

PUBLIC

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



In the Matter of

1-800 CONTACTS, INC.,

Respondent.

Docket No. 9372

RESPONDENT'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA

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January 3, 2017

I. INTRODUCTION

Pursuant to Rule 3.38, Respondent moves for an order compelling Google Inc. to produce three settlement agreements responsive to Respondent's subpoena or, in the alternative, for an order certifying "to the Commission a request that court enforcement of the subpoena . . . be sought." 16 CFR § 3.38(c).

The sought-after discovery is directly relevant to a key issue in this litigation, *viz.*, whether the agreements challenged by the Complaint are "commonplace forms" of settlement agreements and thus not subject to antitrust scrutiny. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2233 (2013). Respondent contends that the challenged agreements "are legitimate, reasonable, and commonplace settlements of *bona fide* trademark litigation based on other contact lens retailers' unauthorized use of 1-800 Contacts' trademarks as keywords to trigger Internet search advertising." (Respondent's Answer and Defenses to Administrative Complaint at 1.) Complaint Counsel, on the other hand, contend that the conduct leading to the agreements—companies paying search engines to display their ads in response to user searches on Respondent's trademarks—did not constitute trademark infringement, that companies agreed to settle with Respondent only to avoid litigation costs, and that the settlement agreements are broader than necessary to prohibit infringement. (Complaint ¶¶ 18, 19, 21.)

The three agreements sought by the subpoena bear on these issues. Each of the sought-after settlement agreements [REDACTED]. In each of the settlement agreements, Google [REDACTED]. The sought-after agreements are therefore relevant to whether Respondent's settlement agreements are (1) "commonplace forms" of settlement that resolved legitimate trademark disputes, (2) reflect a reasonable assessment of the risks of liability (rather than simply avoidance of litigation costs), and (3) provided relief consonant with the protected interest. In addition, the agreements bear on the Complaint's allegation of harm to search engines.

The Court should therefore compel compliance with the subpoena.

II. FACTUAL BACKGROUND

A. The Complaint Allegations

The Complaint challenges certain agreements entered into by Respondent that settled allegations of trademark infringement.¹ (Complaint ¶¶ 17-20.) These agreements arose in the context of alleged trademark infringement related to the competitors' bidding on Respondents' trademarks as "keywords" for paid search advertising. (*Id.* ¶ 10, 17-24.)

As set forth in the Complaint, search engines (such as Google, Yahoo!, and Bing) allow advertisers to "bid" on "keywords" so that their ads will appear on the results page when a user enters a search query containing the keyword. (Complaint ¶ 10.) Thus, if a user seeking to navigate to the 1-800 Contacts website types "1800 contacts" into the search bar, ads for other companies may appear because those companies bid on the trademarked term "1800 contacts." (Complaint ¶ 12.)

Numerous courts have found that bidding on trademarked terms to place ads on search results pages may be unlawful. *See, e.g., Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 131 (2d Cir. 2009) (sale of trademarked terms as keywords to trigger ads may be trademark infringement); *LBF Travel v. Fareportal, Inc.*, 2014 U.S. Dist. LEXIS 156583, at *20-27 (S.D.N.Y. Nov. 5, 2014) (buying trademarked keywords from search engine to trigger ads may be infringement); *Binder v. Disability Grp., Inc.*, 772 F. Supp. 2d 1172 (C.D. Cal. 2011) (plaintiff's bidding on competitor's mark as keyword was trademark infringement, false advertising, and unfair competition). According to the Complaint, Respondent's settlement agreements prohibited the settling parties from engaging in such bidding conduct and required them to employ means to prevent their ads from displaying in response to search queries that include the others' trademark. (Complaint ¶¶ 20, 23, 24.)

The Complaint, however, alleges that Respondent's contentions that a "rival's advertisement appear[ing] on the results page in response to a query containing a 1-800 Contacts

¹ The Complaint uses the loaded term "Bidding Agreements." The allegations, however, make clear that the agreements are settlements of trademark disputes. (Complaint ¶¶ 17-20.)

trademark constituted infringement” were “inaccurat[e].” (Complaint ¶ 18.) It further alleges that companies settled with Respondent “to avoid prolonged and costly litigation” and that the agreements “go well beyond prohibiting trademark infringing conduct.” (Complaint ¶¶ 19, 21.) In addition, Complaint Counsel contend that Respondent could have adequately protected its trademark rights by “redressing the purportedly confusing text of the challenged advertisement rather than prohibiting the display of search advertising altogether.” (Declaration of Sean Gates (“Gates Decl.”) Ex. D, at Response to Interrogatory No. 1.)

B. Respondent’s Subpoena to Google

Respondent served on Google a subpoena *duces tecum*, seeking settlement agreements that resolved trademark claims similar to those resolved by Respondent’s settlement agreements. Specifically, Request No. 27 seeks settlement agreements “resolving claims for trademark infringement . . . Relating to Keywords consisting of or including a trademarked term.” (Gates Decl. Ex. A.)

Instead of filing a motion to quash pursuant to Rule 3.34(c), Google served written objections and refused to produce any settlement agreements. (Gates Decl. Ex. B.) Google contends that the settlement agreements are irrelevant, responding to the Request would be unduly burdensome, and that the agreements contain confidential business information. (*Id.*)

In deposition testimony, however, Google’s in-house trademark counsel identified three settlements [REDACTED] (Gates Decl. Ex. C [Charlston depo. at 131:20-133:17, 138:12-25, 139:4-14].) Under each of these three agreements, Google agreed [REDACTED]. (*Id.*) In at least one of the settlement agreements, Google also agreed [REDACTED]. (*Id.* at 133:22-134:2.) Based on this deposition testimony, Respondent limited its subpoena request to the three agreements, but Google refused to produce them.

Through this motion, Respondent seeks to compel the production of the three settlements. Specifically, Respondent seeks production of Google’s settlement agreements with [REDACTED] [REDACTED]. (Gates Decl. Ex. C [Charlston depo. at 131:20-133:6, 138:12-25, 139:4-14].)

III. GOVERNING STANDARDS

Respondent is entitled “to obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to [Respondent’s] defenses.” 16 CFR § 3.31(c)(1).

The burden of showing that non-compliance with a subpoena is justified is on the subpoenaed party. *See In re 1-800 Contacts, Inc.*, 2016 FTC LEXIS 193, at *5 (F.T.C. Nov. 4, 2016); *In re Lab. Corp. of America*, 2011 FTC LEXIS 31, at *7 (Feb. 28, 2011). Here, Google’s failure to file a motion to quash waived its objections.² *See FTC v. O’Connell Assocs., Inc.*, 828 F. Supp. 165, 168 (E.D.N.Y. 1993).

IV. ARGUMENT

A. The Sought-After Discovery is Relevant to a Key Issue

The Google settlement agreements are directly relevant to a key issue in this case—whether the challenged agreements are “commonplace forms” of settlement agreements. The Complaint challenges Respondent’s settlement agreements as anticompetitive. (Complaint ¶¶ 18, 19, 21.) Given the strong public policy in favor of settlements,³ however, the Supreme Court has made clear that “commonplace forms” of settlement agreements are not subject to antitrust scrutiny. *Actavis*, 133 S. Ct. at 2233; *see also King Drug Co. of Florence, Inc. v.*

² Unlike Federal Rule of Civil Procedure 45(d)(2)(B), the Commission’s rules do not permit a subpoenaed party to simply serve written objections but require subpoenaed parties to raise any objections in a motion to quash. 16 C.F.R. § 3.34(c) (motion to quash “shall set forth all assertions of privilege or other factual and legal objections to the subpoena”).

³ This policy is especially pertinent to the settlement of trademark disputes. *See, e.g., Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 55 (2d Cir. 1997) (trademark dispute settlements are “favored under the law”); *T&T Mfg. Co. v. A. T. Cross Co.*, 587 F.2d 533, 539 (1st Cir. 1978) (expressing “judicial policy of encouraging extra-judicial settlement of trademark litigation”).

SmithKline Beecham Corp., 791 F.3d 388, 402 (3d Cir. 2015) (“The [*Actavis*] Court further explained that its holding should not be read to subject to antitrust scrutiny ‘commonplace forms’ of settlement.”).

The Google settlement agreements are thus relevant for at least four reasons. *First*, the Google agreements are relevant to whether the Respondent’s settlement agreements are, contrary to the Complaint’s allegations, “commonplace forms” of settlements of legitimate trademark disputes. *See FTC v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979) (“relevancy of an adjudicative subpoena is measured against the charges specified in the complaint”). The Google agreements involved [REDACTED]

[REDACTED]. (Gates Decl. Ex. C [Charlston depo. at 131:20-133:17, 138:12-25, 139:4-14].) A comparison of the two sets of agreements would therefore show whether Respondent’s settlement agreements reflect “commonplace” terms or include “unusual” terms that might merit antitrust scrutiny. *Actavis*, 133 S. Ct. at 2231 (antitrust scrutiny merited because form of settlement was “unusual” and “there is reason for concern that settlements taking this form tend to have significant adverse effects on competition”).

Second, the Google settlement agreements are relevant to whether the relief in Respondent’s settlements are “commonplace” or, as the Complaint alleges, “go well beyond prohibiting trademark infringing conduct” (Complaint ¶ 21). Complaint Counsel contend that Respondent could have adequately protected its trademark rights by “redressing the purportedly confusing text of the challenged advertisement rather than prohibiting the display of search advertising altogether.” (Gates Decl. Ex. D at Response to Interrogatory No. 1.) The Google settlement agreements, however, apparently [REDACTED]

[REDACTED]. (Gates Decl. Ex. C [Charlston depo. at 131:20-133:6, 138:12-25, 139:4-14].) These [REDACTED]. (*Id.*) The terms of the Google

agreements thus bear on whether the terms of relief in Respondent's agreements are commonplace forms of settlement.⁴

Third, the Google agreements are relevant to whether Respondent's settlement agreements reflect a reasonable assessment of the risks of potential liability. The Complaint alleges that companies' entered into settlements with Respondent simply to avoid litigation costs (Complaint ¶ 19), implying that Respondent leveraged greater resources to compel smaller retailers to acquiesce. The Google settlement agreements, however, may show that even well-financed defendants, such as Google, chose to [REDACTED] [REDACTED]. (Gates Decl. Ex. C [Charlston depo. at 131:20-133:6, 138:12-25, 139:4-14].) The implication, of course, is that claims such as Respondent's presented a substantial risk of liability, rather than simply a risk of litigation costs.

Fourth, the terms of the Google agreements go to whether search engines are harmed by Respondent's agreements as alleged in the Complaint. (Complaint ¶ 31.) The terms of Google's settlement agreements, especially any that show Google [REDACTED], will tend to show search engines are not harmed by [REDACTED]. The specific terms [REDACTED] are particularly pertinent to this issue; rational companies do not [REDACTED].

B. The Deposition Testimony of Google's Trademark Counsel Is Insufficient

Google may contend that discovery should be denied because the deposition testimony of its trademark counsel is sufficient. This contention is wrong for two reasons.

First, the trademark counsel was unable to provide necessary details regarding the settlement terms. Determining whether Respondent's agreements are commonplace forms of settlement requires a side-by-side comparison of the two sets of agreements. The trademark

⁴ The agreement with [REDACTED] [REDACTED]. (Gates Decl. Ex. C [Charlston depo. at 139:4-21].) This agreement is therefore relevant to whether the relief in Respondent's settlement agreements is commonplace.

counsel, however, did not know numerous key details, such as [REDACTED] [REDACTED] (Gates Decl. Ex. C [Charlston depo. at 134:1-16]), whether [REDACTED] [REDACTED] (*id.* at 138:12-139:3, 140:2-4), and what [REDACTED] (*id.* at 141:5-143:1), which goes to the scope of the relief.

Second, production of the actual agreements may be necessary to eliminate potential evidentiary objections, especially those based on the best evidence rule. Even if the testimony of Google's trademark counsel is admissible, the actual agreements are more reliable evidence of the terms on which Google settled its trademark disputes. Given the centrality of the issues to which the agreements are relevant, the Court should have the benefit of the actual documents.

C. Producing the Three Agreements Would Not Be Unduly Burdensome

If not waived, Google's objection that responding to the Request would create an undue burden is specious. The "burden of showing that the request is unreasonable is on the subpoenaed party." *In re Polypore*, 2009 FTC LEXIS 41, at *10 (F.T.C. Jan. 15, 2009); *see also* *FTC v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at *13 (D.D.C. 1977) (enforcing subpoena served on non-party by the respondent). Google cannot show that producing three agreements would create an undue burden. "Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding." *1-800 Contacts, Inc.*, 2016 FTC LEXIS 193, at *13 (internal quotes omitted).

D. Any Confidentiality Concerns Are Addressed by the Protective Order

Assuming no waiver, Google also objects to producing the settlement agreements on the ground that they contain confidential business information. But the "fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery." *1-800 Contacts, Inc.*, 2016 FTC LEXIS 193, at *9 (quoting *In re N. Texas Specialty Physicians*, 2004 FTC LEXIS 14, at *5 (F.T.C. Jan. 30, 2004)). The Protective Order entered in

this case is sufficient to protect Google's confidential information. *See id.* at *9 (argument that subpoena should be quashed to protect confidential information was "without merit").

