

PUBLIC

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,

Respondent.

Docket No. 9372

**RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION  
IN LIMINE TO PRECLUDE THE TESTIMONY OF DR. NEIL WIELOCH**

**I. INTRODUCTION**

Complaint Counsel’s motion *in limine* to preclude the testimony of Dr. Neil Wieloch should be denied. The motion is founded upon four demonstrably false propositions:

*First*, Complaint Counsel contend that “Respondent did not include Dr. Wieloch as a document custodian in responding to our document requests.” (Complaint Counsel Mem. ISO MIL at 1 [hereinafter “MIL”].) But, as demonstrated by the information included with Respondent’s productions, Respondent did in fact include Dr. Wieloch as a custodian in responding to Complaint Counsel’s document requests.

*Second*, Complaint Counsel contend that “Respondent did not produce documents from his files, despite Requests for Production requesting ‘all documents’ relating to the very topics on which Respondent will now call Dr. Wieloch to testify at trial.” (MIL at 1.) Respondent, however, produced to Complaint Counsel documents from Dr. Wieloch’s files on November 21 and November 30, 2016—a month-and-a-half prior to Dr. Wieloch’s January 18, 2017 deposition.

*Third*, Complaint Counsel contend that Dr. Wieloch was not prepared to testify regarding the Rule 3.33 topic for which he was designated. (MIL at 1.) But Dr. Wieloch specifically testified regarding work he had done that was relevant to the noticed topic. In making this argument, Complaint Counsel misread and incorrectly narrow their own deposition notice and misrepresent the nature of Dr. Wieloch’s deposition testimony.

*Fourth*, Complaint Counsel contend that “Dr. Wieloch has not been deposed in his individual capacity.” (MIL at 1.) But the correspondence between the parties shows that the parties agreed to depose Dr. Wieloch as a corporate representative *and* as an individual. Moreover, the applicable case law holds that the parties were free to ask Dr. Wieloch questions

beyond the scope of the deposition notice and that responsive testimony would be in his individual capacity.

Given these failings, Complaint Counsel's motion should be denied. Respondent properly added Dr. Wieloch to its final witness list pursuant to the Scheduling Order because he was "deposed after [Respondent] exchanged its preliminary witness list." (Scheduling Order, ¶ 15.)

## **II. ARGUMENT**

### **A. Respondent Produced Documents from Dr. Wieloch's Files Long Before His Deposition**

Contrary to Complaint Counsel's unsupported assertions, Respondent identified Dr. Wieloch as a custodian and produced documents from his files to Complaint Counsel. In fact, Respondent did so well before Dr. Wieloch's deposition.

On November 21 and 30, 2016, in response to Complaint Counsel's requests for production, Respondent produced documents, including a set of 39 consumer surveys conducted by Dr. Wieloch. (Declaration of Lisa Clark, Ex. A). These surveys include information regarding brand awareness, consumer perceptions, market competition, and customer buying patterns. The hard drive and disc containing these documents were accompanied by "cross-reference files" that included the identity of the custodian for each document. (*Id.* ¶¶ 4, 10.) For these 39 consumer surveys, the two sets of which were produced with consecutive Bates numbers, the custodian was identified as "Neil Weiloch." (*Id.* ¶ 5.) An excerpt of the information in the cross-reference file is attached hereto as Exhibit C to the Clark Declaration.

There can be no doubt that Complaint Counsel received these documents. Complaint Counsel have included some of the 39 documents, including documents where Wieloch was identified as the custodian, on their trial exhibit list. (Clark Declaration , ¶¶ 4-10.)

**B. The Parties Agreed to Depose Dr. Wieloch Both as a Corporate Representative and as an Individual**

Although Complaint Counsel now contend that Dr. Wieloch was deposed only as a corporate representative, the correspondence between the parties and Complaint Counsel's notice of deposition demonstrate that the parties agreed Dr. Wieloch would be deposed as a corporate representative *and* as an individual. On December 28, 2016, Complaint Counsel served a purported "Notice of Deposition to 1-800 Contacts," which did not provide any date, time, or location for a deposition. (Stone Declaration, Ex. A). The "Notice" did list a series of topics, one of which dealt with the effect of certain manufacturer policies, known as Uniform Pricing Policies or "UPPs," on 1-800 Contacts. (*Id.* at Topic 9.)

After several meet and confers regarding Complaint Counsel's "draft" notice, Respondent designated Dr. Wieloch as one of two witnesses who would testify regarding this topic. In doing so, Respondent specifically stated that these witnesses would be deposed as both corporate representatives *and* individuals:

Thanks for the call earlier today in regard to the draft 3.33(c)(1) deposition notice. I felt we had a very productive conversation. As Garth noted in his recent email, we will be designating two witnesses who you are not already scheduled to depose. They will be made available for deposition on January 18. . . . The two witnesses will be Scott Osmond and Neil Wieloch. Mr. Osmond will be designated as to topics 4 and 9 in the draft notice; Mr. Wieloch will be designated just as to topic 9. ***I expect you will depose them in their individual capacities at the same time as you depose them as designees, and we plan to ask each of them some questions in their individual capacity as well as following up on the topics for which they are designated.***

(Declaration of Gregory P. Stone, Ex. B [emphasis added].)

*Complaint Counsel specifically agreed to proceed in this manner.* In direct response to Respondent's email, Complaint Counsel stated, "We will plan to proceed as you have suggested." (Stone Declaration, Ex. C).

