UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of **1-800 Contacts, Inc.,** **a corporation,** **Respondent**	**DOCKET NO. 9372**

FINAL ORDER

The Commission has heard this matter upon the appeal of Respondent from the Initial Decision, and upon briefs and oral argument in support thereof and in opposition thereto. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to sustain the Initial Decision with certain modifications.

IT IS ORDERED that the Initial Decision of the administrative law judge be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission, to the extent not inconsistent with the findings of fact and conclusions contained in the accompanying Opinion. Other findings of fact and conclusions of law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following Order to cease and desist be, and it hereby is, entered:

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "1-800 Contacts" means 1-800 Contacts, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and any joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by 1-800 Contacts, and the respective partners, directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "Communicate," "Communicating," or "Communication" means the exchange, transfer, or dissemination of any information, without regard to the manner or means by which it is accomplished.

D. "Entering Into" means entering into, adhering to, participating in, maintaining, implementing, enforcing, inviting, offering or soliciting.

E. "Keyword" means a word or phrase used to instruct a Search Engine to display specified Search Advertising.

F. "Negative Keyword" means a word or phrase used to instruct a Search Engine not to display specified Search Advertising.

G. "Person" means both natural persons and artificial persons, including, but not limited to, corporations and unincorporated entities.

H. "Search Advertising" means online advertisements displayed on a Search Engine Results Page in response to a user query.

I. "Search Engine" means a computer program, available to the public, that enables Persons to search for and identify websites and sources of information on the World Wide Web.

J. "Search Engine Results Page" means a web page displayed by a Search Engine in response to a user query.

K. "Seller" means any Person that markets or sells any contact lens product and includes its employees, agents, and representatives.

L. "Trademark Infringement Claim" means a lawsuit threatened or filed in the United States of America purporting to enforce rights under a trademark.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the advertising, marketing, sale, or distribution of contact lenses in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall cease and desist from:

A. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on the ability of a Seller to participate in a Search Advertising auction, or to provide instructions to a Search Engine regarding the nature and extent of a Seller's participation, including but not limited to, prohibiting or restricting the use of a Keyword or requiring the use of a Negative Keyword.

Provided that nothing in this Paragraph II.A shall prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent's intention to initiate or prosecute a lawsuit, or (c) implementing or enforcing an order entered by any court of law, including an order approving a litigation settlement.

B. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on any Search Advertising; *provided, however,* that nothing in this Paragraph II.B shall prohibit Respondent from entering into or complying with a written agreement providing that a:

1. Seller shall not include in the text of any Search Advertising (a) a false or deceptive claim, (b) a representation that Respondent is the source of the goods or services advertised therein, (c) a representation that the Seller is affiliated with or sponsored by Respondent, or (d) a name that is identical to or confusingly similar to any trademark owned by Respondent; or

2. Seller's Search Advertising shall clearly identify the Seller (for the avoidance of doubt, including the name of the Seller in the URL, website address, or domain name shall constitute clear identification of the Seller); and

Provided further that nothing in this Paragraph II.B shall prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent's intention to initiate or prosecute a lawsuit, or (c) implementing or enforcing the order entered by any court of law, including an order approving a litigation settlement.

C. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place any limitation on truthful, non-deceptive, and non-infringing advertising or promotion.

D. Attempting to engage in any conduct that is prohibited by Paragraph II of this Order.

Provided, however, that nothing in this Paragraph II shall prohibit Respondent from entering into or complying with a written agreement with a Seller to require that Search Advertising disclose the Seller's identity and/or lack of affiliation with Respondent or disclose that the Search Advertising is not sponsored by Respondent.

III.

IT IS FURTHER ORDERED that Respondent shall:

A. Cease and desist from enforcing or attempting to enforce any and all provisions, terms, or requirements in an existing agreement or court order that impose a condition on a Seller that is not consistent with Paragraph II of this Order.

B. Within sixty (60) days after the date this Order is issued, take whatever action is necessary to vacate or nullify any and all provisions, terms, or requirements in any court order or agreement that impose a condition on a Seller that is not consistent with Paragraph II of this Order.

IV.

