

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

COMMISSIONERS: **Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
Terrell McSweeney**

In the Matter of

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

Docket No. 9372

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that 1-800 Contacts, Inc. (“1-800 Contacts”), a corporation, hereinafter sometimes referred to as “Respondent,” has violated the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Nature of the Case

1. This action challenges a series of bilateral agreements between 1-800 Contacts and numerous online sellers of contact lenses that prevent the parties from competing against one another in certain online search advertising auctions. The driving force behind these agreements and this anticompetitive scheme is 1-800 Contacts, the largest online seller of contact lenses in the United States.
2. The major online search engine companies, Google and Bing, sell advertising space on their search engine results pages through computerized auctions. Beginning in 2004, 1-800 Contacts secured agreements with at least fourteen competing online sellers of contact lenses providing that the parties would not bid against one another in certain search advertising auctions (the “Bidding Agreements”). As 1-800 Contacts engineered this bid allocation scheme, certain auctions are reserved to 1-800 Contacts alone.
3. These bidding agreements unreasonably restrain both price competition in search advertising auctions and the availability of truthful, non-misleading advertising. The Bidding Agreements individually and in combination constitute an unfair method of competition and violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Respondent

4. Respondent 1-800 Contacts is a corporation organized, existing, and doing business under and by virtue of the laws of the United States, with its office and principal place of business located at 261 Data Drive, Draper, Utah, 84020.

Jurisdiction

5. At all times relevant herein, 1-800 Contacts has been, and is now, a corporation as “corporation” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
6. The acts and practices of 1-800 Contacts, including the acts and practices alleged herein, are in commerce or affect commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Overview of Online Search Advertising

7. Search engines, including Google and Bing, are available to users of the internet without charge. This service is financed primarily through the sale of search advertising. Search advertising refers to the paid advertisements that appear, in response to a search query, on the search engine results page above or adjacent to the unpaid “organic” or “natural” results. Attached hereto as Exhibit 1 is a screen shot showing a Google search engine results page that appeared in response to a query on June 27, 2016, for “1 800 Contacts cheaper competitors.” The first listing in this screen shot, which is preceded by a yellow box containing the text “Ad,” is a paid advertisement (for 1-800 Contacts). The remaining results on the page are unpaid organic results.
8. Search advertising is especially valuable to advertisers because, unlike with other forms of advertising, an advertiser can deliver a message to a user at the precise moment that the user has expressed interest in a specific subject, and may be ready to make a purchase. For example, a seller of contact lenses (or any of a wide variety of products and services advertised online) can display its advertisement to a user who, milliseconds earlier, entered the search query “contact lenses” (or for another product or service).
9. Search advertising is also especially valuable to internet users because a user can quickly and easily navigate between the search engine results page and the websites of several different advertisers (e.g., visiting several different websites that sell contact lenses). In this way, the user can readily compare price and service, purchase the desired merchandise, and arrange for delivery.
10. Search engine companies sell advertising space on the search engine results page by means of auctions. A separate and automated search advertising auction is conducted each time a user enters a query.

- a. Advertisers submit to the search engine companies “bids” specifying the maximum price they are willing to pay to place a particular advertisement on the results page.
 - b. An advertiser may identify the auctions that it wishes to enter by bidding on particular words, referred to as “keywords,” contained in a given query. Alternatively, the advertiser may allow the search engine company, through its algorithms, to identify relevant auctions for the advertiser (thus participating in auctions for relevant queries even without having bid on the precise terms in those queries).
 - c. When a consumer enters a search query, an algorithm instantly evaluates the relevant bids. The winner or winners of the auction will have their advertisements displayed to the user. If the user clicks on an advertisement and visits the advertiser’s website, then the advertiser pays a fee to the search engine company.
11. Search engine companies do not simply place advertisements on the search engine results page in the order of the price bid by the advertiser. Rather, in determining whether and in what order to place advertisements, search engines employ sophisticated algorithms that consider the quality of the advertisement. Quality, in this context, refers to the search engine’s assessment of whether the advertisement will be relevant and useful to the user. The search engine makes this assessment based largely on the search engine’s continual analysis of user feedback (such as click-through data), which is incorporated, in real-time, into the algorithms that determine which advertisements, if any, will be shown. The search engine demotes or eliminates advertisements that prove, based on user feedback, not to be relevant or useful to users.
 12. Computer users sometimes enter a search query that contains a trademarked word or phrase (*e.g.*, “1-800 Contacts,” “Mattress Discounters,” “POLO shirt”). In response, the search engine may present the user with relevant advertisements on behalf of multiple companies, including but not limited to the owner of the trademark.
 13. An advertiser also may specify to the search engine one or more “negative keywords.” This is an instruction that the company’s advertisement should *not* appear in response to a search query that contains a particular term or terms. For example, a business that sells eyeglasses and bids on the term “glasses” in search advertising auctions may use a negative keyword (*e.g.*, “wine”) to prevent its advertisement from being displayed in response to a query for “wine glasses.”