V. CONCLUSION

The Court should order Google to produce the [REDACTED] [REDACTED] agreements within three days and submit to the Court a certificate of compliance the next business day. Should Google fail to do so, the Court should issue an order certifying a request to the Commission to seek court enforcement of the subpoena. Alternatively, Respondent requests the Court immediately issue such an order.

Dated: January 3, 2017

Respectfully submitted,

/s/ Sean Gates

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Counsel for 1-800 Contacts, Inc.

CERTIFICATE OF CONFERENCE

The undersigned counsel certifies that Respondent conferred with counsel for Google Inc. in a good faith effort to resolve by agreement the issues raised in this motion. Respondent's counsel (Sean Gates) and Google's counsel (John Harkrider) met and conferred by telephone on November 14, 2016. Counsel (Mr. Gates and Mr. Harkrider) exchanged letters regarding the subpoena on November 14, 2016. Respondent's November 14 letter specifically addressed Request No. 27, which seeks the settlement agreements at issue in this motion. Counsel (Mr. Gates and Mr. Harkrider) had a subsequent meet and confer by telephone on November 22, 2016, during which counsel specifically discussed Respondent's request regarding the settlement agreements. Counsel for Respondent (Mr. Gates) sent a letter to Google's counsel (Mr. Harkrider) on November 23, 2016, again raising Request No. 27. On December 22, 2016, Respondent's counsel (Mr. Gates) sent another letter to Google's counsel (Mr. Harkrider and Alexander Bergersen) requesting the specific settlement agreements sought by this motion. On December 28, 2016, Google's counsel (Mr. Harkrider) responded by letter, declining to produce the requested settlement agreements.

Dated: January 3, 2017

Respectfully submitted,

/s/ Sean Gates

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

In the Matter of

1-800 CONTACTS, INC.,

Respondent.

Docket No. 9372

**[PROPOSED] ORDER GRANTING RESPONDENT'S MOTION TO COMPEL
COMPLIANCE WITH SUBPOENA**

Having considered Respondent's Motion to Compel Compliance with Subpoena, opposition thereto, and all supporting and opposing declarations and other evidence, and the applicable law, it is hereby ORDERED that Respondent's motion is GRANTED. No later than three days after entry of this Order, Google Inc. shall produce to Respondent the settlement agreements with [REDACTED] that are the subject of Respondent's motion. Google shall certify compliance with this order by filing a certificate with this Court within one business day of producing the settlement agreements to Respondent. Should Google fail to file such certificate, the Court shall issue an order certifying a request that that Commission seek court enforcement of Respondent's subpoena.

IT IS SO ORDERED.

Dated: _____

D. Michael Chappell
Chief Administrative Law Judge

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

In the Matter of

1-800 CONTACTS, INC.,

Respondent.

Docket No. 9372

**DECLARATION OF SEAN GATES IN SUPPORT OF
RESPONDENT'S MOTION TO COMPEL COMPLIANCE WITH SUBPOENA**

I, Sean Gates, declare as follows:

1. I am an attorney and counsel for Respondent, 1-800 Contacts, Inc., in this matter. I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could and would testify competently to such facts.

2. Attached hereto as Exhibit A is a true and correct copy of the subpoena (without appendices) served on Google Inc. by Respondent on November 19, 2016. The requests in this subpoena are identical to an earlier subpoena served on Google by Respondent on October 21, 2016. Respondent served the attached subpoena to address certain alleged issues raised by Google with regard to the earlier subpoena.

3. Attached hereto as Exhibit B is a true and correct copy of the Responses and Objections of Google Inc. to Respondent's Subpoena, which was served on December 2, 2016.

4. Attached hereto as Exhibit C is a true and correct copy excerpts from the deposition of Gavin Charlston, Google's in-house trademark counsel. Google designated the entire transcript as Confidential pursuant to the Protective Order.

5. Attached hereto as Exhibit D is a true and correct copy of Complaint Counsel's Responses and Objections to Respondent's First Set of Interrogatories (1-14).

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 3d day of January, 2017 at Pasadena, California.

 /s/ Sean Gates
Sean Gates

EXHIBIT A



SUBPOENA DUCES TECUM

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

1. TO
Google Inc.
c/o Corporation Service Company
2710 Gateway Oaks Drive, Suite 150N
Sacramento, CA 95833

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION

Charis Lex P.C.
c/o Sean Gates
16 N. Marengo Ave., Suite 300
Pasadena, CA 91101
(626) 508-1717

4. MATERIAL WILL BE PRODUCED TO

Sean Gates, Esq.

5. DATE AND TIME OF PRODUCTION

December 2, 2016 at 1:00 p.m.

6. SUBJECT OF PROCEEDING

In the Matter of 1-800 Contacts, Inc., Docket No. 9372

7. MATERIAL TO BE PRODUCED

Documents & materials responsive to the attached Subpoena Duces Tecum Requests for Production

8. ADMINISTRATIVE LAW JUDGE

The Honorable D. Michael Chappell
Federal Trade Commission
Washington, D.C. 20580

9. COUNSEL AND PARTY ISSUING SUBPOENA

Charis Lex P.C.
c/o Sean Gates
16 N. Marengo Ave., Suite 300
Pasadena, CA 91101
(626) 508-1717
Counsel for Respondent 1-800 Contacts, Inc.

DATE SIGNED

11/19/16

SIGNATURE OF COUNSEL ISSUING SUBPOENA

Sean Gates

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCsRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1995.



RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

- in person.*
- by registered mail.*
- by leaving copy at principal office or place of business, to wit:*

Fed Ex

on the person named herein on:

Nov. 19, 2016
(Month, day, and year)

Sean Gates

(Name of person making service)

Attorney

(Official title)

**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

**RESPONDENT'S SECOND SUBPOENA *DUCES TECUM* ATTACHMENT
TO GOOGLE INC.**

Pursuant to Federal Trade Commission Rules of Practice, 16 C.F.R. §§ 3.34, and in accordance with the Instructions and Definitions below, Respondent 1-800 Contacts, Inc. hereby requests that Google Inc. produce all documents, electronically stored information, and other things in its possession, custody, or control responsive to the following requests.

Request No. 1: According to available active auction data, provide data sufficient to identify each person that has ever:

- a. had their bid for one or more of the following keywords in Adwords cause their advertisement to appear on a search engine results page;
- b. without bidding directly on any of these terms, had an advertisement appear on the search engine results page for any query containing the following keywords in Adwords;

1 800 contacts
1 800 contact
1 800contacts
1 800contact
1800contacts
1800contact
1800 contacts
1800 contact
1-800 contacts
1-800 contact
1800.contacts
1-800-contacts
1800contacs

1800 contacs
1.800 contacts
1 8000 contacts
800 contacts
800.contacts
800contacts
1800contacts.com
www.1800contacts.com
www.1800contacts.net
www.1800contacts.org

Request No. 2: Provide available active auction data sufficient to identify each person that has ever had their bid for one or more of the following keywords in Adwords cause their advertisement to appear on a search engine results page;

AC Lens
Lens.com
LensCrafters
Vision Direct
contact lens
contact lenses
buy contacts online
Acuvue Oasys
TruEye
Air Optics
Optix
Aqua
Comfort
Dailies
Total
Biotrue
Soflens
PureVision
Biofinity
Proclear

Request No. 3: Provide available auction data sufficient to identify whether any of the following persons has ever bid on any of the terms listed in Request No. 1 in any Adwords auction. This data may be provided in Request No. 1, in which case it need not be provided again.

1-800 Contacts
2weekdisposables
Alcon
America's Best
Arlington Contact Lens Service, d/b/a AC Lens
Bausch & Lomb
BJ's

Clearly Contacts
Coastal Contacts
Contact Lens
King Contacts
Direct
CooperVision
Costco
Daysoft Contact Lenses
Empire Vision, d/b/a ECCA
EZ Contacts USA, d/b/a Provision Supply
Johnson & Johnson, d/b/a Vistakon
Luxottica, d/b/a LensCrafters, d/b/a Pearle Vision, d/b/a
Sears Optical, d/b/a Target Optical
Lens.com
Lensdirect
Lens Discounters
Lenspure
Price Smart Contacts
Major Lens
Memorial Eye, d/b/a ShipMyContacts.com
Oakwood Eye Clinic, d/b/a Lenses for Less Sam's Club
Save On Lens
Standard Optical
Tram Data, d/b/a Replace My Contacts, d/b/a Lensfast
Vision Direct, d/b/a Lensworld
Walgreens
Walmart
Web Eye Care

Request No. 4: For each person listed in Request No. 3 or identified in your response to Request No. 1, provide data sufficient to show each search engine advertising campaign (except advertising campaigns that do not involve advertisements for contact lenses) in use during the Request Period. For each such campaign provide the following data. The data may be aggregated by up to one week, but for no greater period.

- a. Bidding entity;
- b. Campaign identifier;
- c. Campaign type and sub-type;
- d. Campaign start date;
- e. Campaign end date
- f. Location;
- g. Language;
- h. Campaign type;

- i. Bid strategy;
- j. Manually set CPC (if applicable);
- k. Daily maximum budget;
- l. Keywords used; and
- k. Negative keywords used.

Request No. 5: For each campaign identified in Request No. 4, provide data sufficient to show:

- a. how frequently the bidding entity served fewer advertisements due to budget constraints;
- b. how frequently the bidding entity stopped serving advertisements due to budget constraints;
- c. documents sufficient to show all applicable policies or algorithms employed by You to adjust bids, prices, or payments due to a bidding entity's budget constraints.

Request No. 6: For each Keyword in Appendix A, provide the following data regarding the Keyword, related auctions, and related advertisements in the Relevant Period. The data may be aggregated by up to one week, but for no greater period. The data should be reported in the aggregate and separately for each entity listed in Request No. 3. The data should also be reported separately by type of device on which the search was conducted, e.g., mobile phone, tablet, computer. Data for each entity listed in Request No. 3 should include data regarding bidding or advertising by that entity's Affiliates.

- a. Date or date and time bid;
- b. Geographic region;
- c. Bidding entity;
- d. Visible URL;
- e. Keyword;
- f. Keyword Match Type (e.g., exact match, phrase match, broad match, broad match modifier, content match)
- g. Campaign;
- h. Campaign type;
- i. Campaign sub-type;
- j. Ad group;
- k. Status;
- l. Impressions;
- m. Clicks;
- n. Clickthrough rate;

- o. Bid or maximum cost per click;
- p. Cost per click or Cost per action or Cost per impression (and identify which);
- q. Cost USD;
- r. Average ad rank;
- s. Average click position;
- t. Conversion rate where available;
- u. Bounce back rate;
- v. Quality score;
- w. Number of search query auctions;
- x. Conversions;
- y. Revenue (Total Conversion Value);
- z. Cost Per Conversion;
- aa. Assisted Conversions;
- bb. Estimated Cross Device Conversions;
- cc. Impression Share;
- dd. Search Lost IS (rank);
- ee. Search Lost IS (budget);
- ff. Search Exact Match IS;
- gg. Position Above Rate;
- hh. Overlap rate;
- ii. Top of page rate;
- jj. Outranking share;
- kk. Ad Copy with performance metrics;
- ll. Total number of bouncebacks;
- mm. Position; and
- nn. Any additional factors that influence ad ranking and placement.

Request No. 7: For queries listed in Appendix B, provide data sufficient to identify any bids that led to the inclusion of an advertisement in the resulting auction despite the advertiser not having bid directly on any of the terms in Appendix B (“smart match”). For each such bid, provide the data listed in Request No. 6. The data should be reported in the aggregate and separately for each entity listed in Request No. 3. The data should also be reported separately by type of device on which the search was conducted, e.g., mobile phone, tablet, computer. Data for each entity listed in Request No. 3 should include data regarding bidding or advertising by that entity’s Affiliates.

Request No. 8: For each auction using a Keyword in Appendix A in the Relevant Period, provide the following data for 1000 randomly selected resulting ads per year. The data should also be reported separately by type of device on which the search was conducted, e.g., mobile phone, tablet, computer. Data for each entity listed in Request No. 3 should include data regarding bidding or advertising by that entity's Affiliates.

- a. Date or date and time of bid;
- b. Geographic region;
- c. Bidding entity;
- d. Keyword;
- e. Keyword Match Type (e.g., exact match, phrase match, broad match, broad match modifier, content match)
- f. Campaign;
- g. Campaign type;
- h. Campaign sub-type;
- i. Ad group;
- j. Status;
- k. Impressions;
- l. Position;
- m. Clicks;
- n. Clickthrough rate;
- o. Bid or maximum cost per click;
- p. Cost per click or Cost per action or Cost per impression (and identify which);
- q. Cost USD;
- r. Conversion rate where available;
- s. Bounce back rate;
- t. Quality score;
- u. Total number of bouncebacks.

