

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

**1-800 Contacts, Inc.,
a corporation,**

Respondent

Docket No. 9372

CONCURRING OPINION OF COMMISSIONER REBECCA KELLY SLAUGHTER

I strongly support the Commission’s decision and order. As explained in the Commission’s Opinion, the agreements between 1-800 Contacts and its online rivals to restrict advertising on search engine result pages harmed consumers and competition. I write separately to explain why this case was a worthwhile expenditure of Commission resources. Specifically, this case merited the Commission’s attention because of the importance of competition in online search bidding for both consumers and for competitive entry by online sellers of goods and services. The Commission’s Opinion also addresses Complaint Counsel’s allegation of harm to search engines in the form of depressed prices paid for search advertising. While I agree with the conclusion that the agreements at issue in this case constituted a type of illegal bid rigging, it was important for me to connect that conduct to consumer harm rather than harm to search engines alone.

Complaint Counsel successfully demonstrated that consumers were harmed by the agreements in this case. Those agreements not only deprived consumers of information about alternative sellers of contact lenses, which is sufficient on its own to establish a violation of Section 5, but the evidence shows that consumers’ paid more for contact lenses as a result of 1-800 Contacts’ efforts to protect itself from lower-priced competitors. Consumers who searched online lost a critical opportunity to explore these alternative contact lenses sellers or take advantage of 1-800 Contacts’ price match if they found such lower prices. These agreements increased the costs to consumers across the country who need contact lenses to correct their vision.

This case is important to competition and consumers – both because of the specific harm to contact lens purchasers and sellers and because of the precedent it sets as sponsored search results generated by bidding on a competitor’s brand name becomes an increasingly important avenue for businesses to break into online sales markets.¹ Online search bidding restriction may be a new frontier in advertising restraints, but it is just as pernicious as traditional restraints in

¹ See, e.g., Rani Molla, *Amazon is Stuffing Its Search Results Pages With Ads*, Recode, (Sept. 10, 2018), available at <https://www.recode.net/2018/9/10/17797720/amazon-is-stuffing-its-search-results-pages-with-ads>.

frustrating the role that advertising plays to benefit consumers in their search for the highest value products and services as recognized by the Supreme Court.²

A competitive marketplace should ensure that consumers get the best prices, choices, quality, and innovation. This case provides a good example of how the Commission should use its resources to attack conduct that robs consumers of competition that results in lower prices, and robs competitors of the ability to challenge a dominant player.

The Opinion also holds that the agreements consisted of a form of bid rigging that artificially depressed the price search engines received for online advertising. I agree with the legal conclusion, expressed in the Opinion, but I write separately to note that I would not have supported pursuing this case based on harm to search engines alone. The resources of the Commission are limited, and should generally be used to protect consumers, not large companies with substantial market share. Given the depth and precedential significance of the consumer-facing harm in this case, I support the Opinion and Order.

² *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (explaining that advertising “serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system.”).