Consistent with the agreement to depose Dr. Wieloch as a corporate representative and as an individual, Complaint Counsel subsequently served a notice of deposition that referenced *both* Rule 3.33(a) (individuals) *and* Rule 3.33(c)(1) (corporations or other organizations):

PLEASE TAKE NOTICE, that *pursuant to Rule 3.33(a) and (c)(1)* of the Federal Trade Commission’s Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.33(a)), Complaint Counsel will take the depositions of the *individuals* listed below.

(Stone Declaration, Exs. A and D (emphasis added)). Dr. Wieloch was listed as one of those “individuals.” (*Id.*)

**C. Dr. Wieloch Was Prepared To, and Did, Provide Testimony Relevant to the Topic in Complaint Counsel’s Rule 3.33 Notice**

Complaint Counsel contend that Dr. Wieloch “could not give any relevant testimony on his designated topic,” which they define as “the impact of UPPs on specific aspects of 1-800’s financial performance.” (MIL at 1, 5.) In making this contention, however, Complaint Counsel misread their own notice. The relevant topic is not limited to the effect of these manufacturer policies on 1-800 Contacts’ *financial performance*; it is broadly worded to include *any* effect on 1-800 Contacts, “including” on various financial aspects of the company:

9. The effect of each Unilateral Pricing Policy on 1-800 Contacts, *including* the effect on its retail prices, revenue, cost of goods sold, units sold, and EBITDA for each of the past four years.

(Stone Declaration, Ex. A.)

As Dr. Wieloch testified at his deposition, he conducted surveys to study the effect of the UPPs on the pricing perceptions of 1-800 Contacts’ customers, their effect on customers who no longer purchased from 1-800 Contacts, and customer awareness of UPP. (MIL, Ex. B, Wieloch Depo. at 20:25–21:21, 27:3–10, 28:23–29:22.) The effect of the UPPs on 1-800 Contacts’ customers obviously effected 1-800 Contacts. Despite this testimony, Complaint Counsel

proceeded to ask questions focused solely on the effect of UPP on 1-800 Contacts' financial metrics. (*Id.* at 22:1–20.)

**D. As Allowed by the Parties' Agreement, and by Applicable Law, Dr. Wieloch Testified About Matters Beyond the Noticed Topic; Complaint Counsel Simply Ignored This Testimony**

In direct contrast to Complaint Counsel's assertion that Respondent did not question Dr. Wieloch about matters beyond the Rule 3.33 topic, Dr. Wieloch gave express testimony regarding his surveys beyond issues related to UPP. For example, Dr. Wieloch testified that his surveys seek to measure "market brand perceptions," customer's "satisfaction with their experience with us and elements of the experience," "perceptions of brands and competitor brand behavior in terms of purchase, behavior around eye exam, relationship with an eye doctor," from where customers are coming, customer switching, why customers have left 1-800 Contacts, and other topics. (MIL, Ex. B, Wieloch Depo. at 29:23–33:16.) Complaint Counsel chose not to examine Dr. Wieloch on these issues.

In addition to the parties' express agreement that Dr. Wieloch would be deposed as an individual as well as a corporate representative, applicable law makes clear that Dr. Wieloch could be deposed in his individual capacity. The scope of discovery is governed by Rule 3.31(c), which provides that "[p]arties may obtain discovery to the extent that it may be reasonably expected to yield [relevant] information." 16 C.F.R. § 3.31(c). Complaint Counsel argue that Rule 3.33(c)(1), which allows a party to depose a corporate representative regarding specified topics, somehow limits that scope. But the federal courts have squarely rejected this very argument.

Under the parallel federal rule, Federal Rule of Civil Procedure 30(b)(6), "the scope of questioning at the deposition is not defined by the notice of deposition." *Emp'rs Ins. Co. v. Nationwide Mut. Fire Ins. Co.*, No. CV 2005-0620 (JFB) (MDG), 2006 U.S. Dist. LEXIS 23419,

at \*3 (E.D.N.Y. Apr. 26, 2006); *see also* *Brignac v. Celadon Trucking Servs.*, No. 2:10 CV 373, 2012 U.S. Dist. LEXIS 6810, at \*6–7 (W.D. La. Jan. 19, 2012) (“[C]orporate deponent[s] may be questioned about subjects other than those identified in the Rule 30(b)(6) notice”); *Am. Gen. Life Ins. Co. v. Billard*, No. C10-1012, 2010 U.S. Dist. LEXIS 114961, at \*12 (N.D. Iowa Oct. 28, 2010) (“[T]he questioning of a Rule 30(b)(6) deponent is not limited to those subjects identified in the Rule 30(b)(6) notice”). In other words, the rule “cannot be used to limit what is asked of a designated witness at deposition.” *Detoy v. City & Cty. of S.F.*, 196 F.R.D. 362, 367 (N.D. Cal. 2000); *see also* *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (“The Rule is not one of limitation but rather of specification within the broad parameters of the discovery rules.”).

Instead, the noticed topics are the *minimum* the witness may be asked. *See Detoy*, 196 F.R.D. at 366; *King*, 161 F.R.D. at 476 (“[T]he Rule simply defines a corporation’s obligations regarding whom they are obligated to produce for such a deposition and what that witness is obligated to be able to answer.”). “Once the witness satisfies the minimum standard, the scope of the deposition is determined solely by relevance . . . , that is, that the evidence sought may lead to the discovery of admissible evidence.” *Detoy*, 196 F.R.D. at 367. Thus, “a corporate designee may be questioned regarding matters outside” the deposition notice, at which point “the deponent is no longer a corporate designee, but merely another fact witness, and he can respond to any question about which he has personal knowledge.” *Swagain v. AON Corp.*, No. 3:05CV326BS, 2006 U.S. Dist. LEXIS 63964, at \*3 (S.D. Miss. Sep. 6, 2006).

