
Third, the revised subpoena calls only for documents created on or after January 1, 2006. *Cf.* Order at 5 (“it is not clear that documents over a decade old are relevant”).

Fourth, the revised subpoena makes clear that it does not call upon the Commission to search any investigative files or files of Staff Attorneys for responsive documents, which will minimize any burden of reviewing documents protected by the attorney-client privilege, the work product doctrine or the investigative privilege.

With these changes to conform with the Court’s Order, this narrowed subpoena seeks documents that the Order holds are relevant, *see* Order at 5, and “cannot reasonably be obtained by other means.” Order at 7.

Pursuant to the Court’s Order, please let us know as soon as possible when you are available this week to meet and confer regarding whether Complaint Counsel will oppose a request to authorize the narrower subpoena attached as Exhibit A.

Sincerely,



Justin P. Raphael

JPR

cc: All Counsel of Record

PUBLIC

EXHIBIT A

**SUBPOENA DUCES TECUM**

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Rule 3.34(a), 16 C.F.R. § 3.34(a) (2010)

1. TO Federal Trade Commission 600 Pennsylvania Ave., NW Suite 172 Washington, DC 20580	2. FROM Munger Tolles & Olson LLP, Counsel for Respondent 1-800 Contacts, Inc.
This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.	
3. PLACE OF PRODUCTION Munger Tolles & Olson LLP c/o Gregory Stone, Esq. 355 South Grand Ave, 35th Floor Los Angeles, CA 90071	4. MATERIAL WILL BE PRODUCED TO Gregory P. Stone, Esq. 5. DATE AND TIME OF PRODUCTION TBD
6. SUBJECT OF PROCEEDING In the Matter of 1-800 Contacts, Inc., Docket No. 9372	
7. MATERIAL TO BE PRODUCED Documents & materials responsive to the attached Subpoena Duces Tecum Requests for Production	
8. ADMINISTRATIVE LAW JUDGE The Honorable D. Michael Chappell Federal Trade Commission Washington, D.C. 20580	9. COUNSEL AND PARTY ISSUING SUBPOENA Justin Raphael, or designee Munger Tolles & Olson LLP 560 Mission Street, 27th Floor San Francisco, CA 94105 (415) 512-4085
DATE SIGNED TBD	SIGNATURE OF COUNSEL ISSUING SUBPOENA

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCsRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1995.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

via FedEx

on the person named herein on:

TBD

(Month, day, and year)

Gregory Stone

(Name of person making service)

Attorney

(Official title)

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

RESPONDENT'S SUBPOENA *DUCES TECUM* ATTACHMENT TO
THE FEDERAL TRADE COMMISSION

Pursuant to the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 3.34 and 3.36, and the Definitions and Instructions set forth below, Respondent hereby requests that the Commission produce all documents, electronically stored information, and other things in its possession, custody, or control responsive to the following requests:

1. All reports, studies or analyses of competition in the market for contact lenses.
2. All reports, studies, or analyses of Paid Search Advertising's effect on consumers, including the potential for consumer confusion, deception, or false advertising in such advertising.
3. The contact lens pricing and availability data relied upon in *Prices and Price Dispersion in Online and Offline Markets for Contact Lenses*, WORKING PAPER NO. 283 (Original Version: April 2006 Revised: November 2006) and the Commission's 2005 report on *Strength of Competition in the Sale of Rx Contact Lenses*.
4. All data, studies, and information that support the statement in footnote 35 of the *FTC Staff Comment Before the North Carolina State Board of Opticians Concerning Proposed Regulations for Optical Goods and Optical Goods Businesses* (Jan. 13, 2011; V110002) that "[t]here [wa]s no indication that" the Commission's 2005 findings about pricing and availability of contact lenses "ha[d] changed in the intervening years."
5. All data, surveys, studies, and information relied upon to support the statements in the Commission's 2015 Enforcement Policy Statement on Deceptively Formatted Advertisements that "consumers ordinarily would expect a search engine to return results based on relevance to a search query, as determined by impartial criteria, not based on

payment from a third party” and that “[k]nowing when search results are included or ranked higher based on payment and not on impartial criteria likely would influence consumers’ decisions with regard to a search engine and the results it delivers.”

6. All documents, data, information, or studies that support the statements in the June 24, 2013 letters from Associate Director Mary K. Engle to Search Engines that Commission Staff had “observed a decline in compliance with the [2002 Search Engine Letter’s] guidance” and that “the features traditional search engines use to differentiate advertising from natural search results have become less noticeable to consumers.”

