

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



In the Matter of

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

Docket No. 17-0372

ORIGINAL

**COMPLAINT COUNSEL’S REPLY BRIEF IN FURTHER SUPPORT OF ITS
MOTION TO COMPEL RESPONSE TO INTERROGATORY NO. 8**

Pursuant to Federal Trade Commission Rule of Practice 3.38(a) and this Court’s January 4, 2017 Order Requiring Reply, Complaint Counsel respectfully submits this Reply Brief in Further Support of its Motion to Compel Response to Interrogatory No. 8 to address three discrete issues raised by Respondent’s Opposition: (1) the timeliness of its motion, (2) the specificity of Respondent 1-800 Contacts’ interrogatory response, and (3) the breadth of Respondent’s claim of privilege.

First, regarding timing, Respondent argues that Complaint Counsel’s motion was not timely filed within 30 days of the parties’ meet and confer or within 30 days of an earlier, superseded set of responses. But it is service of interrogatory responses, not the date of any meet-and-confer—or service of any prior superseded versions of the responses—that triggers the 30-day clock for a motion to compel. Sept. 7, 2016 Scheduling Order ¶ 10. The interrogatory responses to which Complaint Counsel’s motion pertains were served November 22, 2016. *See* Declaration of Kathleen Clair (Dec. 22, 2016), Tab 6. Thus, under the Scheduling Order, any motion to compel was due “within 30 days of service of the responses and/or objections to the

discovery requests.” Sept. 7, 2016 Scheduling Order ¶ 10. Complaint Counsel’s motion was timely filed December 22, 2016.

There is good reason for the Order’s requirement that a motion to compel be triggered by the service of interrogatory responses rather than the date of the meet-and-confer: when a party has made clear that it plans to re-file its interrogatory responses to address inadequacies raised by the serving party, the serving party must await the updated responses to evaluate whether they satisfactorily address those inadequacies or whether, instead, a motion to compel is necessary. To require the serving party to file a motion to compel regarding some portion of the responses while awaiting revisions to other portions—before knowing whether the revised responses will necessitate an additional motion to compel responses to the same set of interrogatories—would be highly inefficient. It would multiply the number of motions that the parties must brief and the Court must consider. Fortunately, the Order allows the serving party to raise all of its concerns with the interrogatory responses in a single motion, filed within 30 days after the complete set of responses are served, thus avoiding seriatim motions.

Second, regarding the specificity with which Respondent identified the documents from which its response may be ascertained, Respondent’s Opposition incorrectly states “1-800 Contacts did not merely tell Complaint Counsel to review the entire set of produced documents. . . . Instead, Respondent pointed Complaint Counsel to the particular advertisements attached to letters or emails between 1-800 Contacts and one or more of the Settling Parties (*e.g.*, cease-and-desist letters sent by 1-800 Contacts), as well as the advertisements attached to pleadings filed by 1-800 Contacts in litigation against a Settling Party.” Opposition at 4-5.

Had Respondent actually identified that set of documents—*and only that set of documents*—as the files from which the interrogatory response could be ascertained, then we

would have no dispute regarding the specificity of the response. But Respondent's answer to the interrogatory was different. It stated the responsive information:

[REDACTED]

Declaration of Kathleen Clair (Dec. 22, 2016) Tab 6, at 23 (emphasis added). As noted in Complaint Counsel's opening brief, Respondent merely parroted back the language of the request, and its use of the word "including" undid any specificity that might have otherwise been provided by identifying categories of correspondence and pleadings. *See* Mem. in Supp. of Mot. to Compel at 5-6. This response is insufficient. *See id.* (citing *Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Inv. Corp.*, 711 F.2d 902, 906 (9th Cir. 1983)).

If Respondent would strike the word "including" from its response and otherwise make clear that the correspondence and pleadings described are the *only* documents upon which it is relying, that would be a sufficiently specific response. So far, however, Respondent has been unwilling to provide any such clarity in its interrogatory response itself.

Third, regarding Respondent's privilege claims, the Opposition misses the mark. Complaint Counsel does not disagree with the uncontroversial notion—stressed in the Opposition—that the thought processes of counsel are usually privileged. Complaint Counsel notes here, however, that the information sought in sub-parts (a) and (b) of Interrogatory 8 includes information other than attorney thought processes, such as steps taken by and information known by the company itself, including numerous non-legal personnel, as described more fully in Complaint Counsel's opening brief. *See* Mem. in Supp. of Mot. to Compel at 7-8.