Request No. 9: For each keyword in Appendix A and query in Appendix B, for the Relevant Period, provide the top five organic search results as well as the following data for each result. The data may be aggregated by up to one week, but for no greater period. The data should also be reported separately by type of device on which the search was conducted, e.g., mobile phone, tablet, computer. The data should also be separated by consumers using ad blocking software and those who did not.

- a. Position;
- b. Impressions;

- c. Clicks;
- d. Click Through Rate;
- e. Conversions;
- f. Conversion rate;
- g. Bounce back rate; and
- h. Total number of bounce backs.

Request No. 10: For each entity listed in Request No. 3, provide all Negative Keywords designated by each entity and the match type for each keyword (broad, phrase or exact) on a weekly basis for the Relevant Period. The data should be provided separately for each entity listed in Request No. 3. The data should reflect each Negative Keyword designated by an entity regardless of whether the entity has designated one or more Negative Keywords on a Campaign or Ad Group basis. Data for each entity listed in Request No. 3 should include data regarding Negative Keywords designated by that entity's Affiliates.

Request No. 11: For June and December of each year, provide data sufficient to show all co-occurring words that appear in queries at least 25 times during the month, for any of the following key words: a) 1 800 contacts, b) 1-800 contacts, c) 1800 contacts, d) 1800.contacts, e) 1800contacts.com, and f) www.1800contacts.com.

Request No. 12: Provide data sufficient to show a representative sample of the contact lens-related web browsing and web searching behavior of individual users who have entered a search query containing any of the keywords identified in Request No. 1.

Request No. 13: Provide a random sample of 1,000 results pages per year that have appeared in response to user searches for the keywords listed in Request No. 1 over the request period. Provide a random sample of 1,000 results pages that have appeared in response to user searches for the following keywords: contacts, contact lens, contact lenses, buy contacts online; over the request period.

Request No. 14: Provide a random sample of 1,000 Adwords advertisements per year that have appeared in response to user searches for the keywords listed in Request No. 1 over the request period. Provide a random sample of 1,000 Adwords advertisements per year that have appeared in response to user searches for the following keywords: contacts, contact lens, contact lenses, buy contacts online; over the request period. The data should include the position of each advertisement.

Request No. 15: Provide any and all search engine advertising algorithm A/B or side-by-side testing relating to the treatment of searches for or including trademarked terms, including the experiment design, results, recommendation, and any actual changes implemented or decisions made as a result.

Request No. 16: Provide documents sufficient to show how active auction data is selected and maintained.

Request No. 17: Provide documents sufficient to show the methodology, including any algorithm, by which You determine (or determined during the Relevant Period) the price that any advertiser pays for a Click.

Request No. 18: Provide documents sufficient to show the methodology, including any algorithm, by which You determine the results or outcome of any auction or bidding process for paid search advertising.

Request No. 19: Provide documents sufficient to show the methodology, including any algorithm, by which You determine an advertisement's Quality Score.

Request No. 20: Provide documents sufficient to show the methodology, including any algorithm, by which You determine the ranking, location, and overall layout of the results page for a paid search advertisement. Provide documents separately by type of device on which the search was conducted, e.g., mobile phone, tablet, computer.

Request No. 21: Provide documents sufficient to show how the methodologies referred to in Requests Nos. 17, 18, 19 and 20, including any algorithms, have changed during the Relevant Period.

Request No. 22: Provide documents sufficient to show the reasons why You changed or modified any of the methodologies referred to in Requests Nos. 17, 18, 19 and 20, including any algorithms during the Relevant Period.

Request No. 23: Provide all documents Relating to any studies, tests, analyses, or reports regarding consumer confusion in connection with paid search advertising.

Request No. 24: Provide all documents Relating to any studies, tests, analyses, or reports regarding Keywords consisting of or including a trademarked term.

Request No. 25: Provide all documents Relating to Your policies Relating to Keywords consisting of or including a trademarked term, including any actual or contemplated changes to such policies.

Request No. 26: Provide all documents Relating to any studies, tests, analyses, or reports regarding any actual or proposed changes in the formatting, design, arrangement, location, or display of paid search advertisements on any Search Engine.

Request No. 27: Provide all settlement agreements Relating to or resolving claims for trademark infringement, trademark dilution, unfair competition or unjust enrichment Relating to Keywords consisting of or including a trademarked term.

Request No. 28: Provide all agreements to which You or an affiliated entity are a party and which limit or restrict your willingness or ability to accept bids from persons other than the

owner of a trademark or trademarked term for Keywords consisting of or including a trademarked term.

Request No. 29: Provide all documents produced in any litigation or arbitration Relating to claims for trademark infringement, trademark dilution, unfair competition or unjust enrichment Relating to Keywords consisting of or including a trademarked term, including any expert reports disclosed and transcripts of testimony taken in such litigation or arbitration.

Request No. 30: For each Keyword listed in Appendix A and query in Appendix B, provide the total number of searches conducted for that Keyword or query by month during the Relevant Period.

Request No. 31: Provide all Documents produced to the Commission in any investigation or enforcement matter Relating to paid search advertising.

Request No. 32: Provide any policies regarding minimum prices for any auction or bidding process for paid search advertising and any methodology, including any algorithm, by which any such minimum price is or was determined during the Relevant Period.

Request No. 33: For each Keyword in Appendix A and query in Appendix B, provide all minimum prices for any auction or bidding process for paid search advertising and the dates on which such a minimum price was in effect during the Relevant Period.

DEFINITIONS

1. “**Company**,” “**Google**,” and “**you**” or “**your**” shall mean Google Inc., its directors, officers, trustees, employees, attorneys, agents, 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, partnerships and joint ventures.
2. “**1-800 Contacts**” shall mean Respondent 1-800 Contacts, Inc., its directors, officers, employees, and representatives, its subsidiaries, and the directors, officers, employees, and representatives of its subsidiaries.
3. “**Ad Group**” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its AdWords product. *See* <https://support.google.com/adwords/answer/6298?ctx=glossary>.
4. “**Affiliate**” means any Person other than the Company which attempts to generate online sales for the Company in exchange for a commission on such online sales.
5. “**And**,” as well as “**or**,” shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any Request in the Schedule all information that otherwise might be construed to be outside the scope of the Request.
6. “**Any**” shall be construed to include “**all**,” and “**all**” shall be construed to include “**any**.”
7. “**Campaign**” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its Adwords product. *See* https://support.google.com/adwords/answer/6304?hl=en&ref_topic=24936.
8. “**Click**” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its Adwords product *See* https://support.google.com/adwords/answer/31799?hl=en&ref_topic=24936.
9. “**Clickthrough rate**” (CTR) has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its Adwords product. *See* <https://support.google.com/adwords/answer/2615875?hl=en>.

10. “**Communication**” shall mean any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
11. “**Containing**” shall mean containing, describing, or interpreting, in whole or in part.
12. “**Documents**” shall mean all written, recorded, transcribed, or graphic matter of every type and description, however and by whomever prepared, produced, reproduced, disseminated, or made, including, but not limited to, analyses, letters, telegrams, memoranda, reports, bills, receipts, telexes, contracts, invoices, books, accounts, statements, studies, spreadsheets, presentations, surveys, pamphlets, notes, charts, maps, plats, tabulations, graphs, tapes, data sheets, data processing cards, printouts, internet sites, microfilm, indices, calendar or diary entries, manuals, guides, outlines, abstracts, histories, agendas, minutes or records of meetings, conferences, electronic mail, and telephone or other conversations or communications, as well as films, tapes, or slides, and all other data compilations in the possession, custody, or control of the Company, or to which the Company has access. The term “**documents**” includes the complete original document (or a copy thereof if the original is not available), all drafts (whether or not they resulted in a final document), and all copies that differ in any respect from the original, including any notation, underlining, marking, or information not on the original. The term “**other data compilations**” includes information stored in, or accessible through, computer or other information retrieval systems, together with instructions and all other material necessary to use or interpret such data compilations. If the name of the person or persons who prepared, reviewed, or received the document and the date of preparation, review, or receipt are not clear on the face of any document, such information should be provided separately.
13. “**Each**” shall be construed to include “**every**,” and “**every**” shall be construed to include “**each**.”
14. “**Impression**” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its Adwords product. *See* https://support.google.com/adwords/answer/6320?hl=en&ref_topic=24936.
15. “**Keyword**” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its Adwords product: *See* https://support.google.com/adwords/answer/6323?hl=en&ref_topic=24936.
16. “**Keyword Match Types**” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its Adwords product. *See* <https://support.google.com/adwords/answer/2497836>.
17. “**Enhanced Cost Per Click Bid**” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its Adwords product. *See* https://support.google.com/adwords/answer/2390590?hl=en&ref_topic=24937.

18. “**Negative Keyword**” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its Adwords product. *See* https://support.google.com/adwords/answer/2453972?hl=en&ref_topic=3122865.
19. “**Person**” includes the Company, and shall mean any natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or any other organization or entity engaged in commerce.
20. “**Quality Score**” has the same meaning that Google ascribes to the term in the ordinary course of business in connection with its Adwords product. *See* https://support.google.com/adwords/answer/140351?hl=en&ref_topic=24936.
21. “**Referring to,**” “**relating to,**” “**regarding,**” or “**about**” shall mean, in whole or in part, constituting, containing, concerning, embodying, reflecting, discussing, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to.
22. The “**Relevant Period**” means January 1, 2002 to the present.
23. The “**Relevant Product**” shall mean contact lenses.
24. “**Search Engine**” means a computer program, available to the public without charge, to search for and identify websites on the World Wide Web based on a User Query.
25. “**Technology Assisted Review**” means any process that utilizes a computer algorithm to limit the number of potentially responsive documents subject to a manual review. A keyword search of documents with no further automated processing is not a Technology Assisted Review.
26. “**User Query**” means data entered into a computer by an end user of a Search Engine for the purpose of operating the Search Engine.

INSTRUCTIONS

1. Unless otherwise indicated, each request covers documents and information dated, generated, received, or in effect from January 1, 2004, to the present.
2. This subpoena shall be deemed continuing in nature so as to require production of all documents responsive to any request included in this subpoena produced or obtained by the Company up to fifteen (15) calendar days prior to the date of the Company's full compliance with this subpoena.
3. Except for privileged material, the Company will produce each responsive document in its entirety by including all attachments and all pages, regardless of whether they directly relate to the specified subject matter. The Company should submit any appendix, table, or other attachment by either attaching it to the responsive document or clearly marking it to indicate the responsive document to which it corresponds. Except for privileged material, the Company will not redact, mask, cut, expunge, edit, or delete any responsive document or portion thereof in any manner.
4. Unless modified by agreement with Counsel for Respondent, this subpoena requires a search of all documents in the possession, custody, or control of the Company including, without limitation, those documents held by any of the Company's officers, directors, employees, agents, representatives, or legal counsel, whether or not such documents are on the premises of the Company. If any person is unwilling to have his or her files searched, or is unwilling to produce responsive documents, the Company must provide the Counsel for Respondent with the following information as to each such person: his or her name, address, telephone number, and relationship to the Company. In addition to hard copy documents, the search must include all of the Company's electronically stored information.
5. Form of Production. The Company shall submit all documents as instructed below absent written consent signed by Counsel for Respondent.
 - a. Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in the following electronic format provided that such copies are true, correct, and complete copies of the original documents:
 - i. Submit Microsoft Excel, Access, and PowerPoint files in native format with extracted text and applicable metadata and information as described in subparts (a)(iii) and (a)(iv).
 - ii. Submit emails in image format with extracted text and the following metadata and information:

Metadata/Document Information	Description
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Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.
To	Recipient(s) of the email.
From	The person who authored the email.
CC	Person(s) copied on the email.
BCC	Person(s) blind copied on the email.
Subject	Subject line of the email.
Date Sent	Date the email was sent.
Time Sent	Time the email was sent.
Date Received	Date the email was received.
Time Received	Time the email was received.
Attachments	The Document ID of attachment(s).
Mail Folder Path	Location of email in personal folders, subfolders, deleted items or sent items.
Message ID	Microsoft Outlook Message ID or similar value in other message systems.

- iii. Submit email attachments in image format, or native format if the file is one of the types identified in subpart (a)(i), with extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.
Parent ID	The Document ID of the parent email.

Metadata/Document Information	Description
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

- iv. Submit all other electronic documents in image format, or native format if the file is one of the types identified in subpart (a)(i), accompanied by extracted text and the following metadata and information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.
Modified Date	The date the file was last changed and saved.
Modified Time	The time the file was last changed and saved.
Filename with extension	The name of the file including the extension denoting the application in which the file was created.
Originating Path	File path of the file as it resided in its original environment.

Metadata/Document Information	Description
Production Link	Relative file path to production media of submitted native files. Example: FTC-001\NATIVE\001\FTC-00003090.xls.
Hash	The Secure Hash Algorithm (SHA) value for the original native file.

- v. Submit documents stored in hard copy in image format accompanied by OCR with the following information:

Metadata/Document Information	Description
Beginning Bates number	The beginning bates number of the document.
Ending Bates number	The last bates number of the document.
Custodian	The name of the custodian of the file.