7. All documents, data, or studies regarding consumers’ inability to distinguish Paid Search Advertising from natural search results as discussed in the June 24, 2013 letters from Associate Director Mary K. Engle to Search Engines.

For the purpose of this subpoena, 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 “Commission” “You,” and “Your” as used herein mean only the Office of Policy Planning, the Bureau of Competition, the Bureau of Economics and the Bureau of Consumer Protection of the Federal Trade Commission and all employees, agents, attorneys, representatives, and all other persons acting or purporting to act or that have acted or purported to have acted on behalf of any of the foregoing.
2. The terms “and” and “or” have both conjunctive and disjunctive meanings.
3. The term “Computer Files” includes information stored in, or accessible through, computer or other information retrieval systems. Thus, the Commission should produce Documents that exist in machine-readable form, including Documents stored in personal computers, portable computers, workstations, minicomputers, mainframes, servers, backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether on or off Commission premises. If the Commission believes that the required search of backup disks and tapes and archive disks and tapes can be narrowed in any way that is consistent with Respondent’s need for Documents and information, you are encouraged to discuss a possible modification to this instruction with Counsel for Respondent identified on the last page of this subpoena. Counsel for Respondent will consider modifying this instruction to:
 - a. exclude the search and production of files from backup disks and tapes and archive disks and tapes unless it appears that files are missing from files that exist in personal computers, portable computers, workstations, minicomputers, mainframes, and servers searched by the Respondent;
 - b. limit the portion of backup disks and tapes and archive disks and tapes that needs to be searched and produced to certain key individuals, or certain time periods or certain specifications identified by Counsel for Respondent; or
 - c. include other proposals consistent with the facts of the case.
4. The term “Documents” means all Computer Files and written, recorded, and graphic materials of every kind in the possession, custody, or control of the Commission. The term “Documents” includes, without limitation: electronic mail messages; electronic correspondence and drafts of documents; metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed on computer systems; copies of documents that are not identical duplicates of the originals in that Person’s files; and copies of

documents the originals of which are not in the possession, custody, or control of the Commission.

5. The terms “each,” “any,” and “all” mean “each and every.”
6. “Paid Search Advertising” means advertising generated on a Search Engine Results Page.
7. “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.
8. “Search Engine Results Page” means a webpage displayed by a Search Engine in response to a User Query.
9. “User Query” means data entered into a computer by an end user of a Search Engine for the purpose of operating the Search Engine.

INSTRUCTIONS

1. Unless otherwise indicated, each request covers documents and information dated, generated, received, or in effect from January 1, 2006 to the present.
2. Your response to this Subpoena shall require a search only of files maintained by the following offices at the Commission:
 - a. the Office of Policy Planning
 - b. the Office of Policy & Coordination, Health Care Division and Anticompetitive Practices Division of the Bureau of Competition;
 - c. the Division of Advertising Practices and Division of Marketing Practices of the Bureau of Consumer Protection; and
 - d. the Office of Applied Research, Antitrust Division I, Antitrust Division II, and Consumer Protection Division of the Bureau of Economics.
3. Nothing in this Subpoena shall be construed to require a search of the Commission’s investigative files or the files of any Staff Attorney.
4. Nothing in this Subpoena shall be construed to require production of draft reports, studies or analyses or e-mail correspondence between Commission employees involved in the preparation of reports, studies or analyses.
5. This subpoena shall be deemed continuing in nature so as to require production of all documents responsive to any request included in this subpoena produced or obtained by the Commission up to fifteen (15) calendar days prior to the date of the Commission’s full compliance with this subpoena.

6. Except for privileged material, the Commission will produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. The Commission should submit any appendix, table, or other attachment by either attaching it to the responsive document or clearly marking it to indicate the responsive document to which it corresponds. Except for privileged material, the Commission will not redact, mask, cut, expunge, edit, or delete any responsive document or portion thereof in any manner.
7. If any person is unwilling to have his or her files searched, or is unwilling to produce responsive documents, the Commission must provide Counsel for Respondent with the following information as to each such person: his or her name, address, telephone number, and relationship to the Commission. In addition to hard copy documents, the search must include all of the Commission's electronically stored information.
8. Form of Production. The Commission shall submit all documents as instructed below absent written consent signed by Counsel for Respondent.
 - a. Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original documents:
 - i. Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and applicable metadata and information as described in subparts (a)(iii) and (a)(iv).
 - ii. Submit emails in image format with extracted text and the following metadata and information:

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 email.
From	The person who authored the email.
CC	Person(s) copied on the email.
BCC	Person(s) blind copied on the email.
Subject	Subject line of the email.

