

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

Docket No. 9372

ORIGINAL

RESPONDENT 1-800 CONTACTS, INC.'S OPPOSITION TO COMPLAINT
COUNSEL'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS IN RESPONSE
TO REQUESTS FOR PRODUCTION 22-25

I. INTRODUCTION

Respondent 1-800 Contacts, Inc. (“1-800 Contacts”) opposes Complaint Counsel’s Motion to Compel Production of Documents in Response to Requests for Production 22-25 (“Motion” or “MTC”). These requests seek not only routine (and largely cumulative) weekly reports on the traffic to 1-800 Contacts website that were generated over the last 12 years (since 2004), but these requests also seek all documents “relating to” any such reports. The dispute here is not over production of these weekly reports; any additional reports that can be located through a further reasonable search will be produced. In fact, 1-800 Contacts already has produced over 1,000 documents responsive to these requests; *and*, 1-800 Contacts has agreed to conduct additional searches over the comprehensive set of nearly [REDACTED] documents it already has collected from [REDACTED] and [REDACTED] [REDACTED] to identify additional versions of these weekly reports that have not yet been produced.

The two principal issues in dispute are:

- (1) whether 1-800 Contacts should be required in responding to Requests 22 and 24 to search beyond its existing, comprehensive document collection; and
- (2) whether 1-800 Contacts should be required to search for “all documents relating” to these various weekly reports.

1-800 Contacts respectfully submits that the answer on both these issues in dispute should be “No.”

In response to these requests, 1-800 Contacts agreed weeks ago to conduct a further and extensive search of its existing collection of documents (nearly [REDACTED] documents), and that is a more than reasonable search. Complaint Counsel’s demands for even more are unwarranted and would impose costs and burdens on 1-800 Contacts that far outweigh any likely benefits.

II. FACTUAL BACKGROUND

1-800 Contacts has already undertaken to collect, search, and review documents from [REDACTED] [REDACTED] and [REDACTED] covering approximately 10 years. *See* Declaration of Lisa Clark, ¶ 3 (“Clark Decl.”). That collection now totals nearly [REDACTED] documents. *See id.* This was an expensive undertaking and imposed a significant burden on 1-800 Contacts and its counsel. 1-800 Contacts has taken these efforts in order to respond to nearly every request for documents and data throughout these proceedings.

The requests now at issue were served on October 19, 2016, in Complaint Counsel’s *Third* Set of Requests for Production. **Requests 22 and 24** seek “regularly prepared” weekly reports (“Weekly Website Overview,” “Weekly Core Website Overview,” and the “Digital Commerce Dashboard”) spanning a period of nearly 12 years from 2004 through the present.¹ Counsel for 1-800 Contacts voluntarily offered to include within the scope of those requests the weekly report titled “Conversion Dashboard.” *See* MTC, Matheson Decl., Tab 6.

Complaint Counsel claims that 1-800 Contacts has only “produced a handful of the reports sought by” these Requests. MTC at 1. In fact, 1-800 Contacts already has produced over 1,000 documents consisting of numerous versions of those reports and many other documents relating to those reports. *See* Clark Decl. ¶ 4. To further respond to Requests 22 and 24, 1-800 Contacts has agreed to search its existing, comprehensive collection for any additional documents that contain the name of any of those four reports in the title, filename, or attachment

¹ The Third Set of Requests for Production states that it is seeking documents from “January 1, 2002, to the present,” but counsel for 1-800 Contacts understands that Complaint Counsel agreed to limit that time period to 2004 through the present.

name fields, and then to produce any responsive, non-privileged documents identified through that search (along with any cover email or other attachments to those documents).

