

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



ORIGINAL

)
In the Matter of)
)
1-800 CONTACTS, INC.,)
a corporation,)
)
Respondent)
_____)

DOCKET NO. 9372

**COMPLAINT COUNSEL’S RESPONSE TO RESPONDENT 1-800 CONTACTS, INC.’S
REQUEST FOR EXCEPTION TO WI-FI ACCESS RULE TO EXAMINE WITNESSES
USING INTERNET**

Complaint Counsel respectfully submits this response to Respondent 1-800 Contacts, Inc.’s Request for Exception to Wi-Fi Access Rule to Examine Witnesses Using Internet (“Request”), filed earlier today. Complaint Counsel advises the Court that permitting Respondent to access the Internet during the examination of witnesses will not add any value to the proceedings, and will not be as simple as Respondent suggests.

Respondent proposes to question witnesses about Internet pages that Respondent will generate and display in real time during trial. To “preserve” the record, Respondent proposes to capture and save each screen shown to the witness as a PDF file, and to label each such screen capture “with an exhibit number.” Request at 2. This proposal is inappropriate because these screen captures are not on any party’s Exhibit List. Discovery is closed, and no newly generated documents should be considered for the truth of any matter asserted therein. For example, Respondent notes that Google Trends “provides interactive information regarding the historical number of searches conducted on queries,” and suggests that at the hearing Respondent intends to provide “inputs into these sites,” question the witnesses regarding the results, and label the

screen capture as an exhibit. *Id.* at 2. This would inappropriately create an exhibit which could be cited for information regarding “the historical number of searches conducted on queries.” *See id.* If any such information belongs in the evidentiary record, it should have been provided during the discovery period and included on Respondent’s exhibit list.

Further, there is no reason to believe that the Court would benefit from watching witnesses or attorneys type inputs into web pages. Thus far in the proceeding, both parties have relied on screen shots (replicas of Internet web pages) to illustrate the results of various Internet searches and Internet navigation. It is not clear that transitioning to live Internet access will afford any significant benefit, and moreover it creates the potential for confusion. As Respondent is aware, saving web pages as PDF files may result in the loss of important information. Because the PDF screen captures will be taking place “live” during a witness’s testimony, Complaint Counsel will not have the opportunity to inspect (or raise timely objections to) the PDF files that Respondent generates.

While Complaint Counsel appreciates Respondent’s efforts to formulate a protocol for the use of live Internet pages, the use of live Internet pages creates no benefits, and the potential for confusion remains. If, notwithstanding these concerns, the Court grants Respondent’s request to use the Internet during trial, Complaint Counsel respectfully requests that the Court adopt the following additional safeguards:

1. The Court should instruct the parties that each screenshot of a live Internet web page accessed in the courtroom shall be labeled as a demonstrative rather than an exhibit, as any live Internet web pages accessed in the courtroom shall be used solely as a demonstrative to develop testimony and shall not be cited to support the truth of any matter appearing on the page.

2. If the Court accepts Respondent's offer to provide a demonstration of the Internet access procedures that Respondent proposes, we respectfully request that Respondent address any such concerns at the start of Respondent's cross examination on Tuesday, April 18, 2017, instead of taking time first thing in the morning, to avoid any potential delay of Prof. Susan Athey's direct examination.
3. The Court may wish to instruct the parties to explore whether staff of the FTC's Information Technology Management Office may be in the courtroom or otherwise available to render any needed assistance when either party anticipates the use of live Internet access.

Dated: April 17, 2017

Respectfully Submitted,

/s/ Daniel Matheson

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

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2075
Facsimile: (202) 326-3496
Email: dmatheson@ftc.gov

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

This is to certify that on April 17, 2017, I served via electronic mail delivery a copy of the foregoing document to:

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

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

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

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

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

Counsel for Respondent 1-800 Contacts, Inc.

Dated: April 17, 2017

By: /s/ Daniel J. Matheson
Attorney

CERTIFICATE FOR ELECTRONIC FILING

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

DATED: April 17, 2017

By: /s/ Daniel J. Matheson
Attorney