Date Sent	Date the email was sent.
Time Sent	Time the email was sent.
Date Received	Date the email was received.
Time Received	Time the email was received.
Attachments	The Document ID of attachment(s).
Mail Folder Path	Location of email in personal folders, subfolders, deleted items or sent items.
Message ID	Microsoft Outlook Message ID or similar value in other message systems.

- iii. Submit email attachments in image format, or native format if the file is one of the types identified in subpart (a)(i), with extracted text and the following metadata and information:

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.
Parent ID	The Document ID of the parent email.
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

- iv. Submit all other electronic documents in image format, or native format if the file is one of the types identified in subpart (a)(i),

accompanied by extracted text and the following metadata and information:

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.
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Originating Path	File path of the file as it resided in its original environment.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

- v. Submit documents stored in hard copy in image format accompanied by OCR with the following information:

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.

- vi. Submit redacted documents in image format accompanied by OCR with the metadata and information required by relevant document type in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the

metadata and information specified in subpart (a)(iii) above. Additionally, please provide a basis for each privilege claim as detailed in Instruction 6.

- b. Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats such as CSV files, with all underlying data un-redacted and all underlying formulas and algorithms intact.
- c. If the Commission intends to utilize any electronic search terms, de-duplication or email threading software or services when collecting or reviewing information that is stored in the Commission's computer systems or electronic storage media, or if the Commission's computer systems contain or utilize such software, the Commission must contact Counsel for Respondent to discuss whether and in what manner the Commission may use such software or services when producing materials in response to this subpoena.
- d. Produce electronic file and image submissions as follows:
 - i. For productions over 10 gigabytes, use IDE, EIDE, and SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure;
 - ii. For productions under 10 gigabytes, CD-R CD-ROM optical disks formatted to ISO 9660 specifications, DVD-ROM optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats; and
 - iii. All documents produced in electronic format shall be scanned for and free of viruses prior to submission. Counsel for Respondent will return any infected media for replacement, which may affect the timing of the Commission's compliance with this subpoena.
 - iv. Encryption of productions using NIST FIPS-compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.¹
- e. Each production shall be submitted with a transmittal letter that includes the FTC matter number; production volume name; encryption method/software used; passwords for any password protected files; list of custodians and document identification number range for each; total number of documents; and a list of load file fields in the order in which they are organized in the load file.¹

¹ The National Institute of Standards and Technology (NIST) issued Federal Information Processing Standard (FIPS) Publications 140-1 and 140-2, which detail

9. All documents responsive to this subpoena:
 - a. Shall be produced in complete form, unredacted unless privileged, and in the order in which they appear in the Commission's files;
 - b. Shall be marked on each page with identification and consecutive document control numbers when produced in image format;
 - c. Shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black and white photocopying or conversion to TIFF format of any document (e.g., a chart or graph) makes any substantive information contained in the document unintelligible, the Commission must submit the original document, a like-color photocopy, or a JPEG format image);
 - d. Shall be accompanied by an affidavit of an officer of the Commission stating that the copies are true, correct, and complete copies of the original documents; and
 - e. Shall be accompanied by an index that identifies (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's documents. Respondent will provide a sample index upon request.
10. If any documents are withheld from production based on a claim of privilege, the Commission shall provide, pursuant to 16 C.F.R. § 3.38A, a schedule which describes the nature of documents, communications, or tangible things not produced or disclosed, in a manner that will enable Counsel for Respondent to assess the claim of privilege.
11. If documents responsive to a particular request no longer exist for reasons other than the ordinary course of business or the implementation of the Commission's document retention policy but the Commission has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the request(s) to which they are responsive, and identify Persons having knowledge of the content of such documents.

certified cryptographic modules for use by the U.S. Federal government and other regulated industries that collect, store, transfer, share, and disseminate sensitive but unclassified information. More information about FIPS 140-1 and 140-2 can be found at <http://csrc.nist.gov/publications/PubsFIPS.html>.