Contrary to Complaint Counsel’s speculative policy argument, the federal courts have explicitly rejected Complaint Counsel’s position because it would amount to an “implicit repeal of the broad discovery standard” and lead to unproductive gamesmanship. *See, e.g., Overseas*

*Private Inv. Corp. v. Mandelbaum*, 185 F.R.D. 67, 68–69 (D.D.C. 1999) (“[A] corporate officer who unquestionably had important information to provide could escape having to provide it because that topic of the information was not described in the notice of deposition. That substitutes hyper-technical pleading and gamesmanship for the true purposes of discovery.”); *Cabot Corp. v. Yamulla Enters.*, 194 F.R.D. 499, 500 (M.D. Pa. 2000) (“I do not read Rule 30(b)(6) as carving out a special limitation on the scope of discovery defined in Rule 26(b)(1).”).

In short, as with the parallel federal rules, Rule 3.33(c)(1) does not limit the scope of discovery or the capacity of a corporate designee to testify in his individual capacity. Complaint Counsel’s position is wholly unsupported and would lead to bad law.

### **III. CONCLUSION**

The Court should deny Complaint Counsel’s motion. At the time of the deposition, Complaint Counsel had in their possession documents from Dr. Wieloch’s files. Respondent provided information showing that Dr. Wieloch was the custodian of those documents. The parties agreed, and case law holds, that Dr. Wieloch would be deposed as a corporate designee *and* as an individual witness. Dr. Wieloch was thus properly put on Respondent’s final witness list as a person who was deposed after the exchange of the initial witness lists. (Scheduling Order, ¶ 15).

DATED: March 28, 2017

Respectfully submitted,

/s/ Steven Perry

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

**In the Matter of  
1-800 CONTACTS, INC.,  
a corporation**

**Docket No. 9372**

**DECLARATION OF LISA A. CLARK IN SUPPORT OF  
RESPONDENT'S OPPOSITION TO MOTION IN LIMINE TO PRECLUDE THE  
TESTIMONY OF DR. NEIL WIELOCH**

I, Lisa A. Clark, declare as follows:

1. I am a staff attorney employed by 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 Motion in Limine to Preclude The Testimony of Dr. Neil Weiloch. I have personal knowledge of the facts stated in this declaration and, if called as a witness, could competently testify to them.
3. My responsibilities during the pendency of this action have included the management and oversight of the productions of documents to Complaint Counsel by Respondent, 1-800 Contacts, including the productions made on November 21, 2016 and November 30, 2016.
4. 1-800 Contacts' productions to Complaint Counsel include with each production of documents a cross-reference file that discloses, among other things, the custodian(s) of the documents produced.

5. Productions made by 1-800 Contacts on November 21, 2016 and November 30, 2016 followed this practice. Among those two productions, a total of thirty-nine (39) documents explicitly disclosed “Neil Weiloch” as their custodian in the cross-reference (or .dat) file that provides metadata and other information regarding the documents being produced.

6. On November 21, 2016, 1-800 Contacts produced a hard drive to Complaint Counsel containing documents bearing bates numbers 1-800F\_00088454 to 1-800F\_00089678. Attached hereto as Exhibit A is a true and correct copy of the November 21, 2016 production transmittal email and letter regarding this production. I am a member of the “~800CON\_FTC\_ATTYS distribution group copied on the email transmission of Exhibit A.

7. 1-800 Contacts’ November 21, 2016 production included thirty-seven (37) custodial documents of Neil Wieloch, consecutively numbered with bates numbers from 1-800F\_00089422 to and including 1-800F\_00089458.

8. I am familiar with the documents and production bates ranges of the documents Complaint Counsel has designated as trial exhibits. In fact, one of the Neil Weiloch custodial documents produced on November 21, 2016 has been identified by Complaint Counsel as Trial Exhibit CX1546, bates number 1-800F\_00089452. A total of 5 documents from the November 21, 2016 production by 1-800 Contacts have been identified as trial exhibits by Complaint Counsel:

| <b>Trial Exhibit</b> | <b>Bates Begin</b> | <b>Bates End</b> |
|----------------------|--------------------|------------------|
| CX1543               | 1-800F_00088484    | 1-800F_00088484  |
| CX1545               | 1-800F_00088538    | 1-800F_00088539  |
| CX1546               | 1-800F_00089452    | 1-800F_00089452  |
| CX1335               | 1-800F_00089460    | 1-800F_00089483  |
| CX1447               | 1-800F_00089486    | 1-800F_00089486  |

9. On November 30, 2016, 1-800 Contacts produced a CD ROM to Complaint Counsel containing documents bearing bates numbers 1-800F\_00089679 to 1-800F\_00092274. Attached hereto as Exhibit B is a true and correct copy of the November 30, 2016 production transmittal email and letter regarding this production. I am a member of the “~800CON\_FTC\_ATTYS distribution group copied on the email transmission of Exhibit 2.