The scope of what 1-800 Contacts agreed to do entails the expense and burden of reviewing nearly 3,500 additional documents. *See id.* ¶ 5. Much of that work has now been completed and the documents are expected to be produced within the next few days. This alone has required approximately 75-80 hours of time for initial review, plus additional time to conduct a privilege review, perform quality control checks, and put the responsive, non-privileged documents into a production. *See id.* ¶ 6. Complaint Counsel, however, insists this is not enough. Complaint Counsel wants 1-800 Contacts to incur the added (and potentially enormous) expense of ensuring that it has produced a “complete set” of each and every weekly report from the past 12 years, regardless of where any particular version resides, regardless of the content, and regardless of the burden associated with finding any particular version. *See MTC, Proposed Order, section 1.*

Requests 23 and 25 broadly seek “[a]ll documents Relating to” the four regularly prepared weekly reports discussed above. 1-800 Contacts objected to these Requests on the grounds that they are “overly broad, “unduly burdensome,” “vague,” and “ambiguous.” *See MTC, Matheson Decl., Ex. 5.* 1-800 Contacts, however, offered “to meet and confer . . . if Complaint Counsel [would be] able to narrow the scope to a search that would be reasonable.” *Id.* Complaint Counsel refused to do so. Instead, Complaint Counsel continues to place the burden on 1-800 Contacts to figure out a way to narrow the scope of these exceedingly broad requests in a manner that Complaint Counsel find satisfactory.

As described above, 1-800 Contacts has already produced over 1,000 documents and has agreed to review nearly 3,500 additional documents that contain the name of any of the four

reports in the title, filename, or attachment name fields. In order to respond to Requests 23 and 25, Complaint Counsel's Proposed Order would have 1-800 Contacts go further by searching its entire collection for any document that merely mentions—*anywhere in the text of that document*—the name of one of the four weekly reports, or the name "Web Channel Trend."² See MTC, Proposed Order, section 2(a). This alone will require 1-800 Contacts to incur the burden and expense of reviewing thousands of additional documents. See *id.* ¶ 7.³ But, a sampling of the documents that this search is likely to identify demonstrates the obvious overbreadth of Complaint Counsel's approach, as the sample includes many irrelevant, non-substantive documents, such as: (1) task lists that merely note an employee's responsibility for the report, see, e.g., Clark Decl., Tab 1 (noting weekly recurring tasks for "Conversion Dashboard," "Web Channel Trend," and "Weekly Website Overview"); (2) employee reminders to pay invoices related to these weekly reports, see, e.g., Clark Decl., Tab 2; and (3) human resource records noting employees' roles with respect to these various reports.

III. ARGUMENT

FTC Rule 3.31(c)(1) provides that "Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." This permitted discovery, however, "shall

² Complaint Counsel's Motion includes the report titled "Web Channel Trend," which was not mentioned in any of the Requests for Production or previously identified by Complaint Counsel as part of Requests 23 or 25. See MTC, Matheson Decl., Tab 2. This is inexplicable given 1-800 Contacts long ago produced hundreds of documents consisting of or discussing the Web Channel Trend report.

³ The burden is further increased by Complaint Counsel's demand that 1-800 Contacts collect the "e-mail and other electronic documents" from five specific people for the last couple years. See MTC, Proposed Order, section 2(a)(ii). Complaint Counsel previously agreed that 1-800 Contacts, for purposes of responding to other requests, need only refresh its collection with the e-mail files for those five people. Including all "other electronic documents" would require new document collections to take place at this late date, which could not reasonably be done in the short time period contemplated by Complaint Counsel's Proposed Order.

be limited” if:

- (i) “[t]he discovery sought . . . is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive,”
- (ii) “[t]he party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought,” or
- (iii) “[t]he burden and expense of the proposed discovery . . . outweigh its likely benefit.”

16 C.F.R. § 3.31(c)(2). Like its analogue in the Federal Rules of Civil Procedure, the FTC discovery rules reflect the basic concept of “proportionality”: “[t]here comes a point where the marginal returns on discovery do not outweigh the concomitant burden, expense, and bother.” *Goodman v. Burlington Coat Factory Warehouse Corp.*, 292 F.R.D. 230, 233 (D.N.J. 2013). *See also* Fed. R. Civ. P. 26 advisory committee’s note (2015).