12. The Commission must provide Counsel for Respondent with a statement identifying the procedures used to collect and search for electronically stored documents and documents stored in paper format. The Commission must also provide a statement identifying any electronic production tools or software packages utilized by the Commission in responding to this subpoena for: keyword searching, Technology Assisted Review, email threading, de-duplication, global de-duplication or near- de-duplication, and
 - a. if the Commission utilized keyword search terms to identify documents and information responsive to this subpoena, provide a list of the search terms used for each custodian;
 - b. if the Commission utilized Technology Assisted Review software;
 - i. describe the collection methodology, including: how the software was utilized to identify responsive documents; the process the Commission utilized to identify and validate the seed set documents subject to manual review; the total number of documents reviewed manually; the total number of documents determined nonresponsive without manual review; the process the Commission used to determine and validate the accuracy of the automatic determinations of responsiveness and nonresponsiveness; how the Commission handled exceptions (“uncategorized documents”); and if the Commission’s documents include foreign language documents, whether reviewed manually or by some technology-assisted method; and
 - ii. provide all statistical analyses utilized or generated by the Commission or its agents related to the precision, recall, accuracy, validation, or quality of its document production in response to this subpoena; and identify the person(s) able to testify on behalf of the Commission about information known or reasonably available to the organization, relating to its response to this subpoena.
 - c. if the Commission intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Commission’s computer systems or electronic storage media in response to this subpoena, or if the Commission’s computer systems contain or utilize such software, the Commission must contact Counsel for Respondent to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Commission may use such software or services when producing materials in response to this subpoena.

13. Any questions you have relating to the scope or meaning of anything in this subpoena or suggestions for possible modifications thereto should be directed to Justin Raphael or designee at (415) 512-4085, Justin.Raphael@mto.com. The response to the subpoena shall be addressed to the attention of Gregory Stone, Munger Tolles & Olson LLP, 355 South Grand Avenue, 35th Floor, Los Angeles, CA 90071, and delivered between 8:30 a.m. and 5:00 p.m. on any business day.

EXHIBIT E

From: Matheson, Daniel <dmatheson@ftc.gov>
Sent: Thursday, November 17, 2016 4:11 PM
To: Raphael, Justin
Cc: Blank, Barbara; Brock, Thomas H.
Subject: RE: In re 1-800 Contacts, Inc., FTC Docket No. 9372

Great, thanks.

From: Raphael, Justin [mailto:Justin.Raphael@mto.com]
Sent: Thursday, November 17, 2016 6:59 PM
To: Matheson, Daniel
Cc: Blank, Barbara; Brock, Thomas H.
Subject: RE: In re 1-800 Contacts, Inc., FTC Docket No. 9372

Sure. We can use the same dial-in.

From: Matheson, Daniel [mailto:dmatheson@ftc.gov]
Sent: Thursday, November 17, 2016 3:49 PM
To: Raphael, Justin
Cc: Blank, Barbara; Brock, Thomas H.
Subject: RE: In re 1-800 Contacts, Inc., FTC Docket No. 9372

I have a conflict 3:30-4:30 Eastern. Would 3:00 Eastern work?

From: Raphael, Justin [mailto:Justin.Raphael@mto.com]
Sent: Thursday, November 17, 2016 6:37 PM
To: Matheson, Daniel
Cc: ~800CON_FTC_ATTYS; Blank, Barbara; Loughlin, Chuck; Slaiman, Charlotte; Green, Geoffrey; Chiarello, Gustav; Gray, Joshua Barton; Clair, Kathleen; Taylor, Mark; Hopkin, Nathaniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.
Subject: RE: In re 1-800 Contacts, Inc., FTC Docket No. 9372

Dan,

It was clear to me from our first meet-and-confer that Complaint Counsel opposed the subpoena in its current form, so I understood that you were going to revert back with something more specific than restating that position. It seems that I misunderstood. How about 4 Eastern / 1 PM Pacific tomorrow?

Best,

Justin

From: Matheson, Daniel [mailto:dmatheson@ftc.gov]
Sent: Thursday, November 17, 2016 2:40 PM
To: Raphael, Justin
Cc: ~800CON_FTC_ATTYS; Blank, Barbara; Loughlin, Chuck; Slaiman, Charlotte; Green, Geoffrey; Chiarello, Gustav;

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Gray, Joshua Barton; Clair, Kathleen; Taylor, Mark; Hopkin, Nathaniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.

Subject: RE: In re 1-800 Contacts, Inc., FTC Docket No. 9372

Justin,

That is not an accurate statement of Complaint Counsel's position. Complaint Counsel does not believe that the proposed subpoena, as drafted, is consistent with the requirements of Rule 3.36 and Rule 3.31. We are generally available to meet and confer tomorrow or Monday if you have in mind any narrower and/or different requests that would meet your needs. We would be happy to discuss further, and to consider any proposals to narrow or modify the requests in a manner that would render the proposed subpoena consistent with the requirements of the aforementioned Rules.

