

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



ORIGINAL

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

DOCKET NO. 9372

COMPLAINT COUNSEL'S CORRECTED POST-TRIAL BRIEF AND EXHIBITS

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I. INTRODUCTION

For more than a decade, 1-800 Contacts, Inc. (“1-800 Contacts”) has relentlessly pursued competing online sellers of contact lenses with threats and lawsuits to prevent them from displaying certain informative, valuable search advertisements. Through these efforts, 1-800 Contacts extracted from at least 14 rivals, comprising “all of [its] major competitors,”¹ agreements not to bid in online search advertising auctions for the right to display any advertisement triggered by 1-800 Contacts’ trademarks (the “Bidding Agreements”).

The question in this case is whether 1-800 Contacts shall be permitted to continue to enforce these facially anticompetitive Bidding Agreements, or whether these restraints shall be set aside.

The purpose and effect of the Bidding Agreements is (i) to suppress competition from lower-price rivals for sales;² and (ii) to reduce the advertising fees paid by 1-800 Contacts and received by search engines, because in search advertising auctions, “low competition = low cost.”³

This much is not seriously disputed: Eliminating the Bidding Agreements will result in *more* advertising, *more* clicks for rival sellers of contact lenses, and consumers purchasing contact lenses at *lower prices*. Fundamental antitrust economics teaches that, over time, this makes the marketplace for contact lenses more efficient and more competitive. In this case, the basic economics is confirmed by ample record evidence. The direct evidence that the Bidding

¹ CCXD0032 (Bethers Radio Interview, Oct. 18, 2016); Bethers, Tr. 3724.

² Craven, Tr. 538-539 (discussing CX0855 at 001).

³ CX0296 at 035; Bethers, Tr. 3786-3787, *in camera*.

Agreements harm competition and consumers includes two detailed economic models; testimony from 1-800 Contacts' hobbled rivals; and 1-800 Contacts' contemporaneous, ordinary-course business documents.

1-800 Contacts fails to undermine Complaint Counsel's *prima facie* showing of competitive harm with any meaningful contrary evidence or alternative economic models. Indeed, 1-800 Contacts' response to Complaint Counsel's evidence consists of little more than a naked assertion that the competitive harm inflicted by the Bidding Agreements is "limited."

Nor does 1-800 Contacts advance any plausible or cognizable efficiencies to rebut Complaint Counsel's *prima facie* showing of harm. The Bidding Agreements cannot be justified as protecting 1-800 Contacts' trademark rights, because the Bidding Agreements restrict rivals' bids for, and display of, confusing *and* non-confusing search advertising alike. The law is clear that rivals of a trademark owner are free to bid for trademark keywords and to place competitive advertising on the search results page, provided that the *content* of the advertisement is not itself confusing within the meaning of trademark law (*i.e.*, not confusing as to source, affiliation or sponsorship). 1-800 Contacts' Bidding Agreements are thus impermissibly overbroad, as the only court to contemplate such an agreement recognized:

[1-800 Contacts] does not seek merely to preclude usage of its trademark. Instead, it wants to obliterate any other competitor advertisement from appearing on a search-results page when a consumer types in '1800Contacts' as a search term or some variation of it. This is disturbing given that broad matching of the generic term 'contacts' could trigger an advertisement if a consumer enters the search term '1800Contacts.' *A trademark right does not grant its owner the right to stamp out every competitor advertisement.*

1-800 Contacts v. Lens.com, 755 F. Supp. 2d 1151, 1188 (D. Utah 2010) (emphasis added).

1-800 Contacts' non-trademark defenses are equally unavailing. 1-800 Contacts cannot justify its Bidding Agreements on the basis that trademark keyword advertising benefits its "unworthy" rivals (who have not invested in television advertising), and decreases the company's incentive to continue to "invest in its brand." An identical "free-riding" defense was rejected as a matter of law by the Commission and by the D.C. Circuit in *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). Likewise, 1-800 Contacts' erroneous assertion that the elimination of competitors' advertising "de-clutters" search engine results pages or allows consumers to satisfy their "navigational intent" is non-cognizable. Anticompetitive collusion cannot be justified by a claim that a group of competitors thereby "improved" a third party's service (*e.g.*, the Google search engine results page).