Competition in the Online Retail Sale of Contact Lenses

14. 1-800 Contacts has long been the largest online seller of contact lenses in the United States. In 2015, 1-800 Contacts had revenues of approximately [REDACTED] million. This represents approximately 50 percent of the online retail sales of contact lenses. The combined share of 1-800 Contacts and the fourteen firms that executed the Bidding Agreements is approximately 80 percent.
15. 1-800 Contacts was a pioneer in the online sale of contact lenses. However, by the early 2000s, a number of competing online retailers had emerged and were expanding rapidly. Online rivals invested in search advertising and competed directly against 1-800 Contacts in search advertising auctions. These online rivals undercut 1-800 Contacts' prices for contact lenses, many by a substantial amount.
16. As early as 2003, 1-800 Contacts recognized that it was losing sales to lower-priced online competitors. However, 1-800 Contacts did not want to lower its prices to compete with these rivals, and devised a plan to avoid doing so. To this day, 1-800 Contacts' prices for contact lenses remain consistently higher than the prices of its online rivals.

The Bidding Agreements

17. In or around 2004, 1-800 Contacts began sending cease-and-desist letters to rival online sellers of contact lenses whose search advertisements appeared in response to user queries containing the term "1-800 Contacts" (or variations thereof). 1-800 Contacts accused its rivals of infringing its trademarks.
18. 1-800 Contacts claimed—inaccurately—that the mere fact that a rival's advertisement appeared on the results page in response to a query containing a 1-800 Contacts trademark constituted infringement. 1-800 Contacts threatened to sue its rivals that did not agree to cease participating in these search advertising auctions.
19. Most often, rivals quickly acceded to 1-800 Contacts' demands in order to avoid prolonged and costly litigation. Only one competitor refused to settle and proceeded to litigation.
20. Between 2004 and 2013, 1-800 Contacts entered at least fourteen agreements with rival online sellers of contact lenses settling 1-800 Contacts' purported trademark claims by restricting bidding in search advertising auctions. The competitors that agreed not to bid against 1-800 Contacts include:



21. The Bidding Agreements go well beyond prohibiting trademark infringing conduct. They restrain a broad range of truthful, non-misleading, and non-confusing advertising.
22. All fourteen Bidding Agreements bar 1-800 Contacts' competitor from bidding in a search advertising auction for any of 1-800 Contacts' trademarked terms (*e.g.*, "1-800 Contacts") or variations thereof (such as common misspellings).
23. All fourteen Bidding Agreements are reciprocal, barring 1-800 Contacts from bidding for the competitors' trademarked terms or variations thereof. Notably, most of the competitors that entered into these Bidding Agreements had never raised trademark infringement claims or counterclaims against 1-800 Contacts.
24. Thirteen of the Bidding Agreements also require 1-800 Contacts' competitor to employ "negative keywords" directing the search engines not to display the competitor's advertisement in response to a search query that includes any of 1-800 Contacts' trademarked terms or variations thereof, even if the search engines' algorithms determine that the advertisement would be relevant and useful to the user. Thus, even if a user enters a query for "1-800 Contacts **cheaper competitors**," the user will see advertisements only for 1-800 Contacts. (See Exhibit 1.) This undertaking is also reciprocal, requiring 1-800 Contacts to employ its competitors' trade names and variations thereof as negative keywords in its own advertising campaigns.
25. 1-800 Contacts has aggressively policed the Bidding Agreements, complaining to competitors when the company has suspected a violation, threatening further litigation, and demanding compliance.