IT IS FURTHER ORDERED that Respondent shall:

A. Within thirty (30) days from the date this Order is issued:

1. Distribute by first-class mail, return receipt requested or by electronic mail with return confirmation, a copy of this Order and the Complaint to each of its officers, directors, and managers;

2. Send by first-class mail, return receipt requested or by electronic mail with return confirmation, on Respondent's official letterhead, the statement attached to this Order as Appendix A to each Person:

   (a) To whom Respondent communicated regarding that Person's involvement as a plaintiff or defendant in any actual or potential Trademark Infringement Claim; and

   (b) With whom Respondent entered into any agreement prohibited by Paragraph II of this Order.

B. For a period of five (5) years from the date this Order is issued:

1. Provide to Commission staff a copy of any Communication by Respondent with any Person regarding that Person's suspected trademark infringement no later than ten (10) days after Communicating with such Person;

2. Send by first-class mail, return receipt requested or by electronic mail with return confirmation, on Respondent's official letterhead, the statement attached to this Order as Appendix A to each Person referenced in Paragraph IV.B.1. of this Order no later than the time Respondent initially Communicates with such Person;

3. Provide to Commission staff a copy of any agreement (or description, if the agreement is not in writing) that Respondent enters into with a Seller relating to Search Advertising, no later than thirty (30) days after it enters into such agreement;

4. Provide to Commission staff notice and a copy of any proposed stipulated order to settle litigation with provisions that prohibit, restrict, regulate, or otherwise place a limitation on any Search Advertising or on the ability of a Seller to participate in

a Search Advertising auction, no later than ten (10) days before requesting entry of that order;

5. Distribute by first-class mail, return receipt requested or by electronic mail with return confirmation, a copy of this Order and the Complaint to each Person who becomes an officer, director, or manager and who did not previously receive a copy of this Order and Complaint, no later than ten (10) days after the date such Person assumes his or her position; and,

6. Provide a copy of this Order to any court evaluating a request that a litigation settlement agreement relating to Search Advertising be approved by the court and/or incorporated into a court order.

C. Retain documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph IV.

V.

IT IS FURTHER ORDERED that Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:

A. No later than ninety (90) days from the date this Order is issued, and

B. One (1) year from the date this Order is issued and annually thereafter for four (4) years on the anniversary of the date on which this Order is issued, and at such other times as the Commission may request.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

A. Any proposed dissolution of Respondent;

B. Any proposed acquisition, merger, or consolidation of Respondent; or

C. Any other change in Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondent, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and

B. To interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on November 7, 2038.

By the Commission, Commissioner Phillips dissenting and Commissioner Wilson not participating.

Donald S. Clark
Secretary

SEAL:
ISSUED: November 7, 2018

Appendix A

[Letterhead of 1-800 Contacts]

[Name and Address of the Recipient]

Dear (Recipient):

As you may know, the Federal Trade Commission issued an administrative complaint in 2016 against 1-800 Contacts, Inc. ("1-800 Contacts") challenging several agreements between 1-800 Contacts and other contact lens sellers that restrict the ability of such sellers to purchase trademark keywords in search advertising auctions, or to place search advertising triggered by those keywords on internet search engine results pages.

The Federal Trade Commission has issued a Decision and Order ("Order") against 1-800 Contacts in connection with its complaint. This Order provides, in part, that 1-800 Contacts may not prohibit competing sellers of contact lenses from engaging in truthful, non-deceptive advertising or solicitation through the display of search advertising. Specifically, 1-800 Contacts may not:

1. Enter into, enforce, or attempt to enforce any agreement between or among 1-800 Contacts and a contact lens seller to restrict the ability of the seller to participate in any internet search advertising auction, including restricting the use of keywords or requiring the use of negative keywords; or

2. Enter into, enforce, or attempt to enforce any agreement with a contact lens seller that otherwise places any limitation on any search advertising.

The Order further requires 1-800 Contacts to take whatever action is necessary to have vacated all court orders or other restraints related to trademark infringement claims initiated to accomplish any of the above-listed prohibited activities.

The Order does not prohibit 1-800 Contacts from entering into an agreement with a seller of contact lenses that requires certain disclosures in the *text* of an advertisement, including a clear identification of the seller placing the advertisement.

For more specific information, you should refer to the FTC order itself. The Federal Trade Commission's Complaint and Decision and Order are available on the Commission's website, http:\\www.ftc.gov.