A. The Burdens Associated with Complaint Counsel’s Additional Demands on Requests 22 and 24 Far Outweigh Any Likely Benefits.

Complaint Counsel argues that the weekly reports, going back to 2004, are relevant because they “track the sources of [1-800 Contacts’] internet traffic and internet-based orders.” MTC at 6. These reports primarily contain weekly statistics showing the means by which consumers arrived at 1-800 Contacts’ website (*e.g.*, email, typing 1-800 Contacts’ URL, bookmark, natural search results, paid search advertisements, or a marketing affiliate). *See* MTC, Matheson Decl., Tabs 1-3. Importantly, however, Complaint Counsel is not asking for the actual underlying data on those metrics, which would have been a far more efficient and less burdensome request. Indeed, Complaint Counsel already have that data because many of the weekly reports include not only that particular week’s metrics but the metrics for every

preceding week.⁴ Complaint Counsel seemingly have made no attempt to determine which of this data they already have.

Despite the marginal relevance and cumulative nature of this additional discovery, 1-800 Contacts has agreed to conduct an extensive search over its existing document collection in order to produce as many additional versions of these weekly reports (including cover emails or attachments to those reports) as it is able to locate through this additional search. But Complaint Counsel insist that this additional search is not sufficient and are demanding that 1-800 Contacts perform whatever additional searches are necessary to ensure that a “complete set” of the various weekly reports generated during a nearly-12-year period has been produced. MTC at 6-7.⁵ This is plainly unreasonable and grossly disproportionate to any potential benefit.

1-800 Contacts should not be required to find every conceivably responsive document, wherever it may exist and whatever the cost may be. Complaint Counsel notably cites no precedent or authority for this outrageous demand. 1-800 Contacts is willing (and agreed weeks ago) to conduct a search that is more than reasonable and comprehensive to identify the documents sought by Requests 22 and 24. Anything further would impose a burden and expense that far outweighs any likely benefits.

⁴ The document attached to the Motion as Matheson Declaration, Tab 2, for example includes an attachment titled “Digital Commerce Dashboard – CY13 Wk31.xlsx,” that includes all of the reported metrics for the 31st week of 2013 and those same metrics for every single preceding week back to the beginning of 2010.

⁵ Complaint Counsel apparently attempts to justify these demands by pointing to the commentary included in *one* weekly report. MTC at 1. Complaint Counsel fails to mention that 1-800 Contacts has responded to many other requests in the underlying investigation and this litigation that specifically sought documents of that nature. Moreover, Complaint Counsel has not suggested any narrowing of Requests 22 and 24 (such as with targeted search terms) to identify any specific type of commentary or analyses associated with the weekly reports.

B. Requests 23 and 25 Are Plainly Overbroad and Impermissible

The principal dispute here is surprisingly about two document requests that are clearly objectionable as overbroad and lacking the reasonable particularity required, as Complaint Counsel itself vigorously argued when the shoe was on the other foot. Requests 23 and 25 broadly seek “[a]ll documents relating to” the various weekly reports described above. Less than two months ago in opposing 1-800 Contacts’ requests for documents from the Commission relating to a few specific reports, Complaint Counsel argued that the requests “fail[ed] to provide reasonable particularity regarding what specific materials Respondent seeks, and whether, or how, such materials relate to Respondent’s defenses.” CC Opp. to Resp.’s Mot. for a Rule 3.36 Subpoena, at 7-8 (filed Oct. 14, 2016). This Court agreed. With respect to 1-800 Contacts’ requests that “seek ‘[a]ll Documents’ from 2002 to [the] present ‘relating to’ specifically identified studies,” this Court held that “*requests that seek documents ‘concerning’ or ‘relating to’ have been found to lack the ‘reasonable particularity’ required.*” Order on Resp.’s Mot., at 6 (Oct. 28, 2016) (emphasis added). Here, Requests 23 and 25 do not merely seek documents “relating to” a few specified reports, they seek all documents “relating to” numerous regularly prepared weekly reports over a course of 12 years.