- vi. Submit redacted documents in image format accompanied by OCR with the metadata and information required by relevant document type in subparts (a)(i) through (a)(v) above. For example, if the redacted file was originally an attachment to an email, provide the metadata and information specified in subpart (a)(iii) above. Additionally, please provide a basis for each privilege claim as detailed in Instruction 6.
- b. Submit data compilations in electronic format, specifically Microsoft Excel spreadsheets or delimited text formats such as CSV files, with all underlying data un-redacted and all underlying formulas and algorithms intact.
- c. If the Company intends to utilize any electronic search terms, de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media, or if the Company's computer systems contain or utilize such software, the Company must contact Counsel for Respondent to discuss whether and in what manner the Company may use such software or services when producing materials in response to this subpoena.
- d. Produce electronic file and image submissions as follows:
- i. For productions over 10 gigabytes, use IDE, EIDE, and SATA hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data in a USB 2.0 external enclosure;

- ii. For productions under 10 gigabytes, CD-R CD-ROM optical disks formatted to ISO 9660 specifications, DVD-ROM optical disks for Windows-compatible personal computers, and USB 2.0 Flash Drives are acceptable storage formats; and
 - iii. All documents produced in electronic format shall be scanned for and free of viruses prior to submission. Complaint Counsel will return any infected media for replacement, which may affect the timing of the Company's compliance with this subpoena.
 - iv. Encryption of productions using NIST FIPS-compliant cryptographic hardware or software modules, with passwords sent under separate cover, is strongly encouraged.¹
- e. Each production shall be submitted with a transmittal letter that includes the FTC matter number; production volume name; encryption method/software used; passwords for any password protected files; list of custodians and document identification number range for each; total number of documents; and a list of load file fields in the order in which they are organized in the load file.
6. All documents responsive to this subpoena:
- a. Shall be produced in complete form, unredacted unless privileged, and in the order in which they appear in the Company's files;
 - b. Shall be marked on each page with corporate identification and consecutive document control numbers when produced in image format;
 - c. Shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black and white photocopying or conversion to TIFF format of any document (e.g., a chart or graph) makes any substantive information contained in the document unintelligible, the Company must submit the original document, a like-color photocopy, or a JPEG format image);
 - d. Shall be accompanied by an affidavit of an officer of the Company stating that the copies are true, correct, and complete copies of the original documents; and
 - e. Shall be accompanied by an index that identifies (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding

¹ The National Institute of Standards and Technology (NIST) issued Federal Information Processing Standard (FIPS) Publications 140-1 and 140-2, which detail certified cryptographic modules for use by the U.S. Federal government and other regulated industries that collect, store, transfer, share, and disseminate sensitive but unclassified information. More information about FIPS 140-1 and 140-2 can be found at <http://csrc.nist.gov/publications/PubsFIPS.html>.

- f. consecutive document control number(s) used to identify that person's documents. Complaint Counsel will provide a sample index upon request.
7. If any documents are withheld from production based on a claim of privilege, the Company shall provide, pursuant to 16 C.F.R. § 3.38A, a schedule which describes the nature of documents, communications, or tangible things not produced or disclosed, in a manner that will enable Counsel for Respondent to assess the claim of privilege.
8. If the Company is unable to answer any question fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by the Company to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for the Company to make an estimate, provide an explanation.
9. If documents responsive to a particular request no longer exist for reasons other than the ordinary course of business or the implementation of the Company's document retention policy but the Company has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the request(s) to which they are responsive, and identify Persons having knowledge of the content of such documents.
10. The Company must provide Counsel for Respondent with a statement identifying the procedures used to collect and search for electronically stored documents and documents stored in paper format. The Company must also provide a statement identifying any electronic production tools or software packages utilized by the company in responding to this subpoena for: keyword searching, Technology Assisted Review, email threading, de-duplication, global de-duplication or near- de-duplication, and
 - a. if the Company utilized keyword search terms to identify documents and information responsive to this subpoena, provide a list of the search terms used for each custodian;
 - b. if the Company utilized Technology Assisted Review software;
 - i. describe the collection methodology, including: how the software was utilized to identify responsive documents; the process the company utilized to identify and validate the seed set documents subject to manual review; the total number of documents reviewed manually; the total number of documents determined nonresponsive without manual review; the process the company used to determine and validate the accuracy of the automatic determinations of responsiveness and nonresponsiveness; how the company handled exceptions ("uncategorized documents"); and if the company's documents include foreign language documents, whether reviewed manually or by some technology-assisted method; and

- ii. provide all statistical analyses utilized or generated by the company or its agents related to the precision, recall, accuracy, validation, or quality of its document production in response to this subpoena; and identify the person(s) able to testify on behalf of the company about information known or reasonably available to the organization, relating to its response to this subpoena.
 - c. if the Company intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the Company's computer systems or electronic storage media in response to this subpoena, or if the Company's computer systems contain or utilize such software, the Company must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner the Company may use such software or services when producing materials in response to this subpoena.
- 11. Any questions you have relating to the scope or meaning of anything in this subpoena or suggestions for possible modifications thereto should be directed to Sean Gates at (626) 508-1717, sgates@charislex.com. The response to the subpoena shall be addressed to the attention of Sean Gates, 16 N. Marengo Ave., Suite 300, Pasadena, CA 91101, and delivered between 8:30 a.m. and 5:00 p.m. on any business day on or before December 2, 2016.

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Subpoena *Duces Tecum* is complete and correct to the best of my knowledge and belief.

(Signature of Official)

(Title/Company)

(Typed Name of Above Official)

(Office Telephone)

EXHIBIT B

Contacts alleged attempts to limit other companies' advertisements from appearing in response to queries containing 1-800 Contacts' trademarks.

3. Google objects to 1-800 Contacts' Subpoena to the extent it seeks documents that are protected by the attorney-client privilege, work product doctrine, the common interest privilege, and other applicable privileges, immunities, and duties of confidentiality belonging to Google. To the extent that any production of documents or information is made, any inadvertent production of privileged documents or information in response to the Subpoena is not intended to constitute a waiver of any applicable privilege or protection. Google demands that 1-800 Contacts, its agents, and attorneys notify Google's undersigned counsel of the production of any such documents or information immediately upon discovery of such documents, and return such documents to undersigned counsel upon request.
4. Google objects to 1-800 Contacts' Subpoena on the grounds that it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information.
5. Google objects to 1-800 Contacts' Subpoena to the extent it seeks documents and/or data that are the confidential and proprietary information of another third party or the subject of non-disclosure agreements and/or confidentiality agreements with third parties.
6. Google objects to 1-800 Contacts' Subpoena to the extent it seeks documents and/or data protected by rights to privacy.

7. Google objects to 1-800 Contacts' Subpoena to the extent that it purports to require the production of documents that are not in its possession, custody, or control and/or documents or information that are no longer in existence.
8. Google objects to 1-800 Contacts' Subpoena to the extent it seeks information already produced by Google in this action.
9. Google objects to 1-800 Contacts' Subpoena to the extent that the discovery sought by any Request is unreasonably cumulative or duplicative or is obtainable from another source that is more convenient, less burdensome, and/or less expensive.
10. Google objects to 1-800 Contacts' Subpoena to the extent that it is vague, ambiguous, confusing, and contrary to the plain meaning of the terms involved.
11. Google objects to 1-800 Contacts' Subpoena on the grounds that they are not limited to a reasonable time period.
12. Google objects to 1-800 Contacts' Subpoena to the extent that it seeks information concerning "all documents" or the like on the basis that providing a response to such Requests would be unduly burdensome.
13. Google objects to 1-800 Contacts' Subpoena to the extent it purports to impose a duty on Google to undertake a search for information beyond a reasonably diligent search of its files where information responsive to the Requests would reasonably be expected to be found.

SPECIFIC OBJECTIONS AND RESPONSES

REQUEST NO. 1:

According to available active auction data, provide data sufficient to identify each person that has ever:

- a. had their bid for one or more of the following keywords in Adwords cause their advertisement to appear on a search engine results page;
- b. without bidding directly on any of these terms, had an advertisement appear on the search engine results page for any query containing the following keywords in Adwords;

1 800 contacts

1 800 contact

1 800contacts

1 800contact

1800contacts

1800contact

1800 contacts

1800 contact

1-800 contacts

1-800 contact

1800.contacts

1-800-contacts

1800contacs

1800 contacs

1.800 contacts

1 8000 contacts

800 contacts

800.contacts

800contacts

1800contacts.com

www .1800contacts.com

www .1800contacts.net

www .1800contacts.org

RESPONSE TO REQUEST NO. 1:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it is overly broad and unduly burdensome. Moreover, Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case. Google also objects to this Request to the extent it seeks information already produced by Google in this action. Google also objects to this Request as vague and ambiguous in its use of the term “active auction data.” Finally, Google objects to this Request to the extent it seeks documents and/or data that are the confidential and proprietary information of another third party or the subject of non-disclosure agreements and/or confidentiality agreements with third parties.

Subject to and without waiving its Specific and General Objections to this Request, Google has produced responsive, non-privileged information within its possession, custody, or control and located after a reasonably diligent search.

REQUEST NO. 2:

Provide available active auction data sufficient to identify each person that has ever had their bid for one or more of the following keywords in Adwords cause their advertisement to appear on a search engine results page;

AC Lens

Lens.com

LensCrafters

Vision Direct

contact lens
contact lenses
buy contacts online
Acuvue Oasys
TruEye
Air Optics
Optix
Aqua
Comfort
Dailies
Total
Biotrue
Softens
Pure Vision
Biofinity
Pro clear

RESPONSE TO REQUEST NO. 2:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it is overly broad and unduly burdensome. Moreover, Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case, and Google objects to this Request as vague and ambiguous in its use of the terms “Aqua,” “Comfort,” “Dailies,” “Total,” and “active auction data.” Google also objects to this Request to the extent it seeks information already produced by Google in this action. Finally, Google objects to this Request to the extent it seeks documents and/or data that are the confidential and proprietary information of another

third party or the subject of non-disclosure agreements and/or confidentiality agreements with third parties.

Subject to and without waiving its Specific and General Objections to this Request, Google has produced responsive, non-privileged information within its possession, custody or control and located after a reasonably diligent search.

REQUEST NO. 3:

Provide available auction data sufficient to identify whether any of the following persons has ever bid on any of the terms listed in Request No. 1 in any Adwords auction. This data may be provided in Request No. 1, in which case it need not be provided again.

1-800 Contacts

2weekdisposables

Alcon

America's Best

Arlington Contact Lens Service, d/b/a AC Lens

Bausch & Lomb

BJ's

Clearly Contacts

Coastal Contacts

Contact Lens

King Contacts

Direct

Cooper Vision

Costco

Daysoft Contact Lenses

Empire Vision, d/b/a ECCA

EZ Contacts USA, d/b/a Provision Supply

Johnson & Johnson, d/b/a Vistakon
Luxottica, d/b/a LensCrafters, d/b/a Pearle Vision, d/b/a
Sears Optical, d/b/a Target Optical
Lens.com
Lensdirect
Lens Discounters
Lenspure
Price Smart Contacts
Major Lens
Memorial Eye, d/b/a ShipMyContacts.com
Oakwood Eye Clinic, d/b/a Lenses for Less Sam's Club
Save On Lens
Standard Optical
Tram Data, d/b/a Replace My Contacts, d/b/a Lensfast
Vision Direct, d/b/a Lensworld
Walgreens
Walmart
Web Eye Care

RESPONSE TO REQUEST NO. 3:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it is overly broad and unduly burdensome. Moreover, Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case, and Google objects to this Request as vague and ambiguous in its use of the terms “Contact Lens,” “King Contacts,” “Direct,” and “auction data.” Google also objects to this Request as unreasonably cumulative or

duplicative to the extent the Request calls for the same information as Request No. 1, and Google objects to this Request to the extent it seeks information already produced by Google in this action. Finally, Google objects to this Request to the extent it seeks documents and/or data that are the confidential and proprietary information of another third party or the subject of non-disclosure agreements and/or confidentiality agreements with third parties.

Subject to and without waiving its Specific and General Objections to this Request, Google has produced responsive, non-privileged information within its possession, custody, or control and located after a reasonably diligent search.

REQUEST NO. 4:

For each person listed in Request No.3 or identified in your response to Request No. 1, provide data sufficient to show each search engine advertising campaign (except advertising campaigns that do not involve advertisements for contact lenses) in use during the Request Period. For each such campaign provide the following data. The data may be aggregated by up to one week, but for no greater period.

- a. Bidding entity;
- b. Campaign identifier;
- c. Campaign type and sub-type;
- d. Campaign start date;
- e. Campaign end date
- f. Location;
- g. Language;
- h. Campaign type;
- i. Bid strategy;
- j. Manually set CPC (if applicable);
- k. Daily maximum budget;
- l. Keywords used; and
- k. Negative keywords used.

RESPONSE TO REQUEST NO. 4:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it is overly broad and unduly burdensome. Moreover, Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case. Google also objects to this Request to the extent it seeks information already produced by Google in this action. Finally, Google objects to this Request to the extent it seeks documents and/or data that are the confidential and proprietary information of another third party or the subject of non-disclosure agreements and/or confidentiality agreements with third parties.