Respondent's Opposition failed to address these points and failed to explain its claim of privilege for the "{ [REDACTED] }" itself, as opposed to the thought processes of its attorneys. *See id.*; Declaration of Kathleen Clair (Dec. 22, 2016), Tab 6, at 24.

CONCLUSION

For the reasons stated above, Complaint Counsel's Motion to Compel should be granted.

Respectfully submitted,

/s/ Daniel J. Matheson

Daniel J. Matheson
Geoffrey M. Green
Barbara Blank
Charles A. Loughlin
Thomas H. Brock
Kathleen M. Clair
Gustav P. Chiarello
Joshua B. Gray
Nathaniel M. Hopkin
Charlotte S. Slaiman
Mika Ikeda

Counsel Supporting the Complaint

Dated: January 10, 2017

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2017, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing documents to:

Gregory P. Stone
Steven M. Perry
Garth T. Vincent
Stuart N. Senator
Gregory M. Sergi
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
gregory.stone@mto.com
steven.perry@mto.com
garth.vincent@mto.com
stuart.senator@mto.com
gregory.sergi@mto.com

Justin P. Raphael
Munger, Tolles & Olson LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
justin.raaphael@mto.com

Sean Gates
Charis Lex P.C.
16 N. Marengo Ave.
Suite 300
Pasadena, CA 91101
sgates@charislex.com

Counsel for Respondent 1-800 Contacts, Inc.

Dated: January 10, 2017

By: /s/ Daniel J. Matheson
Attorney

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

January 10, 2017

By: /s/ Daniel J. Matheson
Attorney

Notice of Electronic Service

I hereby certify that on January 10, 2017, I filed an electronic copy of the foregoing Complaint Counsel's Reply Brief in Further Support of its Motion to Compel Response to Interrogatory No. 8, 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 January 10, 2017, I served via E-Service an electronic copy of the foregoing Complaint Counsel's Reply Brief in Further Support of its Motion to Compel Response to Interrogatory No. 8, upon:

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

Barbara Blank
Attorney
Federal Trade Commission
bblank@ftc.gov
Complaint

Gustav Chiarello
Attorney
Federal Trade Commission
gchiarello@ftc.gov
Complaint

Kathleen Clair
Attorney
Federal Trade Commission
kclair@ftc.gov
Complaint

Joshua B. Gray
Attorney
Federal Trade Commission
jbgray@ftc.gov
Complaint

Geoffrey Green
Attorney
Federal Trade Commission
ggreen@ftc.gov
Complaint

Nathaniel Hopkin
Attorney
Federal Trade Commission
nhopkin@ftc.gov

Complaint

Charles A. Loughlin
Attorney
Federal Trade Commission
cloughlin@ftc.gov
Complaint

Daniel Matheson
Attorney
Federal Trade Commission
dmatheson@ftc.gov
Complaint

Charlotte Slaiman
Attorney
Federal Trade Commission
cslaiman@ftc.gov
Complaint

Mark Taylor
Attorney
Federal Trade Commission
mtaylor@ftc.gov
Complaint

Gregory P. Stone
Attorney
Munger, Tolles & Olson LLP
gregory.stone@mto.com
Respondent

Steven M. Perry
Attorney
Munger, Tolles & Olson LLP
steven.perry@mto.com
Respondent

Garth T. Vincent
Munger, Tolles & Olson LLP
garth.vincent@mto.com
Respondent

Stuart N. Senator
Munger, Tolles & Olson LLP
stuart.senator@mto.com
Respondent

Gregory M. Sergi
Munger, Tolles & Olson LLP
gregory.sergi@mto.com
Respondent

Justin P. Raphael
Munger, Tolles & Olson LLP
Justin.Raphael@mto.com
Respondent

Sean Gates

Charis Lex P.C.
sgates@charislex.com
Respondent

Mika Ikeda
Attorney
Federal Trade Commission
mikeda@ftc.gov
Complaint

Zachary Briers
Munger, Tolles & Olson LLP
zachary.briers@mto.com
Respondent

Chad Golder
Munger, Tolles, and Olson
chad.golder@mto.com
Respondent

Daniel Matheson
Attorney