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December 23, 2017

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Notice
GN Docket No. 17-192 & CC Docket No. 95-155

Dear Ms. Dortch:

On December 18, 2017, Vanity International filed an *ex parte* letter in this proceeding addressing the appellate decision, *Holiday Inns, Inc. v. 800 Reservations, Inc.*¹ Although the facts of the case are somewhat unique, the appellate court emphasized that Holiday Inns owns trademark rights in its vanity toll free telephone number 1-800-HOLIDAY.² It is on this basis that 1-800 Contacts, Inc. and other commenters in this proceeding have urged the Commission to refrain from using an auction to distribute trademark protected numbers in new toll free codes, such as 833, and instead give trademark holders a right of first refusal in such numbers.³

The *Holiday Inns* case is unique because it involved the use of 1-800 405-4329 (which does not spell HOLIDAY) to take advantage of people who misdial the letter “O” as the number “0”.⁴ The court concluded that, although Holiday Inns owns trademark rights in 1-800-HOLIDAY

¹ See *Holiday Inns, Inc. v. 800 Reservation, Inc.*, 86 F.3d 619 (6th Cir. 1996).

² See *id.* at 625.

³ See Letter from Gerard M. Gallagher, Senior Vice President, General Counsel, 1-800-Flowers.com, Inc., to Federal Communications Commission, WC Docket No. 17-192 (Dec. 12, 2017); Comments of Network Telephone Services, Inc., WC Docket No. 17-192 and CC Docket No. 95-155, at 2 (Nov. 13, 2017); Brief Comments of M&S Telecom Services, WC Docket No. 17-192 and CC Docket No. 95-155, at 1 (Nov. 14, 2017); Comments of Midwest Asset Management, Inc., WC Docket No. 17-192 and CC Docket No. 95-155 (Nov. 14, 2017); Brief Comments of Tellnet Communications Inc., WC Docket No. 17-192 and CC Docket No. 95-155, at 1 (Nov. 13, 2017).

⁴ See *Holiday Inns*, 86 F.3d at 620.

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(i.e., 1-800 465-4329), those trademark rights do not extend to the defendant's number, 1-800 405-4329.⁵

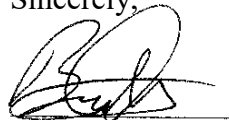
In reaching this decision, the court lamented the public confusion that appeared to result "among the misdialing public" and observed that Holiday Inns "neglected to take the simple precaution of reserving its complementary number – a practice which many of its competitors have chosen to take."⁶

The court also acknowledged other trademark cases, such as Dial-A-Mattress Franchise Corp. v. Page, in which the court enjoined the confusingly similar use of the number 628-8737 in various area codes in order to protect 1-800-MATTRES (which corresponds with 628-8737).⁷ The court observed that, although the term "mattress" is a generic term, telephone numbers that correlate with generic terms may be entitled to trademark protection.⁸

Given this case law, it is clear that the Lanham Act would prohibit bad actors from securing toll free numbers in the new 833 code that correspond to such trademark protected numbers as 1-800 MATTRES, 1-800-FLOWERS, and 1-800 CONTACTS and using them in a confusingly similar manner. To prevent the consumer confusion that would inevitably result and in recognition of Congress' public policy goals in adopting the Lanham Act, the Commission should refrain from auctioning trademark protected numbers in new toll free codes and instead create a right of first refusal to such confusingly similar numbers.

Thank you for your attention to this matter. Please contact the undersigned if you have any questions.

Sincerely,



Bruce A. Olcott
1-800 CONTACTS, Inc.

⁵ See *id.* at 625.

⁶ *Id.*

⁷ See *Dial-A-Mattress Franchise Corp. v. Page*, 880 F.2d 675 (2d Cir. 1989).

⁸ See *id.* at 678.