10. 1-800 Contacts’ November 30, 2016 production included two (2) additional Neil Wieloch documents, produced with “Neil Weiloch” as the custodian. The two documents bear bates number 1-800F\_00092273 and 1-800F\_00092274. Both of these documents have been identified by Complaint Counsel as trial exhibits – CX117 and CX1165, respectively. The same production included a total of at least eight (8) 1-800 Contacts documents that Complaint Counsel has designated as trial exhibits:

| <b>Trial Exhibit</b> | <b>Bates Begin</b> | <b>Bates End</b> |
|----------------------|--------------------|------------------|
| CX1362               | 1-800F_00090185    | 1-800F_00090186  |
| CX1359               | 1-800F_00090423    | 1-800F_00090423  |
| CX1160               | 1-800F_00091135    | 1-800F_00091135  |
| CX1343               | 1-800F_00091505    | 1-800F_00091570  |
| CX1162               | 1-800F_00091702    | 1-800F_00091704  |
| CX1744               | 1-800F_00091868    | 1-800F_00091869  |
| CX1117               | 1-800F_00092273    | 1-800F_00092273  |
| CX1165               | 1-800F_00092274    | 1-800F_00092274  |

11. Attached hereto as Exhibit C is a true and correct copy of an excerpt of the cross-

reference information that was included in 1-800 Contacts' productions to Complaint Counsel on November 21<sup>st</sup> and 30<sup>th</sup>, 2016.

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

Executed on March 28, 2017, in Los Angeles, California.

/s/Lisa A. Clark  
Lisa A. Clark

**EXHIBIT A**

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**From:** Sergi, Gregory  
**Sent:** Monday, November 21, 2016 5:28 PM  
**To:** Matheson, Daniel  
**Cc:** BC-1040-1800-Search Ad Team-DL; ~800CON\_FTC\_ATTYS  
**Subject:** RE: FTC Docket No. 9372 - 1-800 Contacts Production Cover Letter  
**Attachments:** GMS Cover Letter - Production (Nov. 21, 2016).pdf

Dan,

Today we sent by overnight mail another production in this matter by 1-800 Contacts.

The password to access the hard drive is: !234QwerAsdf

Best regards,  
Greg Sergi

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## VIA EMAIL & OVERNIGHT DELIVERY

Daniel Matheson, Esq.  
United States Federal Trade Commission  
Bureau of Competition  
Anticompetitive Practices Division  
600 Pennsylvania Avenue, NW  
Washington, D.C. 20580

Re: **In re 1-800 Contacts, Inc., FTC Docket No. 9372**  
**Non-Public, Confidential Materials**

Dear Dan:

Enclosed is a hard drive containing a production of documents by 1-800 Contacts, Inc. ("1-800 Contacts") in the above-referenced matter. The documents in this production are labeled 1-800F\_00088454 to 1-800F\_00089678.

The hard drive also contains a revised overlay and replacement image files for the documents produced by 1-800 Contacts on October 24<sup>th</sup> and November 8<sup>th</sup> (Bates ranges 1-800F\_00084253-1-800F\_00088254). The corrected overlay and images are to correct bates

Daniel Matheson  
November 21, 2016  
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numbering that inadvertently were assigned without the dash between 1 and 800 in the prefix. The numbers themselves are otherwise identical.

The password to access the enclosed hard drive will be provided by email.

The enclosed documents are produced by 1-800 Contacts pursuant to the Protective Order Governing Confidential Material dated August 8, 2016 and 1-800 Contacts requests Confidential treatment.

Please do not hesitate to contact me if you have any questions.

Sincerely,

/s/ Gregory M. Sergi  
Gregory M. Sergi

GMS  
Enclosure

**EXHIBIT B**

**From:** Sergi, Gregory  
**Sent:** Wednesday, November 30, 2016 4:07 PM  
**To:** Matheson, Daniel  
**Cc:** BC-1040-1800-Search Ad Team-DL; ~800CON\_FTC\_ATTYS  
**Subject:** RE: FTC Docket No. 9372 - 1-800 Contacts Production Cover Letter  
**Attachments:** GMS Cover Letter - Production (Nov. 30, 2016).PDF

Dan,

Today we sent by overnight mail another production in this matter by 1-800 Contacts.

The password to access the CD Rom is: !234QwerAsdf

Best regards,  
Greg Sergi

**Gregory M. Sergi | Munger, Tolles & Olson LLP**  
355 South Grand Avenue | Los Angeles, CA 90071  
Tel: 213.683.9261 | Fax: 213.683.5161 | [Gregory.Sergi@mto.com](mailto:Gregory.Sergi@mto.com) | [www.mto.com](http://www.mto.com)

\*\*\*NOTICE\*\*\*

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November 30, 2016

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Writer's Direct Contact  
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gregory.sergi@mto.com

## VIA EMAIL & OVERNIGHT DELIVERY

Daniel Matheson, Esq.  
United States Federal Trade Commission  
Bureau of Competition  
Anticompetitive Practices Division  
600 Pennsylvania Avenue, NW  
Washington, D.C. 20580

Re: **In re 1-800 Contacts, Inc., FTC Docket No. 9372**  
**Non-Public, Confidential Materials**

Dear Dan:

Enclosed is a CD-ROM containing a production of documents by 1-800 Contacts, Inc. ("1-800 Contacts") in the above-referenced matter. The documents in this production are labeled 1-800F\_00089679 to 1-800F\_00092274.

The password to access the enclosed CD-ROM will be provided by email.

Daniel Matheson  
November 30, 2016  
Page 2

The enclosed documents are produced by 1-800 Contacts pursuant to the Protective Order Governing Confidential Material dated August 8, 2016 and 1-800 Contacts requests Confidential treatment.

Please do not hesitate to contact me if you have any questions.