26. Only one online seller of contact lenses—Lens.com—did not settle with 1-800 Contacts. Instead, Lens.com litigated against 1-800 Contacts at significant expense. Ultimately, the Court of Appeals for the Tenth Circuit rejected 1-800 Contacts’ trademark infringement claims. The court found that consumers were not confused when an advertisement for Lens.com appeared on the search results page in response to a user query for “1-800 Contacts.” *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1245-49 (10th Cir. 2013). And, in the absence of the likelihood of consumer confusion, there can be no infringement of 1-800 Contacts’ trademarks.
27. 1-800 Contacts targeted rivals whose advertisements appeared on the search engine results page in response to a user query for “1-800 Contacts” or variations thereof. 1-800 Contacts acted without regard to whether the advertisements were likely to cause consumer confusion or infringed 1-800 Contacts’ trademarks.

Anticompetitive Effects of the Bidding Agreements

28. One relevant product market or line of commerce in which to analyze the competitive effects of 1-800 Contacts’ challenged conduct is no larger than the sale of search advertising by auction in response to user queries signaling the user’s interest in contact lenses, or smaller relevant markets therein.
29. A second relevant product market or line of commerce in which to analyze the competitive effects of 1-800 Contacts’ challenged conduct is no larger than the retail sale of contact lenses, or smaller relevant markets therein, including the online retail sale of contact lenses.
30. The relevant geographic market for each product market alleged herein is no larger than the United States.
31. Respondent’s conduct, as alleged herein, had the purpose, capacity, tendency, and likely effect of restraining competition unreasonably and injuring consumers and others in the following ways, among others:
 - a. Unreasonably restraining price competition in certain search advertising auctions;
 - b. Distorting prices in, and undermining the efficiency of, certain search advertising auctions;
 - c. Preventing search engine companies from displaying to users on the results page the array of advertisements that are most responsive to a user’s search;
 - d. Impairing the quality of the service provided to consumers by search engine companies, including the results page;

- e. Depriving consumers of truthful and non-misleading information about the prices, products, and services offered by online sellers of contact lenses;
 - f. Depriving consumers of the benefits of vigorous price and service competition among online sellers of contact lenses;
 - g. Preventing online sellers of contact lenses from disseminating truthful and non-confusing information about the availability of, and prices for, their products and services;
 - h. Increasing consumers' search costs relating to the online purchase of contact lenses; and
 - i. Causing at least some consumers to pay higher prices for contact lenses than they would pay absent the agreements, acts, and practices of 1-800 Contacts.
32. As horizontal agreements that restrain price competition and restrain truthful and non-misleading advertising, the Bidding Agreements are inherently suspect. Furthermore, the Bidding Agreements are overbroad: they exceed the scope of any property right that 1-800 Contacts may have in its trademarks, and they are not reasonably necessary to achieve any procompetitive benefit. Less restrictive alternatives are available to 1-800 Contacts to safeguard any legitimate interest the company may have under trademark law.

Violations Alleged

33. As set forth above, 1-800 Contacts agreed to restrain competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.
34. The acts and practices of Respondent, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