Subject to and without waiving its Specific and General Objections to this Request, Google has produced responsive, non-privileged information within its possession, custody, or control and located after a reasonably diligent search.

REQUEST NO. 5:

For each campaign identified in Request No.4, provide data sufficient to show:

- a. how frequently the bidding entity served fewer advertisements due to budget constraints;
- b. how frequently the bidding entity stopped serving advertisements due to budget constraints;
- c. documents sufficient to show all applicable policies or algorithms employed by You to adjust bids, prices, or payments due to a bidding entity's budget constraints.

RESPONSE TO REQUEST NO. 5:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity, and/or any other applicable privilege or immunity. Moreover, Google objects

to this Request to the extent it is overly broad and unduly burdensome. Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case, and Google objects to this Request as vague and ambiguous in its use of the term “budget constraints.” Google also objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information. Google objects to this Request to the extent that it seeks information outside of Google's possession, custody, or control and to the extent that this Request seeks information that may be obtained from another source that is more convenient, less burdensome, and/or less expensive. Google also objects to this Request to the extent it seeks information already produced by Google in this action. Finally, Google objects to this Request to the extent it seeks documents and/or data that are the confidential and proprietary information of another third party or the subject of non-disclosure agreements and/or confidentiality agreements with third parties.

Subject to and without waiving its Specific and General Objections to this Request, Google has produced or is producing responsive, non-privileged information within its possession, custody, or control and located after a reasonably diligent search.

REQUEST NO. 6:

For each Keyword in Appendix A, provide the following data regarding the Keyword, related auctions, and related advertisements in the Relevant Period. The data may be aggregated by up to one week, but for no greater period. The data should be reported in the aggregate and separately for each entity listed in Request No.3. The data should also be reported separately by type of device on which the search was conducted, e.g., mobile phone, tablet, computer. Data for each entity listed in Request No. 3 should include data regarding bidding or advertising by that entity's Affiliates.

- a. Date or date and time bid;
- b. Geographic region;
- c. Bidding entity;
- d. Visible URL;
- e. Keyword;
- f. Keyword Match Type (e.g., exact match, phrase match, broad match, broad match modifier, content match);
- g. Campaign;
- h. Campaign type;
- i. Campaign sub-type;
- j. Ad group;
- k. Status;
- l. Impressions;
- m. Clicks;
- n. Clickthrough rate;
- o. Bid or maximum cost per click;
- p. Cost per click or Cost per action or Cost per impression (and identify which);
- q. Cost USD;
- r. Average ad rank;
- s. Average click position;
- t. Conversion rate where available;
- u. Bounce back rate;
- v. Quality score;
- w. Number of search query auctions;
- x. Conversions;
- y. Revenue (Total Conversion Value);
- z. Cost Per Conversion;
- aa. Assisted Conversions;

- bb. Estimated Cross Device Conversions;
- cc. Impression Share;
- dd. Search Lost IS (rank);
- ee. Search Lost IS (budget);
- ff. Search Exact Match IS;
- gg. Position Above Rate;
- hh. Overlap rate;
- ii. Top of page rate;
- jj. Outranking share;
- kk. Ad Copy with performance metrics;
- ll. Total number of bouncebacks;
- mm. Position; and
- nn. Any additional factors that influence ad ranking and placement.

RESPONSE TO REQUEST NO. 6:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it is overly broad and unduly burdensome. Moreover, Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case, and Google objects to this Request as vague and ambiguous in its use of the terms “regarding,” “related auctions,” and “related advertisements.” Google also objects to this Request to the extent it seeks documents and/or data that are the confidential and proprietary information of another third party or the subject of non-disclosure agreements and/or confidentiality agreements with third parties. Google also objects to this Request to the extent it seeks information already produced by

Google in this action. Finally, Google objects to this Request to the extent that it seeks information outside of Google's possession, custody, or control.

Subject to and without waiving its Specific and General Objections to this Request, Google has produced responsive, non-privileged information within its possession, custody, or control and located after a reasonably diligent search and that is reasonably accessible in the ordinary course of business.

REQUEST NO. 7:

For queries listed in Appendix B, provide data sufficient to identify any bids that led to the inclusion of an advertisement in the resulting auction despite the advertiser not having bid directly on any of the terms in Appendix B ("smart match"). For each such bid, provide the data listed in Request No.6. The data should be reported in the aggregate and separately for each entity listed in Request No.3. The data should also be reported separately by type of device on which the search was conducted, e.g., mobile phone, tablet, computer. Data for each entity listed in Request No.3 should include data regarding bidding or advertising by that entity's Affiliates.

RESPONSE TO REQUEST NO. 7:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence and/or not proportional to the needs of the case. Google objects to this Request as vague and ambiguous in its use of the terms "regarding" and "smart match." Moreover, Google objects to this Request to the extent it seeks documents and/or data that are the confidential and proprietary information of another third party or the subject of non-disclosure agreements and/or confidentiality agreements with third parties. Google also objects to this Request to the extent it seeks information already produced by Google in this action.

REQUEST NO. 8:

For each auction using a Keyword in Appendix A in the Relevant Period, provide the following data for 1000 randomly selected resulting ads per year. The data should also be reported separately by type of device on which the search was conducted, e.g., mobile phone, tablet, computer. Data for each entity listed in Request No. 3 should include data regarding bidding or advertising by that entity's Affiliates.

- a. Date or date and time of bid;
- b. Geographic region;
- c. Bidding entity;
- d. Keyword;
- e. Keyword Match Type (e.g., exact match, phrase match, broad match, broad match modifier, content match)
- f. Campaign;
- g. Campaign type;
- h. Campaign sub-type;
- i. Ad group;
- j. Status;
- k. Impressions;
- l. Position;
- m. Clicks;
- n. Clickthrough rate;
- o. Bid or maximum cost per click;
- p. Cost per click or Cost per action or Cost per impression (and identify which);
- q. Cost USD;
- r. Conversion rate where available;
- s. Bounce back rate;
- t. Quality score;
- u. Total number of bouncebacks.

RESPONSE TO REQUEST NO. 8:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case, and Google objects to this Request as vague and ambiguous in its use of the terms “randomly selected” and “regarding.” Moreover, Google objects to this Request as unreasonably cumulative or duplicative to the extent the Request calls for the same information as Request No. 6. Google also objects to this Request to the extent it seeks documents and/or data that are the confidential and proprietary information of another third party or the subject of non-disclosure agreements and/or confidentiality agreements with third parties. Google also objects to this Request to the extent it seeks information already produced by Google in this action. Finally, Google objects to this Request to the extent that it seeks information outside of Google's possession, custody, or control.

Subject to and without waiving its Specific and General Objections to this Request, Google has produced responsive, non-privileged information within its possession, custody, or control and located after a reasonably diligent search.

REQUEST NO. 9:

For each keyword in Appendix A and query in Appendix B, for the Relevant Period, provide the top five organic search results as well as the following data for each result. The data may be aggregated by up to one week, but for no greater period. The data should also be reported separately by type of device on which the search was conducted, e.g., mobile phone, tablet, computer. The data should also be separated by consumers using ad blocking software and those who did not.

- a. Position;
- b. Impressions;

- c. Clicks;
- d. Click Through Rate;
- e. Conversions;
- f. Conversion rate;
- g. Bounce back rate; and
- h. Total number of bounce backs.

RESPONSE TO REQUEST NO. 9:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it is overly broad and unduly burdensome. Moreover, Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case, and Google objects to this Request as vague and ambiguous in its use of the term “ad blocking software.” Google also objects to this Request to the extent it seeks information already produced by Google in this action. Finally, Google objects to this Request to the extent that it seeks information outside of Google's possession, custody, or control.

Subject to and without waiving its Specific and General Objections to this Request, Google has produced responsive, non-privileged information within its possession, custody, or control and located after a reasonably diligent search, to the extent that Google comprehends the Request, and subject to the following limitations: search data associated with queries is only reasonably accessible for a limited period of time in Google’s systems and top five organic search results can differ for each user due to user location, past searches, and customizations, among other things.

REQUEST NO. 10:

For each entity listed in Request No.3, provide all Negative Keywords designated by each entity and the match type for each keyword (broad, phrase or exact) on a weekly basis for the Relevant Period. The data should be provided separately for each entity listed in Request No.3. The data should reflect each Negative Keyword designated by an entity regardless of whether the entity has designated one or more Negative Keywords on a Campaign or Ad Group basis. Data for each entity listed in Request No.3 should include data regarding Negative Keywords designated by that entity's Affiliates.

RESPONSE TO REQUEST NO. 10:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it is overly broad and unduly burdensome. Moreover, Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case, and Google objects to this Request as vague and ambiguous in its use of the term “regarding.” Google also objects to this Request to the extent it seeks documents and/or data that are the confidential and proprietary information of another third party or the subject of non-disclosure agreements and/or confidentiality agreements with third parties. Finally, Google also objects to this Request to the extent it seeks information already produced by Google in this action.

Subject to and without waiving its Specific and General Objections to this Request, Google has produced responsive, non-privileged information within its possession, custody, or control and located after a reasonably diligent search.

Subject to and without waiving its Specific and General Objections to this Request, Google is willing to produce a list of current keywords and negative keywords for accounts that Google can reasonably locate and that 1-800 Contacts has identified as missing from what has already been produced.

REQUEST NO. 11:

For June and December of each year, provide data sufficient to show all co-occurring words that appear in queries at least 25 times during the month, for any of the following key words: a) 1 800 contacts, b) 1-800 contacts, c) 1800 contacts, d) 1800.contacts, e) 1800contacts.com, and f) www.1800contacts.com.

RESPONSE TO REQUEST NO. 11:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence and/or not proportional to the needs of the case. Google objects to this Request to the extent it is unduly burdensome. Google also objects to this Request to the extent it seeks information already produced by Google in this action.

Subject to and without waiving its Specific and General Objections to this Request, Google has produced responsive, non-privileged information within its possession, custody, or control and located after a reasonably diligent search and that is reasonably accessible in the ordinary course of business.

REQUEST NO. 12:

Provide data sufficient to show a representative sample of the contact lens-related web browsing and web searching behavior of individual users who have entered a search query containing any of the keywords identified in Request No. 1.

RESPONSE TO REQUEST NO. 12:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it is overly broad and unduly burdensome. Moreover, Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case, and Google objects to this

Request as vague and ambiguous in its use of the terms “representative sample,” “contact lens-related,” and “web browsing and web searching behavior.” Google also objects to this Request to the extent it seeks documents and/or data that are the confidential and proprietary information of another third party or the subject of non-disclosure agreements and/or confidentiality agreements with third parties. Finally, Google objects to this Request to the extent it seeks documents and/or data protected by rights to privacy.

REQUEST NO. 13:

Provide a random sample of 1,000 results pages per year that have appeared in response to user searches for the keywords listed in Request No. 1 over the request period. Provide a random sample of 1,000 results pages that have appeared in response to user searches for the following keywords: contacts, contact lens, contact lenses, buy contacts online; over the request period.

RESPONSE TO REQUEST NO. 13:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it is overly broad and unduly burdensome. Moreover, Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case. Google also objects to this Request as vague and ambiguous in its use of the terms “random sample” and “request period.” Finally, Google objects to this Request to the extent it seeks documents and/or data protected by rights to privacy.

REQUEST NO. 14:

Provide a random sample of 1,000 Adwords advertisements per year that have appeared in response to user searches for the keywords listed in Request No. 1 over the request period. Provide a random sample of 1,000 Adwords advertisements per year that have appeared in response to user searches for the following keywords: contacts, contact lens, contact lenses, buy contacts online; over the request period. The data should include the position of each advertisement.

RESPONSE TO REQUEST NO. 14:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it is overly broad and unduly burdensome. Moreover, Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case. Finally, Google objects to this Request as vague and ambiguous in its use of the terms “random sample” and “request period.”

REQUEST NO. 15:

Provide any and all search engine advertising algorithm A/B or side-by-side testing relating to the treatment of searches for or including trademarked terms, including the experiment design, results, recommendation, and any actual changes implemented or decisions made as a result.

RESPONSE TO REQUEST NO. 15:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity, and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case. Google also objects to this Request to the extent it seeks information already produced by Google in this action. Finally, Google objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information.

Subject to and without waiving its Specific and General Objections to this Request, Google has produced responsive, non-privileged documents within its possession, custody, or control and located after a reasonably diligent search.

REQUEST NO. 16:

Provide documents sufficient to show how active auction data is selected and maintained.

RESPONSE TO REQUEST NO. 16:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity, and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case, and Google objects to this Request as vague and ambiguous in its use of the terms “active auction data,” “selected,” and “maintained.” Finally, Google objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information.

Subject to and without waiving its Specific and General Objections to this Request, Google is producing additional responsive, non-privileged documents within its possession, custody or control and located after a reasonably diligent search.

REQUEST NO. 17:

Provide documents sufficient to show the methodology, including any algorithm, by which You determine (or determined during the Relevant Period) the price that any advertiser pays for a Click.

RESPONSE TO REQUEST NO. 17:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity, and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case. Finally, Google objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information.