Sincerely,

/s/ Gregory M. Sergi  
Gregory M. Sergi

GMS  
Enclosure

**EXHIBIT C**

| Begin Bates     | End Bates       | Custodian    | File Name   |
|-----------------|-----------------|--------------|---|
| 1-800F_00089422 | 1-800F_00089422 | Neil Weiloch | 1-800 Brand Tracker August 2014.pptx                |
| 1-800F_00089423 | 1-800F_00089423 | Neil Weiloch | 1-800 Brand Tracker August 2014_Internal.pptx       |
| 1-800F_00089424 | 1-800F_00089424 | Neil Weiloch | 1-800 Brand Tracker November 2014 (12.5.14).pptx    |
| 1-800F_00089425 | 1-800F_00089425 | Neil Weiloch | 1800 CONTACTS - April 2015 DO REV.pptx              |
| 1-800F_00089426 | 1-800F_00089426 | Neil Weiloch | 1800 CONTACTS - April 2015.pptx                     |
| 1-800F_00089427 | 1-800F_00089427 | Neil Weiloch | 1800 CONTACTS - August 2015_DO.pptx                 |
| 1-800F_00089428 | 1-800F_00089428 | Neil Weiloch | 1800 CONTACTS - Feb 2015_DO.pptx                    |
| 1-800F_00089429 | 1-800F_00089429 | Neil Weiloch | 1800 CONTACTS - Jan 2015_DO.pptx                    |
| 1-800F_00089430 | 1-800F_00089430 | Neil Weiloch | 1800 CONTACTS - July 2015 DO.pptx                   |
| 1-800F_00089431 | 1-800F_00089431 | Neil Weiloch | 1800 CONTACTS - June 2015.pptx                      |
| 1-800F_00089432 | 1-800F_00089432 | Neil Weiloch | 1800 CONTACTS - June 2015v2_DO.pptx                 |
| 1-800F_00089433 | 1-800F_00089433 | Neil Weiloch | 1800 CONTACTS - March 2015_DO.pptx                  |
| 1-800F_00089434 | 1-800F_00089434 | Neil Weiloch | 1800 CONTACTS - May 2015_DO.pptx                    |
| 1-800F_00089435 | 1-800F_00089435 | Neil Weiloch | 1800 CONTACTS Brand Tracker Results April 2014.pptx |
| 1-800F_00089436 | 1-800F_00089436 | Neil Weiloch | 1800 Tracker Assembly June 2014 7.15.14.pptx        |
| 1-800F_00089437 | 1-800F_00089437 | Neil Weiloch | 1800 Tracker Assembly May 2014.pptx                 |
| 1-800F_00089438 | 1-800F_00089438 | Neil Weiloch | 1800CONTACTS - December 2015.pptx                   |
| 1-800F_00089439 | 1-800F_00089439 | Neil Weiloch | 1800CONTACTS - February 2016_DO.pptx                |
| 1-800F_00089440 | 1-800F_00089440 | Neil Weiloch | 1800CONTACTS - March 2016_DO.pptx                   |
| 1-800F_00089441 | 1-800F_00089441 | Neil Weiloch | 1800CONTACTS - May 2016_DO.pptx                     |
| 1-800F_00089442 | 1-800F_00089442 | Neil Weiloch | Customer Experience Report April 2015.pptx          |
| 1-800F_00089443 | 1-800F_00089443 | Neil Weiloch | Customer Experience Report December 2014.pptx       |
| 1-800F_00089444 | 1-800F_00089444 | Neil Weiloch | Customer Experience Report February 2015.pptx       |
| 1-800F_00089445 | 1-800F_00089445 | Neil Weiloch | Customer Experience Report January 2015.pptx        |
| 1-800F_00089446 | 1-800F_00089446 | Neil Weiloch | Customer Experience Report June 2015.pptx           |

| Begin Bates     | End Bates       | Custodian    | File Name  |
|-----------------|-----------------|--------------|--|
| 1-800F_00089447 | 1-800F_00089447 | Neil Weiloch | Customer Experience Report March 2015.pptx             |
| 1-800F_00089448 | 1-800F_00089448 | Neil Weiloch | Customer Experience Report November 2014[3].pptx       |
| 1-800F_00089449 | 1-800F_00089449 | Neil Weiloch | Customer Experience Report October 2014.pptx           |
| 1-800F_00089450 | 1-800F_00089450 | Neil Weiloch | Customer Experience Report September 2014[2].pptx      |
| 1-800F_00089451 | 1-800F_00089451 | Neil Weiloch | July_August_Satisfaction_Report_Marketing_Meeting.pptx |
| 1-800F_00089452 | 1-800F_00089452 | Neil Weiloch | 2015_H1_Market_Pulse_Report_v1.pptx                    |
| 1-800F_00089453 | 1-800F_00089453 | Neil Weiloch | Market Pulse Price Perceptions_Slides.pptx             |
| 1-800F_00089454 | 1-800F_00089454 | Neil Weiloch | Market_Pulse_Report_Full_Final.pptx                    |
| 1-800F_00089455 | 1-800F_00089455 | Neil Weiloch | Phase_IV_Report_DRAFT.pptx                             |
| 1-800F_00089456 | 1-800F_00089456 | Neil Weiloch | Refined_Target_Deck_Feb.pptx                           |
| 1-800F_00089457 | 1-800F_00089457 | Neil Weiloch | Segmentation_DRAFT.pptx                                |
| 1-800F_00089458 | 1-800F_00089458 | Neil Weiloch | Price Match pre vs post clubs summary 2016-11.xlsx     |
| 1-800F_00092273 | 1-800F_00092273 | Neil Weiloch | Deadfile Research ReportB.pptx                         |
| 1-800F_00092274 | 1-800F_00092274 | Neil Weiloch | Deadfile_where_they_went.pptx                          |