In sum, 1-800 Contacts' Bidding Agreements with at least 14 rivals that reciprocally restrain *all* trademark keyword advertising are anticompetitive, and must be reformed. The Court should enter Complaint Counsel's proposed Order, which would void 1-800 Contacts' anticompetitive agreements and prohibit similar agreements in the future, but permit 1-800 Contacts to enter into agreements that address the confusing *content* of any particular advertisement.

II. FACTUAL BACKGROUND: INDUSTRY AND CHALLENGED RESTRAINTS

A. Industry Background

1. Overview of the Contact Lens Industry

a. Contact Lenses Are a “Commodity” Product

Approximately 40 million Americans wear contact lenses.⁴ After obtaining a prescription from an eye care professional (“ECP”),⁵ the consumer is shopping for a “commodity” product:⁶ the prescription specifies not only the strength of the lens, but also the brand and product line (which affects the fit and suitability of the lens).⁷ Thus, once a prescription is written, there is no opportunity for a retailer to sell the customer some other brand or type of contact lenses.⁸

b. Channels of Distribution

Contact lenses are distributed through four channels. First, consumers can buy from their ECPs. ECPs are generally the most expensive sellers,⁹ and the bulk of these sales are made during patient visits.¹⁰ ECPs may be divided into two sub-groups: (1) Independent ECPs

⁴ CX0429 at 028.

⁵ Joint Stipulations of Jurisdiction, Law and Facts (“JX0001”) at 001 (¶ 4). An ECP is an ophthalmologist or optometrist who prescribes contact lenses. ECPs typically both prescribe the product and offer it for sale to their patients. Clarkson, Tr. 188-189.

⁶ Clarkson, Tr. 202-203; Alovio, Tr. 994; Athey, Tr. 746-748.

⁷ Clarkson, Tr. 293.

⁸ Holbrook, Tr. 1880-1883; CX9029 (Bethers, Dep. at 022-023) (“We sell a commodity . . . a consumer can only buy one product. They have no ability to buy a different product.”).

⁹ Clarkson, Tr. 189-190 (“historically we have thought of eye doctors as being 25-plus percent higher”); Coon, Tr. 2709-2710 (“doctors . . . have generally higher prices and relatively poor service”) (describing CX0201 at 030); Bethers, Tr. 3544-3545.

¹⁰ CX0547 at 036

, *in camera*.

(“IECPs”), which are independent retail locations associated with an ECP’s office, and which collectively operate thousands of locations across the country, and (2) retail optical chains, such as Luxottica, which provide ECPs on location.¹¹ IECPs account for roughly 40 percent of all contact lens sales; while Luxottica accounts for an additional 10 percent.¹²

Second, some general merchandise retailers, such as Walmart, or membership clubs, such as Costco,¹³ either employ or have other relationships with ECPs that allow them to sell contact lenses in their brick-and-mortar stores.¹⁴ These general merchandise retailers tend to price below IECPs and retail optical chains, although – with the exception of membership clubs – they are usually more expensive than online sellers.¹⁵

¹¹ Bethers, Tr. 3509-3511, 3520-3521.

¹² CX0201 at 017 (2012 presentation estimates that “[i]ndependent doctors” make 40 percent of all sales and Luxottica makes an additional 10 percent of all sales); CX0439 at 009, *in camera* (2015 analysis estimates that [REDACTED]).

¹³ CX0201 at 017 (2012 presentation estimates that Walmart makes 10 percent of all sales and that Costco makes 4 percent of all sales).

¹⁴ Murphy, Tr. 4096-4097 (“mass merchandisers,” like national chains, “typically have an eyecare professional. They’ll have a place that they can write prescriptions and they can sell both contacts as well as do eye exams.”).

