

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS: Maureen K. Ohlhausen, Chairwoman
Terrell McSweeney

In the Matter of

1-800 Contacts, Inc.,
a corporation,

Respondent.

Docket No. 9372

JOINT MOTION TO EXTEND DEADLINES
FOR THE PARTIES' APPEAL BRIEFS

I. INTRODUCTION

Pursuant to Rules 3.22 and 3.52, 16 C.F.R. §§ 3.22 and 3.52, Complaint Counsel and Respondent 1-800 Contacts, Inc. ("1-800 Contacts") hereby jointly move the Commission for an Order extending the deadlines by which the parties' respective appeal briefs are due to be filed. In light of the upcoming holidays, and in order to accommodate long-planned holiday commitments and travel, the parties jointly request that the Commission order the parties to adhere to the following schedule:

- Respondent's opening brief to be filed on December 6, 2017;
- Complaint Counsel's answering brief to be filed on January 24, 2018;
- Respondent's reply brief to be filed on February 9, 2018.

II. PROCEDURAL HISTORY

The Administrative Complaint in this case issued on August 8, 2016, and alleged that fourteen agreements between 1-800 Contacts and other sellers of contact lenses had unreasonably restrained competition, in violation of Section 5 of the FTC Act. Initial Decision, pp 1-2. 1-800 Contacts filed its Answer and Defenses on August 29, 2016. *Id.*, p. 2.

Judge Chappell filed an initial *in camera* version of his Initial Decision with the Secretary on October 20, 2017 and requested that the parties submit proposed revisions to the *in camera* designations. On October 27, 2017, the Secretary provided the parties with courtesy copies of an initial revised version of the Initial Decision that reflected revisions to the *in camera* designations.¹ On November 1, 2017, the Secretary provided the parties with courtesy copies of the final *in camera* version of the Initial Decision that reflected additional revisions to the *in camera* designations. The Secretary further stated that he would forward the official paper service copies to the parties on November 2, 2017 and that the date of service, for purposes of the Commission Rules, would be the date on which delivery of those copies was completed pursuant to Rule 4.4(a)(1).

On November 2, 2017, the Secretary, *sua sponte*, adjusted the deadlines for filing opening briefs in this matter. The Secretary cited Rule 4.2(g), which permits the Secretary to excuse compliance with rules involving the filing of documents in cases of “extreme hardship.” The Secretary found that using that standard, and in light of the delays that accompanied various *in camera* redaction issues and the pendency of the holidays, Respondent’s Opening Brief shall be filed on or before December 1, 2017, and that Complaint Counsel’s Answering Brief shall be filed by January 12, 2018.

¹ 1-800 Contacts filed a Notice of Appeal on October 27, 2017.

III. REQUESTED RELIEF

While the parties appreciate the Secretary's quick action, the parties believe that good cause exists under Rule 4.3(b) for an additional, slight adjustment to the briefing schedule in order to prevent cancellation of holiday travel plans and to ensure that the parties have sufficient time to provide helpful, yet thorough, briefs in this case.² The parties respectfully request that the Commission adjust the current briefing deadlines as follows:

	Current Deadline	Proposed Deadline
Respondent's Opening Brief	December 1, 2017	December 6, 2017
Complaint Counsel's Answering Brief	January 12, 2018	January 24, 2018
Respondent's Reply Brief	January 25, 2018	February 9, 2018

The parties recognize that the Commission's Rules of Practice prescribe time periods that are intended to afford parties sufficient time to prepare and file appellate briefs. Here, however, absent an order of the Commission extending the deadlines for appellate briefing, Respondent's brief would be due on December 1, 2017, shortly after the Thanksgiving holiday, and Complaint Counsel's answering brief would be due on January 12, 2018, shortly after the Christmas and New Year's holidays. Those deadlines would cause multiple lawyers for each party to cancel or substantially shorten their planned holiday travel plans. In similar situations, the Commission has acknowledged these unintended hardships and has seen fit to allow adjustments in the briefing schedule. *See, e.g.*, Order Granting Joint Motion to Extend Deadlines for Filing Appeal and Answering Briefs, *In the Matter of LabMD, Inc.*, Docket No. 9357 (December 3, 2015), available at <http://www.ftc.gov/system/files/documents/cases/151203mabmdorder.pdf>; Order Partially Granting Joint Motion for Extension of Time Throughout the Appellate Briefing

² Rule of Practice 4.3(b) provides that “. . . the Commission, for good cause shown, may extend any time limit prescribed by the rules. . . .”).

Process, *In the Matter of RealComp II, Ltd.*, Docket No. 9320 (December 28, 2007), available at <http://www.ftc.gov/sites/default/files/documents/cases/2017/12/071228order.pdf>.

The requested adjustments in the briefing schedule are reasonably short (in one instance, only three calendar days) and will further the interests of justice. The parties therefore respectfully request that the Commission grant this Joint Motion.

Dated: November 6, 2017

Respectfully submitted,

/s/ Steven M. Perry

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**[PROPOSED] ORDER GRANTING JOINT MOTION TO EXTEND
DEADLINES FOR FILING BRIEFS ON APPEAL**

Complaint Counsel and Respondent have filed a Joint Motion to extend the deadlines to file appeal briefs in this matter. The parties request these extensions due to longstanding holiday commitments that would be impacted in the absence of an extension. Pursuant to Commission Rule 4.30(b), 16 C.F.R. § 4.3(b), the Commission has determined, for good cause shown, to grant the Joint Motion. Accordingly,

IT IS ORDERED THAT Respondent's appeal brief must be filed on or before December 6, 2017 and if Respondent files an appeal brief by that date, its appeal from the Initial Decision will be treated as having been perfected in accordance with Commission Rule 3.52(b)(2); and

IT IS FURTHER ORDERED THAT any answering brief must be filed on or before January 24, 2018, and any reply brief must be filed on or before February 9, 2018.

By the Commission

Donald S. Clark
Secretary

SEAL:

Issued: _____

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2017, I filed the **JOINT MOTION TO EXTEND DEADLINES FOR THE PARTIES' APPEAL BRIEFS and [PROPOSED] ORDER GRANTING JOINT MOTION TO EXTEND DEADLINES FOR FILING BRIEFS ON APPEAL** 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: November 6, 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: November 6, 2017

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

Notice of Electronic Service

I hereby certify that on November 06, 2017, I filed an electronic copy of the foregoing Joint Motion to Extend Deadlines for the Parties' Appeal Briefs, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
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Donald Clark
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I hereby certify that on November 06, 2017, I served via E-Service an electronic copy of the foregoing Joint Motion to Extend Deadlines for the Parties' Appeal Briefs, upon:

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