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 GREGORY P. STONE IN SUPPORT OF  
RESPONDENT'S OPPOSITION TO MOTION IN LIMINE TO PRECLUDE  
TESTIMONY OF NEIL WIELOCH**

I, Gregory P. Stone, declare as follows:

1. I am a member of 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 Opposition to Complaint Counsel's Motion in Limine to Preclude Testimony of Neil Wieloch. I have personal knowledge of the facts set forth herein and, if called as a witness, could competently testify thereto.

3. Attached hereto as Exhibit A is a true and correct copy of Complaint Counsel's draft Notice of Deposition of 1-800 Contacts, Inc. pursuant to Rule 3.33(a) and (c)(1), which I received on December 28, 2016.

4. On January 9, 2017, I participated in a telephone conference with Complaint Counsel, Daniel Matheson, regarding Complaint Counsel's draft 3.33(c)(1) deposition notice.

5. Attached hereto as Exhibit B is a true and correct copy of my subsequent email to Daniel Matheson dated January 9, 2017.

6. Attached as Exhibit C is a true and correct copy of an email I received in response from Daniel Matheson on January 10, 2017.

7. Attached as Exhibit D is a true and correct copy of Complaint Counsel's Notice of Deposition, dated January 11, 2017, which scheduled, *inter alia*, the deposition of 1-800 Contacts and Neil Wieloch under Rules 3.33(a) and (c)(1),.

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

Executed on March 27, 2017, in Los Angeles, California.

/s/Gregory P. Stone  
Gregory P. Stone

# **EXHIBIT A**

**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**

**COMPLAINT COUNSEL'S NOTICE OF DEPOSITION TO 1-800 CONTACTS, INC.**

Pursuant to the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.33(a) and (c)(1), Complaint Counsel will take the deposition of 1-800 Contacts, Inc. ("1-800 Contacts") or its designee(s), who shall testify on behalf of 1-800 Contacts about matters known or reasonably available to 1-800 Contacts.

**DEPOSITION TOPICS**

1-800 Contacts is advised that it must designate one or more officer, director, managing agent, or other person who consents to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. The persons so designated shall testify as to matters known or reasonably available to 1-800 Contacts relating to the following deposition topics:

1. The obligations imposed on each party to a Settlement Agreement, and the meaning of each provision of each Settlement Agreement, including 1-800 Contacts's interpretation of each word used in each Settlement Agreement.
2. The factual basis for 1-800 Contacts' Response to Complaint Counsel Request for Admission No. 4, in particular but not limited to the meaning of the phrase "not all User Queries containing a term on which 1-800 Contacts claims a trademark" as used therein. See 1-800 Contacts' Response to Complaint Counsel Request for Admission No. 4 (asserting that 1-800 Contacts "anticipated, at the time it executed each Settlement Agreement, that the Settlement Agreement would prohibit a Settlement Party from presenting paid ads or sponsored links . . . on Search Engine Results Pages in response to certain User Queries, but not all User Queries, containing a term on which 1-800 Contacts claims a trademark."). This Topic requires a witness able to identify, for each Settlement Agreement, specific "User Queries containing a term on which 1-800 Contacts claims a trademark" in response to which each "Settlement Party" was not prohibited by a Settlement Agreement from presenting paid ads or sponsored links on Search Engine Results Pages.

3. The meaning of 1-800 Contacts' Response to Complaint Counsel's Interrogatory No. 14, and each term used therein, in particular but not limited to the meaning of the phrases "purchase of Keywords" and "used, following their purchase, to trigger a display of a paid advertisement or sponsored link."
4. Each Price Match Policy, and each version of each such Policy, 1-800 Contacts has implemented from January 1, 2004 to the present, including: the terms of each such Price Match Policy, the date on which each such Price Match Policy was implemented, the date on which each such Price Match Policy was discontinued, the identity of each Competitor whose prices 1-800 Contacts committed to meet or beat under each such Price Match Policy, and the reasons for each term of each Price Match Policy.
5. The identity of each Settlement Partner that was informed by 1-800 Contacts that the Negative Keywords identified in the Settlement Partner's Settlement Agreement should be implemented as Exact-Matched Negative Keywords, and the date of such communication.
6. Each benefit 1-800 Contacts received from a Settlement Agreement, and the pecuniary value of each such benefit.
7. Each procompetitive efficiency produced by each Settlement Agreement, and the pecuniary benefit each such procompetitive efficiency produced for (a) 1-800 Contacts, (b) customers of 1-800 Contacts, and/or (c) any other Person.
8. Each Negative Keyword 1-800 Contacts implemented as a result of a Settlement Agreement, and the date each such Negative Keyword was implemented.
9. The effect of each Unilateral Pricing Policy on 1-800 Contacts, including the effect on its retail prices, revenue, cost of goods sold, units sold, and EBITDA for each of the past four years.