Subject to and without waiving its Specific and General Objections to this Request, Google is producing additional responsive, non-privileged documents within its possession, custody, or control and located after a reasonably diligent search.

REQUEST NO. 18:

Provide documents sufficient to show the methodology, including any algorithm, by which You determine the results or outcome of any auction or bidding process for paid search advertising.

RESPONSE TO REQUEST NO. 18:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity, and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence,

and/or not proportional to the needs of the case. Finally, Google objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information.

Subject to and without waiving its Specific and General Objections to this Request, Google is producing additional responsive, non-privileged documents within its possession, custody, or control and located after a reasonably diligent search.

REQUEST NO. 19:

Provide documents sufficient to show the methodology, including any algorithm, by which You determine an advertisement's Quality Score.

RESPONSE TO REQUEST NO. 19:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity, and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case. Finally, Google objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information.

Subject to and without waiving its Specific and General Objections to this Request, Google is producing additional responsive, non-privileged documents within its possession, custody, or control and located after a reasonably diligent search.

REQUEST NO. 20:

Provide documents sufficient to show the methodology, including any algorithm, by which You determine the ranking, location, and overall layout of the results page for a paid search advertisement. Provide documents separately by type of device on which the search was conducted, e.g., mobile phone, tablet, computer.

RESPONSE TO REQUEST NO. 20:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case. Finally, Google objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information.

Subject to and without waiving its Specific and General Objections to this Request, Google is producing additional responsive, non-privileged documents within its possession, custody, or control and located after a reasonably diligent search.

REQUEST NO. 21:

Provide documents sufficient to show how the methodologies referred to in Requests Nos. 17, 18, 19 and 20, including any algorithms, have changed during the Relevant Period.

RESPONSE TO REQUEST NO. 21:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case. Finally, Google objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information.

REQUEST NO. 22:

Provide documents sufficient to show the reasons why You changed or modified any of the methodologies referred to in Requests Nos. 17, 18, 19 and 20, including any algorithms during the Relevant Period.

RESPONSE TO REQUEST NO. 22:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity, and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case. Finally, Google objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other

confidential business and commercial information of Google, including commercially and/or competitively sensitive information.

REQUEST NO. 23:

Provide all documents Relating to any studies, tests, analyses, or reports regarding consumer confusion in connection with paid search advertising.

RESPONSE TO REQUEST NO. 23:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity, and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case, and Google objects to this Request as vague and ambiguous in its use of the term “relating to” and in its scope. Google further objects to this Request as unreasonably cumulative or duplicative to the extent the Request calls for the same information as Request No. 24. Google objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information. Google also objects to this Request to the extent it seeks information already produced by Google in this action. Finally, Google objects to this Request to the extent that it seeks information outside of Google's possession, custody, or control.

Subject to and without waiving its Specific and General Objections to this Request, Google has produced responsive, non-privileged documents within its possession, custody, or control and located after a reasonably diligent search.

REQUEST NO. 24:

Provide all documents Relating to any studies, tests, analyses, or reports regarding Keywords consisting of or including a trademarked term.

RESPONSE TO REQUEST NO. 24:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity, and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case, and Google objects to this Request as vague and ambiguous in its use of the terms “regarding” and “relating to,” and in its scope. Further, Google objects to this Request as unreasonably cumulative or duplicative to the extent the Request calls for the same information as Request No. 23. Google also objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information. Google also objects to this Request to the extent it seeks information already produced by Google in this action. Finally, Google objects to this Request to the extent that it seeks information outside of Google's possession, custody, or control.

Subject to and without waiving its Specific and General Objections to this Request, Google has produced responsive, non-privileged documents within its possession, custody, or control and located after a reasonably diligent search.

REQUEST NO. 25:

Provide all documents Relating to Your policies Relating to Keywords consisting of or including a trademarked term, including any actual or contemplated changes to such policies.

RESPONSE TO REQUEST NO. 25:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity, and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case, and Google objects to this Request as vague and ambiguous in its use of the term “relating to.” Google also objects to this Request to the extent it seeks information already produced by Google in this action. Further, Google objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information. Finally, Google objects to this Request to the extent that it seeks information outside of Google's possession, custody or control.

Subject to and without waiving its Specific and General Objections to this Request, Google has produced responsive, non-privileged documents within its possession, custody, or control and located after a reasonably diligent search.

REQUEST NO. 26:

Provide all documents Relating to any studies, tests, analyses, or reports regarding any actual or proposed changes in the formatting, design, arrangement, location, or display of paid search advertisements on any Search Engine.

RESPONSE TO REQUEST NO. 26:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity, and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence and/or not proportional to the needs of the case, and Google objects to this Request as vague and ambiguous in its use of the terms “regarding” and “relating to,” and its scope. Google further objects to this Request as unreasonably cumulative or duplicative to the extent the Request calls for the same information as Request No. 23. Google objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information. Google also objects to this Request to the extent it seeks information already produced by Google in this action. Finally, Google objects to this Request to the extent that it seeks information outside of Google's possession, custody, or control.

REQUEST NO. 27:

Provide all settlement agreements Relating to or resolving claims for trademark infringement, trademark dilution, unfair competition or unjust enrichment Relating to Keywords consisting of or including a trademarked term.

RESPONSE TO REQUEST NO. 27:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity, settlement privilege, and/or any other applicable privilege or immunity.

Google objects to this Request to the extent it seeks documents protected by duties of

confidentiality belonging to Google. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case. Google further objects to this Request as unreasonably cumulative or duplicative to the extent the Request calls for the same information as Request No. 28. Google also objects to this Request to the extent that it seeks information outside of Google's possession, custody, or control, and Google objects to this Request to the extent that it seeks information that may be obtained from another source that is more convenient, less burdensome, and/or less expensive. Google also objects to this Request to the extent it seeks documents and/or data that are the confidential and proprietary information of another third party or the subject of non-disclosure agreements and/or confidentiality agreements with third parties. Finally, Google objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information.

REQUEST NO. 28:

Provide all agreements to which You or an affiliated entity are a party and which limit or restrict your willingness or ability to accept bids from persons other than the owner of a trademark or trademarked term for Keywords consisting of or including a trademarked term.

RESPONSE TO REQUEST NO. 28:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity, and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any

party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case, and Google objects to this Request as vague and ambiguous in its use of the phrase “restrict your willingness or ability to accept bids.” Google further objects to this Request as unreasonably cumulative or duplicative to the extent the Request calls for the same information as Request No. 27. Google objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information. Google also objects to this Request to the extent it seeks documents and/or data that are the confidential and proprietary information of another third party or the subject of non-disclosure agreements and/or confidentiality agreements with third parties. Finally, Google objects to this Request to the extent that it seeks information outside of Google's possession, custody or control, and Google objects to this Request to the extent that it seeks information that may be obtained from another source that is more convenient, less burdensome, and/or less expensive.

REQUEST NO. 29:

Provide all documents produced in any litigation or arbitration Relating to claims for trademark infringement, trademark dilution, unfair competition or unjust enrichment Relating to Keywords consisting of or including a trademarked term, including any expert reports disclosed and transcripts of testimony taken in such litigation or arbitration.

RESPONSE TO REQUEST NO. 29:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any

party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case. Google objects to this Request as vague and ambiguous in its use of the term “relating to,” and in its scope. Google also objects to this Request to the extent it seeks information already produced by Google in this action. Finally, Google objects to this Request to the extent that it seeks information outside of Google's possession, custody, or control, and Google objects to this Request to the extent that it seeks information that may be obtained from another source that is more convenient, less burdensome and/or less expensive, or that may be obtained from public sources.

Subject to and without waiving its Specific and General Objections to this Request, Google has produced responsive, non-privileged documents within its possession, custody, or control and located after a reasonably diligent search.

Subject to and without waiving its Specific and General Objections to this Request, Google is willing to produce additional responsive, non-privileged documents within its possession, custody, or control and located after a reasonably diligent search, subject to limitations resulting from the length of time that has passed since certain litigations began and concluded, including that Google does not in the ordinary course maintain litigation documents in its records from concluded litigations after a certain amount of time. Subject to and without waiving its Specific and General Objections to this Request, Google also is willing to produce responsive, non-privileged documents in the possession, custody, or control of its former outside counsel to the extent those documents can be located after a reasonably diligent search.

REQUEST NO. 30:

For each Keyword listed in Appendix A and query in Appendix B, provide the total number of searches conducted for that Keyword or query by month during the Relevant Period.

RESPONSE TO REQUEST NO. 30:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it is overly broad and unduly burdensome. Moreover, Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case. Google also objects to this Request to the extent it seeks information already produced by Google in this action. Finally, Google objects to this Request to the extent it seeks documents and/or data protected by rights to privacy.

Subject to and without waiving its Specific and General Objections to this Request, Google is willing to provide the number of times each query appeared in the United States subject to the date limitations in the relevant Google systems and to the extent that it can do so while protecting the privacy of its users.

REQUEST NO. 31:

Provide all Documents produced to the Commission in any investigation or enforcement matter Relating to paid search advertising.

RESPONSE TO REQUEST NO. 31:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity, and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case, and Google objects to this Request as vague and

ambiguous in its use of the terms “relating to” and “paid search advertising,” and its scope. Google further objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information. Finally, Google objects to this Request to the extent that it seeks information outside of Google's possession, custody, or control, and Google objects to this Request to the extent that it seeks information that may be obtained from another source that is more convenient, less burdensome, and/or less expensive, or that may be obtained from public sources.

REQUEST NO. 32:

Provide any policies regarding minimum prices for any auction or bidding process for paid search advertising and any methodology, including any algorithm, by which any such minimum price is or was determined during the Relevant Period.

RESPONSE TO REQUEST NO. 32:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it seeks information protected by the attorney-client privilege, work product immunity, and/or any other applicable privilege or immunity. Moreover, Google objects to this Request to the extent it is overly broad and unduly burdensome. Google also objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case. Google also objects to this Request as vague and ambiguous in its use of the term “regarding.” Further, Google objects to this Request to the extent it seeks information or documents that constitute, contain, or refer to trade secrets or other confidential business and commercial information of Google, including commercially and/or competitively sensitive information. Google also objects to this Request to the extent it seeks

information already produced by Google in this action. Finally, Google objects to this Request to the extent that it seeks information outside of Google's possession, custody, or control.

Subject to and without waiving its Specific and General Objections to this Request, Google is producing additional responsive, non-privileged documents within its possession, custody, or control and located after a reasonably diligent search.

REQUEST NO. 33:

For each Keyword in Appendix A and query in Appendix B, provide all minimum prices for any auction or bidding process for paid search advertising and the dates on which such a minimum price was in effect during the Relevant Period.

RESPONSE TO REQUEST NO. 33:

In addition to and in express reliance on the General Objections set forth above, Google objects to this Request to the extent it is overly broad and unduly burdensome. Moreover, Google objects to this Request to the extent it seeks information that is not relevant to any claim or defense of any party in this action, not reasonably calculated to lead to the discovery of admissible evidence, and/or not proportional to the needs of the case.

Dated: December 2, 2016

Respectfully submitted,

By Counsel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on December 2, 2016, I have caused a copy of the foregoing to be served by electronic mail upon the following counsel of record:

Sean Gates
Charis Lex P.C.
16 N. Marengo Ave., Suite 300
Pasadena, CA 91101
(626) 508-1717

Dated: December 2, 2016

/s/ John D. Harkrider

EXHIBIT C
(*IN CAMERA*)
REDACTED IN ENTIRETY

EXHIBIT D

**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 RESPONSES AND OBJECTIONS TO RESPONDENT’S
FIRST SET OF INTERROGATORIES (1-14)**

Pursuant to Section 3.35(b) of the Federal Trade Commission’s Rules of Practice, Complaint Counsel hereby responds to Respondent 1-800 Contacts, Inc.’s (“1-800 Contacts”) First Set of Interrogatories (“Respondent’s Interrogatories”). Subject to the General and Specific Objections below, and without waiving these objections, Complaint Counsel answers as follows:

GENERAL OBJECTIONS

The following General Objections apply to all of Respondent’s Interrogatories and are hereby incorporated by reference into each of the following responses. The assertion of the same, similar, or additional objections or the provision of partial answers in response to an individual interrogatory does not waive any of Complaint Counsel’s general objections as to the other interrogatories.

1. Complaint Counsel notes that Respondent’s Interrogatories 3, 9, 11, 12, and 14 each consists of at least two separate and distinct subparts, and that Respondent’s First Set of Interrogatories, including all separate and distinct subparts, therefore total 19 interrogatories. Complaint counsel reserves the right to object to additional interrogatories served by

Respondent to the extent the interrogatories exceed the 25 interrogatories allowed under Rule 3.35(a) of the Commission's Rules of Practice for Adjudicative Proceedings and in Paragraph 11 of the September 7, 2016, Scheduling Order.