Regards,

Dan

From: Raphael, Justin [<mailto:Justin.Raphael@mto.com>]

Sent: Thursday, November 17, 2016 3:21 PM

To: Matheson, Daniel

Cc: ~800CON_FTC_ATTYS; Blank, Barbara; Loughlin, Chuck; Slaiman, Charlotte; Green, Geoffrey; Chiarello, Gustav; Gray, Joshua Barton; Clair, Kathleen; Taylor, Mark; Hopkin, Nathaniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.

Subject: RE: In re 1-800 Contacts, Inc., FTC Docket No. 9372

Thanks Dan. Can you please confirm that Complaint Counsel opposes every single one of the proposed requests in its entirety and has no suggestions about how the subpoena could be narrowed or modified to resolve any objections?

Thanks,

Justin P. Raphael | Munger, Toiles & Olson LLP

560 Mission Street | San Francisco, CA 94105

Tel: 415.512.4085 | justin.raaphael@mto.com | www.mto.com

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From: Matheson, Daniel [<mailto:dmatheson@ftc.gov>]

Sent: Thursday, November 17, 2016 12:13 PM

To: Raphael, Justin

Cc: ~800CON_FTC_ATTYS; Blank, Barbara; Loughlin, Chuck; Slaiman, Charlotte; Green, Geoffrey; Chiarello, Gustav; Gray, Joshua Barton; Clair, Kathleen; Taylor, Mark; Hopkin, Nathaniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.

Subject: RE: In re 1-800 Contacts, Inc., FTC Docket No. 9372

Counsel,

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Thank you for meeting and conferring with us regarding Respondent's contemplated Motion seeking a subpoena under Rule 3.36. Based on the subpoena attached to your letter of November 9, Complaint Counsel intends to oppose such a Motion.

Respectfully,

Dan

From: Raphael, Justin [<mailto:Justin.Raphael@mto.com>]

Sent: Wednesday, November 09, 2016 7:47 PM

To: Matheson, Daniel

Cc: ~800CON_FTC_ATTYS; Blank, Barbara; Loughlin, Chuck; Slaiman, Charlotte; Green, Geoffrey; Chiarello, Gustav; Gray, Joshua Barton; Clair, Kathleen; Taylor, Mark; Hopkin, Nathaniel; BC-1040-1800-Search Ad Team-DL; Brock, Thomas H.

Subject: In re 1-800 Contacts, Inc., FTC Docket No. 9372

Counsel:

Please see the attached letter in the above matter.

Best,

Justin P. Raphael | Munger, Tolles & Olson LLP
560 Mission Street | San Francisco, CA 94105
Tel: 415.512.4085 | justin.raphael@mto.com | www.mto.com

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

In the Matter of

1-800 CONTACTS, INC.,
a corporation

PUBLIC

Docket No. 9372

[PROPOSED] ORDER GRANTING
RESPONDENT'S RENEWED MOTION FOR DISCOVERY FROM THE COMMISSION
PURUSANT TO RULE 3.36

Upon consideration of Respondent's Renewed Motion for Discovery from the Commission Pursuant to Rule 3.36:

IT IS HEREBY ORDERED that Respondent's Motion is GRANTED.

IT IS FURTHER ORDERED that Respondent 1-800 Contacts, Inc. is authorized to issue the subpoena attached as Exhibit A to the Declaration of Justin P. Raphael in support of the Motion.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

DATED:

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2016, 2016, I filed **RESPONDENT'S RENEWED MOTION FOR DISCOVERY FROM THE COMMISSION PURSUANT TO RULE 3.36** using the FTC's E-Filing System, which will send notification of such filing to all counsel of record as well as the following:

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

DATED: November 28, 2016

By: /s/ Justin P. Raphael
Justin P. Raphael

CERTIFICATE FOR ELECTRONIC FILING

I hereby 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.

DATED: November 28, 2016

By: /s/ Justin P. Raphael
Justin P. Raphael

Notice of Electronic Service

I hereby certify that on November 28, 2016, I filed an electronic copy of the foregoing RESPONDENT'S RENEWED MOTION FOR DISCOVERY FROM THE COMMISSION PURSUANT TO RULE 3.36, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on November 28, 2016, I served via E-Service an electronic copy of the foregoing RESPONDENT'S RENEWED MOTION FOR DISCOVERY FROM THE COMMISSION PURSUANT TO RULE 3.36, upon:

Thomas H. Brock
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Federal Trade Commission
TBrock@ftc.gov
Complaint

Barbara Blank
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Federal Trade Commission
bblank@ftc.gov
Complaint

Gustav Chiarello
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Respondent

Justin Raphael
Attorney