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 terms “and” and “or” have both conjunctive and disjunctive meanings.
3. 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>.
4. The term “Competitor” means any Person other than 1-800 Contacts engaged in the business of selling contact lenses to consumers.
5. The terms “each,” “any,” and “all” mean “each and every.”
6. 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>.
7. The term “Negative Keyword” has the same meaning set forth by Google in connection with its AdWords product: “[a] type of keyword that prevents [an advertiser’s] ad from being triggered by certain words or phrases.” *See* <https://support.google.com/adwords/answer/105671?hl=en>. The term Exact-Matched Negative Keywords has the same meanings set forth by Google in connection with its AdWords product. *See, e.g.,* <https://support.google.com/adwords/answer/2453972>.
8. 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.
9. The terms “Plan” or “Plans” mean proposals, strategies, recommendations, analyses, reports, or considerations, whether or not tentative, preliminary, precisely formulated, finalized, authorized, or adopted.

10. 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. This term includes each version of each such Policy implemented at any time from January 1, 2004 to the present.
11. 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.
12. The terms “Settlement Agreement” or “Settlement Agreements” mean, in whole or in part, in singular or plural, any agreement entered into by or between 1-800 Contacts and a Competitor to resolve any allegation, dispute, litigation, or other matter concerning the appearance of advertisements on search engine results pages for searches containing 1-800 Contacts’ trademark and variations. “Settlement Agreements” include but are not limited to 1-800F\_00003062 (Aug. 19, 2002 Agreement between 1-800 Contacts and JSJ Enterprises); 1800\_FTC-00000019 (June 24, 2004 Agreement between 1-800 Contacts and Vision Direct); 1800\_FTC-00000001 (Oct. 29, 2004 Agreement between 1-800 Contacts and Coastal Contacts); 1800\_FTC-00000027 (May 12, 2008 Agreement between 1-800 Contacts and EZ Contacts USA); 1-800F\_00021153 (Dec. 18, 2009 Agreement between 1-800 Contacts and Lensfast); 1800\_FTC-00000071 (March 10, 2010 Agreement between 1-800 Contacts and AC Lens); 1800\_FTC00000103 (March 23, 2010 Agreement between 1-800 Contacts and Lenses for Less) 1800\_FTC-00000079 (March 29, 2010 Agreement between 1-800 Contacts and Contact Lens King); 1800\_FTC-00000089 (May 13, 2010 Agreement between 1-800 Contacts and Empire Vision Center); 1800\_FTC-00000112 (May 18, 2010 Agreement between 1-800 Contacts and Tram Data); 1800\_FTC-00000129 (June 29, 2010 Agreement between 1-800 Contacts and Walgreen); 1800\_FTC-00000130 (Sept. 3, 2010 Agreement between 1-800 Contacts and Web Eye Care); 1800\_FTC-00000148 (Feb. 4, 2011 Agreement between 1-800 Contacts and Standard Optical); 1800\_FTC-00000161 (Nov. 26, 2013 Settlement Agreement between 1-800 Contacts and Memorial Eye). For the purpose of this definition, “Search Engine Results Page” means a webpage displayed by a Search Engine in response to a User Query.
13. The term “Settlement Party” means any party, other than 1-800 Contacts, that was subject to a Settlement Agreement.
14. 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](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>.

**CERTIFICATE OF SERVICE**

I certify that on December 28, 2016, I delivered via electronic mail a copy of the foregoing document to:

Gregory P. Stone  
Steven M. Perry  
Garth T. Vincent  
Stuart N. Senator  
Gregory M. Sergi  
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*Counsel for Respondent 1-800 Contacts, Inc.*

Dated: December 28, 2016

By: /s/ Daniel J. Matheson  
Attorney

# EXHIBIT B

---

**From:** Stone, Gregory  
**Sent:** Monday, January 09, 2017 7:25 PM  
**To:** Daniel Matheson (dmatheson@ftc.gov)  
**Cc:** Vincent, Garth  
**Subject:** Depositions on January 18

Dan,

Thanks for the call earlier today in regard to the draft 3.33(c)(1) deposition notice. I felt we had a very productive conversation. As Garth noted in his recent email, we will be designating two witnesses who you are not already scheduled to depose. They will be made available for deposition on January 18. You can take them concurrently or consecutively. I think their depositions will be fairly short and that you could easily take them consecutively. For example, we could start the first deposition at 8, go to noon, and then start the second deposition at 1 and finish by 5. But however you want to schedule them would be fine with us. The two witnesses will be Scott Osmond and Neil Wieloch. Mr. Osmond will be designated as to topics 4 and 9 in the draft notice; Mr. Wieloch will be designated just as to topic 9. I expect you will depose them in their individual capacities at the same time as you depose them as designees, and we plan to ask each of them some questions in their individual capacity as well as following up on the topics for which they are designated. However, we do not anticipate that our questioning will be lengthy. Once you decide whether to take them concurrently or consecutively, will you send out deposition notices for them? We will arrange a conference room or conference rooms for the depositions once you decide how you want to schedule them.

Greg

# EXHIBIT C

---

**From:** Matheson, Daniel <dmatheson@ftc.gov>  
**Sent:** Tuesday, January 10, 2017 5:51 AM  
**To:** Stone, Gregory  
**Cc:** Vincent, Garth; Ikeda, Mika  
**Subject:** RE: Depositions on January 18

Greg,

Thanks very much. We will plan to proceed as you have suggested. I agree that consecutively should work well, starting the first deposition at 8:00 and the second at 1:00. We will send out deposition notices today or tomorrow.