2. Complaint Counsel objects to Respondent's Interrogatories to the extent the interrogatories are directed to the Federal Trade Commission rather than to Complaint Counsel.
3. Complaint Counsel objects to Respondent's Interrogatories to the extent they seek to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel's responses will comply with the Commission's Rules of Practice for Adjudicative Proceedings.
4. Complaint Counsel objects to Respondent's Interrogatories to the extent they seek information that relates to expert testimony prior to the dates prescribed by the September 7, 2016, Scheduling Order.
5. Complaint Counsel objects to Respondent's Interrogatories to the extent the interrogatories seek information protected by deliberative process privilege, law enforcement investigative privilege, informant's privilege, or the attorney work product doctrine. Complaint Counsel does not, by any response to any Request, waive or partially waive any applicable privilege or attorney work-product claim.
6. Complaint Counsel objects to Respondent's Interrogatories to the extent the interrogatories purport to require Complaint Counsel to conduct a search beyond that required by Rule 3.31(c)(2) or Rule 3.35(a)(1).
7. Complaint Counsel objects to Respondent's Interrogatories to the extent they are overly broad, vague, ambiguous, unduly burdensome, oppressive, and are not reasonably calculated

to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of Respondent.

8. Complaint Counsel objects to Respondent's Interrogatories to the extent the interrogatories call for information previously provided to Respondent or for information that may be less onerously obtained through other means.
9. Complaint Counsel objects to Respondent's Interrogatories as overly broad, unduly burdensome and oppressive in that they ask Complaint Counsel to disclose information that is already in Respondent's possession or control, or is a matter of public record.
10. Complaint Counsel objects to each interrogatory to the extent that it seeks information for which the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.
11. Complaint Counsel objects to Respondent's Interrogatories to the extent that, as framed, they purport to obligate Complaint Counsel to conduct an extensive and complete investigation of detailed facts within the thirty (30) days allotted for its responses and objections when such facts are known to Respondent and/or contained in thousands of pages of documents already produced by Respondent.
12. Complaint Counsel reserves all of its evidentiary objections or other objections to the introduction or use of any response herein at the hearing in this action, and does not, by any response to any Request, waive any objection to that Request, stated or unstated.
13. Complaint Counsel has not completed its investigation of the facts relating to this case, its formal discovery or its preparation for trial. Complaint Counsel reserves the right to assert additional objections to Respondent's Interrogatories, and to amend or supplement these objections and responses as necessary after the close of discovery.

SPECIFIC OBJECTIONS AND RESPONSES

Subject to the foregoing, Complaint Counsel provides the following responses to Respondent's First Set of Interrogatories:

Interrogatory No. 1

Identify each of the “[l]ess restrictive alternatives” that was “available to 1-800 Contacts to safeguard any legitimate interest the company may have under trademark law,” as alleged in Paragraph 32 of the Complaint.

Response to Interrogatory No. 1

In addition to its General Objections, Complaint Counsel specifically objects to this interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to the interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Subject to, and without waiving, these objections, the “less restrictive alternatives” that were “available to 1-800 Contacts to safeguard any legitimate interest the company may have under trademark laws” would include redressing the purportedly confusing text of the challenged advertisement rather than prohibiting the display of search advertising altogether.

Interrogatory No. 2

Identify each fact known to Complaint Counsel that supports the allegation in Paragraph 31 of the Complaint that Respondent's conduct “had the purpose, capacity, tendency, and likely effect of restraining competition unreasonably and injuring consumers and others.”

Response to Interrogatory No. 2

In addition to its General Objections, Complaint Counsel specifically objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 3

Identify each instance in which competition has actually been restrained as a result of any conduct challenged in the Complaint (including but not limited to being restrained in any manner alleged in Paragraph 31 of the Complaint) and, for each such instance, Identify each Communication that describes, evidences, or comprises that restraint.

Response to Interrogatory No. 3

Complaint Counsel notes that, while Respondent categorizes this interrogatory as Interrogatory No. 3, it actually constitutes Respondent's third and fourth interrogatories, as this interrogatory contains at least two discrete subparts, by seeking the identification of: (1) each instance in which competition has actually been restrained as a result of any conduct challenged in the Complaint; and (2) for each instance in which competition has actually been restrained, each Communication that describes, evidences, or comprises that restraint.

In addition to its General Objections, Complaint Counsel specifically objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Counsel Complaint Counsel further objects to this interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel

also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Interrogatory No. 4

Identify each Communication that evidences or comprises 1-800 Contacts “aggressively polic[ing] the Bidding Agreements” as alleged in Paragraph 25 of the Complaint.

Response to Interrogatory No. 4

Complaint Counsel notes that, while Respondent categorizes this interrogatory as Interrogatory No. 4, it constitutes Respondent’s fifth interrogatory.

In addition to its General Objections, Complaint Counsel specifically objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Subject to, and without waiving, these objections, Communications that evidence or comprise 1-800 Contacts “aggressively polic[ing] the Bidding Agreements” include Communications between 1-800 Contacts and each Settlement Partner that relate to each Bidding Agreement. These Communications include, but are not limited to, the following:

1. Cease-and-desist letters and related correspondence sent by 1-800 Contacts to Settlement Partners, after entering into Bidding Agreements, whose advertisements

continued to appear on a search engine results page in response to a user query containing the term “1-800 Contacts” or variations thereof. These Communications include, but are not limited to: FTC-0000008; FTC-0000042; FTC-0000044; 1-800F_000045184; 1-800F_000045450; 1-800F_000045478; 1-800F_000045650; 1-800F_000047079; 1-800F_00020366; 1-800F_00020376; 1-800F_00020842; 1-800F_00020957; 1-800F_00021201; 1-800F_00024242; 1-800F_00027916; 1-800F_00045152; 1-800F_00047468; 1-800F_00047469; 1-800F_00072173; 1-800F_00076189.

2. Communications described by Investigational Hearing testimony from 1-800 Contacts employees, including, but not limited to: Brian Bethers (Bethers Tr. 128:12-133:10; 209:15-221:6); Jonathan Coon (Coon Tr. 300:9-304:18); Bryce Craven (Craven Tr. 130:18-131:20; 135:19-136:21; 137:20-139:20; 165:25-181:23); Brandon Dansie (Dansie Tr. 176:18-177:1; 187:23-191:16; 192:18-194:18); Amy Larson (Larson Tr. 144:15-145:14); Brady Roundy (Roundy Tr. 37:20-40:9; 42:14-44:13; 109:24-115:16; 122:16-124:18; 126:15-129:21; 171:21-172:22); Laura Schmidt (Schmidt Tr. 146:13-147:1; 157:10-159:10; 273:5-280:19); David Zeidner (Zeidner, D., Tr. 123:10-19; 177:15-179:3; 206:19-208:9); and Joseph Zeidner (Zeidner, J., Tr. 153:15-154:11; 177:13-183:2; 186:17-196:9; 247:4-248:7; 253:12-259:3).
3. Communications described by Investigational Hearing testimony from third parties, including, but not limited to: Peter Clarkson of Arlington Contact Lens Service, Inc. (“AC Lens”) (Clarkson Tr. 86:22-87:2; 94:24-97:8; 99:18-100:17; 132:17-23; 145:11-19; 151:3-154:4); and Glen Hamilton of Vision Direct, Inc. (“Vision Direct”) (Hamilton Tr. 48:4-49:22; 71:21-72:18).

4. Communications described by the Declaration of Jared Duley, Visionworks of America, Inc. (“Visionworks”) (FTC-PROD-0007422, at ¶¶ 9, 14-15).

Interrogatory No. 5

Identify each Communication that evidences or comprises “1-800 Contacts act[ing] without regard to whether the advertisements [of its rivals] were likely to cause consumer confusion or infringed 1-800 Contacts’ trademarks,” as alleged in Paragraph 27 of the Complaint.

Response to Interrogatory No. 5

Complaint Counsel notes that, while Respondent categorizes this interrogatory as Interrogatory No. 5, it constitutes Respondent’s sixth interrogatory.

In addition to its General Objections, Complaint Counsel specifically objects to this interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Subject to, and without waiving, these objections, Communications that evidence or comprise “1-800 Contacts act[ing] without regard to whether the advertisements [of its rivals] were likely to cause consumer confusion or infringed 1-800 Contacts’ trademarks” include Communications between 1-800 Contacts and each Settlement Partner that relate to each Bidding Agreement. These Communications include, but are not limited to, the following:

1. Cease-and-desist letters and related correspondence sent by 1-800 Contacts to rivals whose advertisements appeared on a search engine results page in response to a user query containing the term “1-800 Contacts” or variations thereof. These

Communications include, but are not limited to: FTC-0000008; FTC-0000042; FTC-0000044; 1-800F_000045139; 1-800F_000045184; 1-800F_000045450; 1-800F_000045478; 1-800F_000045650; 1-800F_000047079; 1-800F_00011417; 1-800F_00020366; 1-800F_00020376; 1-800F_00020408; 1-800F_00020544; 1-800F_00020842; 1-800F_00020893; 1-800F_00020957; 1-800F_00021201; 1-800F_00023620; 1-800F_00023644; 1-800F_00024242; 1-800F_00024267; 1-800F_00027916; 1-800F_00028435; 1-800F_00037438; 1-800F_00045152; 1-800F_00047468; 1-800F_00047469; 1-800F_00072173; 1-800F_00076189; FTC-LensDirect-00000001.

2. Complaints filed by 1-800 Contacts against rivals whose advertisements appeared on a search engine results page in response to a user query containing the term “1-800 Contacts” or variations thereof. These rivals include: AC Lens; Coastal Contacts, Inc. (“Coastal”); Contact Lens King, Inc. (“Contact Lens King”); Empire Vision Center, Inc. (“Empire Vision”); Lenses For Less, Inc. (“Lenses For Less”); Lensfast, LLC (“Lensfast”); Lens.com, Inc. (“Lens.com”); Memorial Eye P.A. (“Memorial Eye”); Provision Supply, LLC d/b/a EZ ContactsUSA.com (“EZ Contacts”); Standard Optical Company (“Standard Optical”); Tram Data, LLC d/b/a ReplaceMyContacts.com (“Replace My Contacts”); Vision Direct; Walgreen Co. (“Walgreens”); and Web Eye Care.
3. Bidding Agreements entered into by 1-800 Contacts and at least 14 rivals, including, but not limited to: AC Lens; Coastal; Contact Lens King; Empire Vision; Lenses For Less; Lensfast; Luxottica; Memorial Eye; EZ Contacts; Standard Optical; Replace My Contacts; Vision Direct; Walgreens; and Web Eye Care.

4. Communications described by Investigational Hearing testimony from 1-800 Contacts employees, including, but not limited to: Brian Bethers (Bethers Tr. 116:7-117:18; 118:23-121:20; 122:6-123:9; 128:12-133:10; 136:21-137:14; 139:8-142:18; 209:15-219:2; 221:2-6; 227:17-234:18); Jonathan Coon (Coon Tr. 296:4-304:18); Bryce Craven (Craven Tr. 130:18-131:20; 135:19-136:21; 137:20-139:20; 165:25-181:23); Brandon Dansie (Dansie Tr. 176:18-177:1; 187:23-191:16; 192:18-194:18); Amy Larson (Larson Tr. 144:15-145:14); Brady Roundy (Roundy Tr. 37:20-40:9; 42:14-44:13; 109:24-115:16; 117:25-121:18; 122:16-124:18; 126:15-129:21; 171:21-172:22); Laura Schmidt (Schmidt Tr. 146:13-147:1; 157:10-159:10; 273:5-280:19); David Zeidner (Zeidner, D., Tr. 113:5-119:1; 123:10-19; 177:15-179:3; 206:19-208:9; 215:18-222:19; 246:4-251:2; 251:23-263:7; 264:12-271:13; 281:19-283:13); and Joseph Zeidner (Zeidner, J., Tr. 129:9-134:10; 143:2-145:3; 147:1-152:12; 153:15-154:11; 161:23-163:14; 174:25-175:7; 177:13-183:2; 186:17-196:9; 196:12-199:6; 207:1-209:11; 219:14-225:5; 226:12-229:10; 230:8-232:15; 234:22-236:23; 237:12-239:21; 241:9-23; 247:4-248:7; 253:12-259:3; 260:5-264:8; 264:21-269:2).
5. Communications described by Investigational Hearing testimony from third parties, including, but not limited to: Peter Batushansky of Web Eye Care (Batushansky Tr. 73:13-78:1; 80:18-81:25; 93:5-94:2); Peter Clarkson of AC Lens (Clarkson Tr. 86:22-87:2; 94:24-97:8; 99:18-100:17; 101:25-103:12; 109:10-110:1; 128:4-14; 132:17-23; 145:11-19; 151:3-154:4); and Glen Hamilton of Vision Direct (Hamilton Tr. 48:4-49:22; 71:21-72:18).
6. Communications described by the Declaration of Jared Duley, Visionworks (FTC-PROD-0007422, at ¶¶ 9, 14-15).

Interrogatory No. 6

State whether Complaint Counsel contend that any Lawsuit or cease-and-desist letters by Respondent constituted or threatened “sham” litigation as defined by the Supreme Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

Response to Interrogatory No. 6

Complaint Counsel notes that, while Respondent categorizes this interrogatory as Interrogatory No. 6, it constitutes Respondent’s seventh interrogatory.