NOTICE

Notice is hereby given to the Respondent that the eleventh day of April, 2017, at 10:00 a.m., is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Washington D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46 of said Rules.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after an answer is filed by Respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within five days of receiving the answer of Respondent, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Respondent has violated or is violating Section 5 of the FTC Act, as amended, as alleged in the complaint, the Commission may order such relief against Respondent as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Ordering Respondent to cease and desist from the conduct alleged in the complaint to violate Section 5 of the FTC Act, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of, the anticompetitive practices engaged in by Respondent, or similar practices.
2. Prohibiting Respondent from, directly or indirectly, maintaining, entering into, or attempting to enter into, an agreement with any contact lens retailer that restrains participation in or otherwise restrains competition in any search advertising auction.
3. Prohibiting Respondent from, directly or indirectly, maintaining, entering into, or attempting to enter into, an agreement with any contact lens retailer to forbear from disseminating truthful and non-misleading advertising.
4. Prohibiting Respondent from, directly or indirectly, enforcing, attempting to enforce, or threatening to enforce any provision of an agreement that restricts bidding for search advertising or that restricts the display of advertisements in response to certain user search queries, or any provision of an agreement requiring the use of negative keywords in search engine advertising.
5. Prohibiting Respondent from filing or threatening to file a lawsuit against any contact lens retailer alleging trademark infringement, deceptive advertising, or unfair competition that is based on the use of 1-800 Contacts' trademarks in a search advertising auction. *Provided, however,* that Respondent shall not be barred from filing or threatening to file a lawsuit challenging any advertising copy where Respondent has a good faith belief that such advertising copy gives rise to a claim of trademark infringement, deceptive advertising, or unfair competition.
6. Ordering Respondent to submit at least one report to the Commission sixty days after issuance of the Order, and other reports as required, describing how it has complied, is complying, and will comply in the future.
7. Requiring, for a period of time, that Respondent document all communications with settlement parties, including the persons involved, the nature of the communication, and its duration, and that Respondent submit such documentation to the Commission.

8. Ordering Respondent, for a period of time, to file annual compliance reports to the Commission describing its compliance with the requirements of the order. The order would terminate twenty years from the date it becomes final.
9. Requiring that Respondent's compliance with the order may be monitored at Respondent's expense by an independent monitor, for a term to be determined by the Commission.
10. Any other relief appropriate to prevent, correct or remedy the anticompetitive effects in their incipency of any or all of the conduct alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighth day of August, 2016 issues its complaint against Respondent.

By the Commission.

Donald S. Clark
Secretary

SEAL:

Exhibit 1

File Edit View History Bookmarks Tools Help

1-800 Contacts cheaper co... x +

https://www.google.com/?gws_rd=ssl#q=1-800+Contacts+cheaper+competitors

Google 1-800 Contacts cheaper competitors Sign in

All News Shopping Images Videos More Search tools

About 1,150,000 results (0.63 seconds)

1800CONTACTS.com - Lenses
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4.7 ★★★★★ rating for 1800contacts.com
We Have Your Lenses in Stock & Ready to Ship. Crazy Fast Delivery!
Free lens replacement · 24/7 Customer service · We price match · Easy ordering
Ratings: Shipping 10/10 - Website 10/10 - Prices 10/10 - Customer service 9.5/10
Air Optix Easy Re-Order
Use Your Vision Insurance

Where To Buy Contact Lenses - AllAboutVision.com
www.allaboutvision.com > [Contact Lenses](#)
But many eye doctors offer contacts at very **competitive prices**, especially if you purchase a year's supply of lenses at one ... **1-800 Contacts**, \$67.50, \$135.00.

Unbeatable Price Guarantee | 1-800 CONTACTS
<https://www.1800contacts.com/unbeatable-price-guarantee.html> 1-800 Contacts
With the **1-800 CONTACTS** Unbeatable Price Guarantee, we will beat any price on every product we ...
Competitors' promo codes are not valid for this discount.

Fairness to Contact Lens Consumers Act - 1-800 Contacts
www.1800contacts.com/.../1-800-contacts-opposes-legislation-introdu... 1-800 Contacts
Apr 12, 2016 - "This anti-consumer bill would stifle **competition** in the **contact lenses** ... increasing **prices** on many **contact lenses** and effectively eliminating ...

The FCLCA Becomes Law | 1-800 CONTACTS
www.1800contacts.com/connect/articles/fclca-becomes-law 1-800 Contacts
Further, the law eliminates barriers to retail **competition** which will make **contact lenses cheaper** to