Regards,

Dan

---

**From:** Stone, Gregory [<mailto:Gregory.Stone@mto.com>]  
**Sent:** Monday, January 09, 2017 10:25 PM  
**To:** Matheson, Daniel  
**Cc:** Vincent, Garth  
**Subject:** Depositions on January 18

Dan,

Thanks for the call earlier today in regard to the draft 3.33(c)(1) deposition notice. I felt we had a very productive conversation. As Garth noted in his recent email, we will be designating two witnesses who you are not already scheduled to depose. They will be made available for deposition on January 18. You can take them concurrently or consecutively. I think their depositions will be fairly short and that you could easily take them consecutively. For example, we could start the first deposition at 8, go to noon, and then start the second deposition at 1 and finish by 5. But however you want to schedule them would be fine with us. The two witnesses will be Scott Osmond and Neil Wieloch. Mr. Osmond will be designated as to topics 4 and 9 in the draft notice; Mr. Wieloch will be designated just as to topic 9. I expect you will depose them in their individual capacities at the same time as you depose them as designees, and we plan to ask each of them some questions in their individual capacity as well as following up on the topics for which they are designated. However, we do not anticipate that our questioning will be lengthy. Once you decide whether to take them concurrently or consecutively, will you send out deposition notices for them? We will arrange a conference room or conference rooms for the depositions once you decide how you want to schedule them.

Greg

# EXHIBIT D

**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. 9372

**COMPLAINT COUNSEL'S NOTICE OF DEPOSITION  
TO 1-800 CONTACTS, INC.**

PLEASE TAKE NOTICE, that pursuant to Rule 3.33(a) and (c)(1) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 3.33(a)), Complaint Counsel will take the depositions of the individuals listed below. The depositions will be conducted before a person authorized to administer oaths and will be recorded by stenographic means.

| <u>Deponent</u> | <u>Date</u>                 | <u>Time</u> | <u>Location</u>  |
|-----------------|-----------------------------|-------------|--|
| Scott Osmond    | Wednesday, January 18, 2017 | 8:00am      | Parr Brown Gee & Loveless<br>101 South 200 East, Suite 700<br>Salt Lake City, UT 84111 |
| Neil Wieloch    | Wednesday, January 18, 2017 | 1:00pm      | Parr Brown Gee & Loveless<br>101 South 200 East, Suite 700<br>Salt Lake City, UT 84111 |
| Amy Larson      | Thursday, January 19, 2017  | 9:00am      | Parr Brown Gee & Loveless<br>101 South 200 East, Suite 700<br>Salt Lake City, UT 84111 |
| Brady Roundy    | Thursday, January 19, 2017  | 9:00am      | Parr Brown Gee & Loveless<br>101 South 200 East, Suite 700<br>Salt Lake City, UT 84111 |
| Brian Bethers   | Friday, January 20, 2017    | 8:00am      | Parr Brown Gee & Loveless<br>101 South 200 East, Suite 700<br>Salt Lake City, UT 84111 |
| Amber Powell    | Monday, January 23, 2017    | 9:00am      | Hatch, James & Dodge, P.C.<br>10 West Broadway, Suite 400<br>Salt Lake City, UT 84101  |
| Laura Schmidt   | Tuesday, January 24, 2017   | 9:00am      | Hatch, James & Dodge, P.C.<br>10 West Broadway, Suite 400<br>Salt Lake City, UT 84101  |

|               |                             |        |   |
|---------------|-----------------------------|--------|---|
| Tim Roush     | Wednesday, January 25, 2017 | 8:00am | Hatch, James & Dodge, P.C.<br>10 West Broadway, Suite 400<br>Salt Lake City, UT 84101 |
| Jonathan Coon | Thursday, January 26, 2017  | 9:00am | TBD<br>Austin, Texas  |

Dated: January 11, 2017

Respectfully submitted,

/s/ Daniel J. Matheson

Daniel J. Matheson

Kathleen M. Clair

Barbara Blank

Thomas H. Brock

Gustav P. Chiarello

Joshua B. Gray

Nathaniel M. Hopkin

Mika Ikeda

Charlotte S. Slaiman

Charles Loughlin

Geoffrey M. Green

*Counsel Supporting the Complaint*

**CERTIFICATE OF SERVICE**

I hereby certify that I delivered via electronic mail a copy of the foregoing document to:

Gregory P. Stone  
Steven M. Perry  
Garth T. Vincent  
Stuart N. Senator  
Gregory M. Sergi  
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Pasadena, CA 91101  
sgates@charislex.com

*Counsel for Respondent 1-800 Contacts, Inc.*

January 11, 2017

By: /s/ Daniel Matheson  
Daniel Matheson  
Federal Trade Commission  
Bureau of Competition  
400 7<sup>th</sup> Street SW  
Washington, DC 20024  
dmatheson@ftc.gov  
Telephone: (202) 326-2075

*Counsel Supporting the  
Complaint*

**CERTIFICATE OF SERVICE**

I hereby certify that on March 28, 2017, I filed **RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO PRECLUDE THE TESTIMONY OF DR. NEIL WIELOCH** 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: March 28, 2017

By: /s/ Eunice Ikemoto  
Eunice Ikemoto

**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: March 28, 2017

By: /s/ Steven M. Perry  
Steven M. Perry  
Attorney

Notice of Electronic Service

**I hereby certify that on March 28, 2017, I filed an electronic copy of the foregoing Respondent's Opposition to Motion In Limine to Preclude the Testimony of Dr. Neil Wieloch, 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 March 28, 2017, I served via E-Service an electronic copy of the foregoing Respondent's Opposition to Motion In Limine to Preclude the Testimony of Dr. Neil Wieloch, upon:**

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

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