Indeed, Requests 23 and 25 are prime examples of the impermissible “fishing expedition.” See *Henry v. Morgan’s Hotel Grp., Inc.*, 2016 WL 303114, at *2 (S.D.N.Y. Jan. 25, 2016) (describing similar document requests as “merely trying to engage in a fishing expedition”); *Rice v. Reliastar Life Insurance Co.*, 2011 WL 5513181, at *2 (M.D.La. Nov. 10, 2011) (finding that “a request for ‘any and all documents’ relating to a particular subject is overbroad and amounts to little more than a fishing expedition”). Complaint Counsel’s suggestion that the flaws in Requests 23 and 25 are overcome by 1-800 Contacts simply searching the entire collection of nearly [REDACTED] documents for any mention—*anywhere in*

the text of any document—of these reports is unrealistic and untenable.⁶ As shown above, 1-800 Contacts has determined that Complaint Counsel’s approach would require the review of thousands of additional documents, many of which are plainly irrelevant. In light of the extensive efforts 1-800 Contacts already has taken (and agreed to take) to respond to Requests 22 and 24, as well as Complaint Counsel’s many other Requests, 1-800 Contacts should not have to incur the added expense and burden of Complaint Counsel’s fishing expedition with Requests 23 and 25.⁷

IV. CONCLUSION

For these reasons, 1-800 Contacts respectfully requests that this Court deny Complaint Counsel’s Motion to Compel further production of documents in response to Requests 22-25.

⁶ Complaint Counsel’s reliance on *In re North Texas Specialty Physicians* is unpersuasive as the decisions in that matter do not reveal circumstances remotely similar. *See, e.g.*, Docket No. 9312, 2004 WL 527340, at *5 (Jan. 30, 2004); 2004 WL 527337, at *5 (Feb. 4, 2004). There, the requests to commercial insurance companies sought documents specifically mentioning a specific physician group (North Texas Specialty Physicians). The requests did not seek all documents relating to an internal weekly report generated over a 12-year period.

⁷ If this Court were to order 1-800 Contacts to further respond to Requests 23 and 25, this should be limited to the documents already collected, pursuant to Complaint Counsel’s prior agreement. *See supra* n.3; MTC, Matheson Decl., Tab 7 (email detailing scope of “refresh” collection).

DATED: December 7, 2016

Respectfully submitted,

/s/ Gregory M. Sergi

Gregory P. Stone (gregory.stone@mto.com)
Steven M. Perry (steven.perry@mto.com)
Garth T. Vincent (garth.vincent@mto.com)
Stuart N. Senator (stuart.senator@mto.com)
Gregory M. Sergi (gregory.sergi@mto.com)
Zachary Briers (zachary.briers@mto.com)

MUNGER, TOLLES & OLSON LLP
355 South Grand Ave, 35th Floor
Los Angeles, California 90071
Phone: (213) 683-9100
Fax: (213) 687-3702

Justin P. Raphael (justin.rafael@mto.com)
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, California 94105

Chad Golder (chad.golder@mto.com)
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, DC 20004

Sean Gates (sgates@charislex.com)
CHARIS LEX P.C.
16 N. Marengo Avenue, Suite 300
Pasadena, California 91101
Phone: (626) 508-1717
Fax: (626) 508-1730

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2016, I filed **RESPONDENT 1-800 CONTACTS, INC.'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS IN RESPONSE TO REQUESTS FOR PRODUCTION 22-25** 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: December 7, 2016