In addition to its General Objections, Complaint Counsel specifically objects to this interrogatory as irrelevant and not reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to Respondent’s defenses. Complaint Counsel further objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent.

Subject to, and without waiving, these objections, Complaint Counsel states that it takes no position on whether any Lawsuit or cease-and-desist letters by Respondent constituted or threatened “sham” litigation as defined by the Supreme Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), as this issue is not relevant to the Complaint in this matter.

Interrogatory No. 7

Identify each Person other than the Commission and Respondent who used as a Keyword a term on which 1-800 Contacts owned a trademark for a purpose other than navigating to a website of 1-800 Contacts.

Response to Interrogatory No. 7

Complaint Counsel notes that, while Respondent categorizes this interrogatory as Interrogatory No. 7, it constitutes Respondent’s eighth interrogatory.

In addition to its General Objections, Complaint Counsel specifically objects to the phrases “used as a Keyword” and “navigating to” as vague and ambiguous. Complaint Counsel further objects to this interrogatory because Respondent has not identified the terms on which Respondent claims a trademark. To the extent that this interrogatory asks Complaint Counsel to identify particular consumers who entered a search query on an internet search engine that consisted of, or contained, a term on which 1-800 Contacts owns a trademark, Complaint Counsel objects to this interrogatory because it seeks information that is not in possession, custody, or control of Complaint Counsel, and is beyond the scope of information that Complaint Counsel is required to provide pursuant to Rule 3.31(c)(2). Complaint Counsel further objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case.

Interrogatory No. 8

Identify each Person who presently would use as a Keyword a term on which 1-800 Contacts owns a trademark, but who is restrained by an agreement with 1-800 Contacts from doing so.

Response to Interrogatory No. 8

Complaint Counsel notes that, while Respondent categorizes this interrogatory as Interrogatory No. 8, it constitutes Respondent’s ninth interrogatory.

In addition to its General Objections, Complaint Counsel specifically objects to the phrase “use as a Keyword” as vague and ambiguous. Complaint Counsel further objects to this interrogatory because Respondent has not identified the terms on which Respondent claims a trademark. Complaint Counsel also objects to this interrogatory as unduly burdensome to the

extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature and unduly burdensome because discovery regarding this issue is ongoing. Complaint Counsel will supplement its answer, as appropriate, after the close of discovery.

Subject to, and without waiving, these objections, Persons who might presently advertise on a search engine results page in response to a user query containing a term on which 1-800 Contacts owns a trademark, but who are restrained from so doing by an agreement with 1-800 Contacts, include each of the rivals currently restrained by a Bidding Agreement.

Interrogatory No. 9

Identify each Person, other than 1-800 Contacts, who presently uses as a Keyword a term on which 1-800 Contacts owns a trademark or who presents paid ads or sponsored links in response to a Keyword on which 1-800 Contacts owns a trademark.

Response to Interrogatory No. 9

Complaint Counsel notes that, while Respondent categorizes this interrogatory as Interrogatory No. 9, it actually constitutes Respondent's tenth and eleventh interrogatories, as this interrogatory contains at least two discrete subparts, by seeking the identification of: (1) each Person, other than 1-800 Contacts, who presently uses as a Keyword a term on which 1-800 Contacts owns a trademark; and (2) each Person, other than 1-800 Contacts, who presents paid ads or sponsored links in response to a Keyword on which 1-800 Contacts owns a trademark.

In addition to its General Objections, Complaint Counsel specifically objects to the phrases "uses as a Keyword" and "in response to a Keyword" as vague and ambiguous. Complaint Counsel further objects to this interrogatory because Respondent has not identified the terms on which Respondent claims a trademark. Complaint Counsel also objects to this interrogatory to the extent that it seeks information that is already in Respondent 1-800 Contacts'

possession or control, or is a matter of public record. Complaint Counsel further objects to this interrogatory to the extent that it seeks information that is not in possession, custody, or control of Complaint Counsel, and is beyond the scope of information that Complaint Counsel is required to provide pursuant to Rule 3.31(c)(2). Complaint Counsel also objects to this interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent.

Subject to, and without waiving, these objections, Persons who presently advertise on a search engine results page in response to a user query containing a term on which 1-800 Contacts owns a trademark include other online retailers of contact lenses that are not subject to a Bidding Agreement with 1-800 Contacts. These online retailers include, but are not limited to, Wal-Mart Stores, Inc. (“Walmart”), and Lens Direct.com (“Lens Direct”).

Interrogatory No. 10

Identify the dollar volume of online retail sales in the United States of contact lenses for each Person who is or was an “online seller of contact lenses” at retail for each of the years from 2002 through 2015.

Response to Interrogatory No. 10

Complaint Counsel notes that, while Respondent categorizes this interrogatory as Interrogatory No. 10, it constitutes Respondent’s twelfth interrogatory.

In addition to its General Objections, Complaint Counsel specifically objects to this interrogatory to the extent that it seeks information that is already in Respondent 1-800 Contacts’ possession or control, or is a matter of public record. Complaint Counsel further objects to this interrogatory to the extent that it seeks information that is not in possession, custody, or control of Complaint Counsel, and is beyond the scope of information that Complaint Counsel is required to provide pursuant to Rule 3.31(c)(2). Complaint Counsel also objects to this

interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because discovery regarding this issue is ongoing. Complaint Counsel will supplement its answer, as appropriate, after the close of discovery.

Interrogatory No. 11

Identify the dollar volume of retail sales of contact lenses in the United States, other than online sales of contact lenses, in total and individually by each Person who made such sales, for each of the years 2002 through 2015.

Response to Interrogatory No. 11

Complaint Counsel notes that, while Respondent categorizes this interrogatory as Interrogatory No. 11, it actually constitutes Respondent's thirteenth and fourteenth interrogatories, as this interrogatory contains at least two discrete subparts, by seeking the identification of: (1) the dollar volume of retail sales of contact lenses in the United States, other than online sales of contact lenses, in total, for each of the years 2002 through 2015; and (2) the dollar volume of retail sales of contact lenses in the United States, other than online sales of contact lenses, individually by each Person who made such sales, for each of the years 2002 through 2015.

In addition to its General Objections, Complaint Counsel specifically objects to this interrogatory to the extent that it seeks information that is already in Respondent 1-800 Contacts' possession or control, or is a matter of public record. Complaint Counsel further objects to this interrogatory to the extent that it seeks information that is not in possession, custody, or control

of Complaint Counsel, and is beyond the scope of information that Complaint Counsel is required to provide pursuant to Rule 3.31(c)(2). Complaint Counsel also objects to this interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because discovery regarding this issue is ongoing. Complaint Counsel will supplement its answer, as appropriate, after the close of discovery.

Interrogatory No. 12

Identify each Person at 1-800 Contacts who “recognized that [1-800 Contacts] was losing sales to lower-priced online competitors” and who then “devised a plan to avoid” lowering its prices to compete with its rivals, as alleged in Paragraph 16 of the Complaint.

Response to Interrogatory No. 12

Complaint Counsel notes that, while Respondent categorizes this interrogatory as Interrogatory No. 12, it actually constitutes Respondent’s fifteenth and sixteenth interrogatories, as this interrogatory contains at least two discrete subparts, by seeking the identification of: (1) each Person at 1-800 Contacts who “recognized that [1-800 Contacts] was losing sales to lower-priced online competitors”; and (2) each Person at 1-800 Contacts who “devised a plan to avoid” lowering 1-800 Contacts’ prices to compete with its rivals.

In addition to its General Objections, Complaint Counsel specifically objects to this interrogatory to the extent that it seeks information that is already in Respondent 1-800 Contacts’ possession or control. Complaint Counsel further objects to this interrogatory to the extent that it seeks information that is not in possession, custody, or control of Complaint Counsel, and is

beyond the scope of information that Complaint Counsel is required to provide pursuant to Rule 3.31(c)(2). Complaint Counsel also objects to this interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel further objects to this interrogatory as premature to the extent it seeks information relating to issues that may be the subject of expert testimony in this case. Complaint Counsel also objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Subject to, and without waiving, these objections, Persons who “recognized that [1-800 Contacts] was losing sales to lower-priced online competitors” include 1-800 Contacts and any relevant officers or employees of 1-800 Contacts. These officers or employees include, but are not limited to, the following:

1. Josh Aston
2. Brian Bethers
3. Joan Blackwood
4. Jonathan Coon
5. Kevin McCallum
6. Clinton Schmidt

Persons who “devised a plan to avoid” lowering 1-800 Contacts’ prices to compete with its rivals, and/or implemented that plan, include 1-800 Contacts and any relevant officers or employees of 1-800 Contacts. These officers or employees include, but are not limited to, the following:

1. Josh Aston
2. Brian Bethers
3. Joan Blackwood
4. Jonathan Coon
5. Bryce Craven
6. Brandon Dansie
7. Rick Galan
8. Jordan Judd
9. Amy Larson
10. Kevin McCallum
11. Tim Rousch
12. Clinton Schmidt
13. Laura Schmidt
14. David Zeidner
15. Joseph Zeidner

Interrogatory No. 13

Identify each action taken in furtherance of the “plan” alleged in Paragraph 16 of the Complaint.

Response to Interrogatory No. 13

Complaint Counsel notes that, while Respondent categorizes this interrogatory as Interrogatory No. 13, it constitutes Respondent’s seventeenth interrogatory.

In addition to its General Objections, Complaint Counsel specifically objects to this interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel

further objects to this interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, after the close of discovery, as set forth in Rule 3.35(b)(2).

Subject to, and without waiving, these objections, “actions” taken in furtherance of the “plan” alleged in Paragraph 16 of the Complaint include, but are not limited to, the following:

1. Sending cease-and-desist letters and related correspondence to rivals whose advertisements appeared on a search engine results page in response to a user query containing the term “1-800 Contacts” or variations thereof. These rivals include AC Lens; Coastal; Contact Lens King; Empire Vision; Lens Direct; Lens Discounters; Lenses For Less; Lensfast; Luxottica; Memorial Eye; EZ Contacts; Standard Optical; Replace My Contacts; Vision Direct; Walgreens; and Web Eye Care.
2. Filing complaints against rivals whose advertisements appeared on a search engine results page in response to a user query containing the term “1-800 Contacts” or variations thereof. These rivals include AC Lens; Coastal; Contact Lens King; Empire Vision; Lenses For Less; Lensfast; Lens.com; Memorial Eye; EZ Contacts; Standard Optical; Replace My Contacts; Vision Direct; Walgreens; and Web Eye Care.
3. Entering into at least 14 Bidding Agreements with rivals, including, but not limited to: AC Lens; Coastal; Contact Lens King; Empire Vision; Lenses For Less; Lensfast; Luxottica; Memorial Eye; EZ Contacts; Standard Optical; Replace My Contacts; Vision Direct; Walgreens; and Web Eye Care.
4. Policing and enforcing at least 14 Bidding Agreements against rivals, including, but not limited to: AC Lens; Coastal; Contact Lens King; Empire Vision; Lenses For Less;

Lensfast; Luxottica; Memorial Eye; EZ Contacts; Standard Optical; Replace My Contacts; Vision Direct; Walgreens; and Web Eye Care.

5. Rivals of 1-800 Contacts are, in their advertising programs and policies, implementing the terms of at least 14 Bidding Agreements.
6. 1-800 Contacts is, in its advertising programs and policies, implementing the terms of at least 14 Bidding Agreements.

Interrogatory No. 14

Identify each Settlement Agreement to which Respondent is not a Settlement Partner and, for each such Settlement Agreement, identify each Settlement Partner.

Response to Interrogatory No. 14

Complaint Counsel notes that, while Respondent categorizes this interrogatory as Interrogatory No. 14, it actually constitutes Respondent's eighteenth and nineteenth interrogatories, as this interrogatory contains at least two discrete subparts, by seeking the identification of: (1) each Settlement Agreement to which Respondent is not a Settlement Partner; and (2) each Settlement Partner for each such Settlement Agreement.

In addition to its General Objections, Complaint Counsel specifically objects to this interrogatory to the extent that it seeks information that is not in possession, custody, or control of Complaint Counsel, and is beyond the scope of information that Complaint Counsel is required to provide pursuant to Rule 3.31(c)(2). Counsel Complaint Counsel further objects to the interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent.

Subject to, and without waiving, these objections, Complaint Counsel is not, at this time, aware of any Settlement Agreements relating to contact lenses to which Respondent is not a

Settlement Partner. Therefore, Complaint Counsel is not in a position to identify “each Settlement Partner” for “each such Settlement Agreement.”

I state under penalty of perjury that the above Complaint Counsel’s Objections and Responses to Respondent 1-800 Contacts’ First Set of Interrogatories was prepared and assembled under my supervision, and that the information contained herein is, to the best of my knowledge, true and correct.

Dated: October 11, 2016

Respectfully submitted,

s/ Daniel Matheson

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2017, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

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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

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

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Counsel for Respondent 1-
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Dated: January 7, 2017

Respectfully submitted,

/s/ Sean Gates

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CERTIFICATE OF 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: January 7, 2017

Respectfully submitted,

/s/ Sean Gates

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