By: /s/ Gregory M. Sergi
Gregory M. Sergi

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: December 7, 2016

By: /s/ Gregory M. Sergi
Gregory M. Sergi

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

Docket No. 9372

DECLARATION OF LISA A. CLARK IN SUPPORT OF
RESPONDENT 1-800 CONTACTS, INC.'S OPPOSITION TO COMPLAINT
COUNSEL'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS IN RESPONSE
TO REQUESTS FOR PRODUCTION 22-25

I, Lisa A. Clark, declare as follows:

1. I am a staff 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.

2. I submit this Declaration in Support of Respondent's Opposition to Complaint Counsel's Motion to Compel Production of Documents in Response to Requests for Production 22-25. I have personal knowledge of the facts stated in this declaration and, if called as a witness, could competently testify to them.

3. In the course of the underlying investigation and the above-referenced litigation, 1-800 Contacts has collected documents from the files of [REDACTED] [REDACTED] of 1-800 Contacts and from [REDACTED] [REDACTED]. This collection now totals nearly [REDACTED] documents. 1-800 Contacts has searched this collection of documents in order to make the various productions of documents it has made to date.

4. In the course of this litigation and the investigation that preceded it, 1-800 Contacts produced to the Federal Trade Commission staff and/or to Complaint Counsel over 1,000 documents that contain one or more of the phrases “Weekly Website Overview,” “Weekly Core Website Overview,” “Digital Commerce Dashboard,” and “Conversion Dashboard.” Once all of the accompanying cover emails and other attachments to those documents are counted, the total exceeds 1,600 documents.

5. A search for the terms “Weekly Website Overview,” “Weekly Core Website Overview,” “Digital Commerce Dashboard,” or “Conversion Dashboard” *in the title, filename, or attachment name* of the nearly [REDACTED] already collected results in approximately 3,500 documents that have not yet been produced.

6. Based on my extensive experience managing and supervising document review projects in the context of litigation, approximately 75-80 hours are required to conduct an initial review of the 3,500 documents identified above in paragraph 5. Additional time is required to review those documents for any privilege issues, conduct standard quality control checks, and ultimately put the responsive, non-privileged documents into a formal production.

7. Setting aside documents already produced and those identified in paragraphs 5 and 6 above, a search for the terms “Weekly Website Overview,” “Weekly Core Website Overview,” “Digital Commerce Dashboard,” “Conversion Dashboard,” or “Web Channel Trend” *in the text* of any of the nearly [REDACTED] documents already collected, as suggested in section 2 of Complaint Counsel’s Proposed Order, results in thousands of additional documents that have not yet been produced. As discussed above in paragraph 6, the review and production of these additional documents would require substantial time and expense.

PUBLIC

8. Tab 1 is a true and correct copy of the first worksheet in an Excel spreadsheet produced by 1-800 Contacts with Bates number 1-800F_00059498.

9. Tab 2 is a true and correct copy of a document produced by 1-800 Contacts with Bates number 1-800F_00025054.

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

Executed on December 7, 2016, in Los Angeles, California.

/s/ Lisa A. Clark

Lisa A. Clark

Tab 1

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Tab 2

When: Tue Aug 07 15:00:00 2007 (America/Chicago)
Until: Tue Aug 07 16:00:00 2007 (America/Chicago)

Bill Me Later \$10 promotion

What is objective of \$10 promotion?

How important is call center incentive? (Will it drive volume?)

Phase II calendar

Asking for 3 weeks

Kick off meeting last week

Ryan's position

Invoices on Conversion Dashboard

Not updated

Notice of Electronic Service

I hereby certify that on December 15, 2016, I filed an electronic copy of the foregoing Respondent 1-800 Contacts' Opp. to Complaint Counsel's Motion to Compel on RFPs 22-25 - PUBLIC (Dec. 7, 2016), 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 December 15, 2016, I served via E-Service an electronic copy of the foregoing Respondent 1-800 Contacts' Opp. to Complaint Counsel's Motion to Compel on RFPs 22-25 - PUBLIC (Dec. 7, 2016), 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

Gregory Sergi
Attorney