¹⁵ Clarkson, Tr. 189-190; Bethers, Tr. 3544-3545 (identifying “mass merchandisers” Walmart, Target, Sears, J.C. Penney as higher priced than “the other pure-play online contact lens sellers [other than 1-800 Contacts]”); CX9037 (Owens, Dep. at 014, 023) (identifying Target, Sears, JC Penney as brick-and-mortar sellers with higher prices than “the online competitors”). Membership clubs, such as Costco, tend to price at a level comparable to (or even below) online options, but they require an annual membership to shop, and engaged in little or no price advertising. *See, e.g.*, CX9017 (Blackwood, Dep. at 288) (“So Costco, BJ’s, [there are] other pricing strategies where they are actually paying to belong to that club. Part of the pricing comes from the membership fee. . . .”); CX9034 (Roush, Dep. at 156) (“[O]ur price matching has typically excluded clubs as a policy. And the reason for that is pretty simple, and that is that there’s a fee, a membership fee that’s associated with clubs, and so you have to pay that fee.”); *id.* at 151-152; *id.* at 155-157; CX8004 at 001-002 (¶¶ 2-3, 8) (Salas, Decl.) (Costco operates a “membership club model,” and aims to be “the low-cost seller”); *id.* at 002 (¶ 7) (Salas, Decl.) (Costco does not use internet search advertising to promote contact lens sales).

Third, some brick-and-mortar retailers, including Walmart, offer customers the option of purchasing either online or in-store.¹⁶ Walmart has focused primarily on customers in its physical stores,¹⁷ and sells at the same price over the internet as in its brick-and-mortar locations.¹⁸

Fourth, “pure-play” online retailers sell only online.¹⁹ These sellers appeal to customers who value convenience and low prices.²⁰

c. Online Sales of Contact Lenses

Online sales, including online storefronts operated by brick-and-mortar retailers, account for about 20 percent of all contact lens sales.²¹ Online purchasing allows consumers to purchase refills without the need for an additional visit to an IECF or brick-and-mortar retailer, and pure-play online merchants usually offer the lowest prices for contact lenses.²²

¹⁶ CX9037 (Owens, Dep. at 020) (“[W]e have in-store purchasing, but we also have the online purchasing available to our customers as well.”).

¹⁷ CX9033 (Mohan, Dep. at 095-096) (online sales are “just an added service for our store customer base”).

¹⁸ CX9037 (Owens, Dep. at 026-027).

¹⁹ This category also includes retailers that have brick-and-mortar stores, but only sell contact lenses online (*i.e.*, they do not sell contact lenses in their brick-and-mortar stores), such as Walgreens. CX9038 (Hamilton, Dep. at 011).

²⁰ *See, e.g.*, Holbrook, Tr. 1889 (“online customers are looking primarily for low price and quick delivery”); CX9003 (Clarkson, IHT at 017-018) (characterizing the category of online contacts retailers as having a combination of the best service, convenience, and relatively low pricing compared to ECPs and most other retail channels).

²¹ CX8006 at 022 (¶ 53) (Evans Expert Report) (online accounts for 20 percent of all sales); RX0739 at 087 (Ex. 3) (Murphy Expert Report) (sales of pure play online retailers, excluding online sales made by retailers with a brick-and-mortar presence, are around [REDACTED] of sales in 2015), *in camera*; CX0439 at 009 (2015 analysis estimates that online sales account for [REDACTED] of all contact lens sales in 2015), *in camera*.

²² CX8006 at 017-018 (¶ 50, 53) (Evans Expert Report). *See, e.g.*, Bethers, Tr. 3536-3537, 3544-3545 (noting that the only cheaper place to buy contact lenses would be membership clubs if the customer is a member); Clarkson, Tr. 189-190; Holbrook, Tr. 1888 (Memorial Eye’s small chain of brick-and-mortar stores priced contact lenses “quite a bit higher” than its national pure-play online storefront); *id.* at 1889 (“online customers are looking primarily for low price and quick delivery”; “low price is a substantial part of what goes into them making a decision as to where they buy”).

1-800 Contacts is the exception. While 1-800 Contacts prices below traditional IECPs, its price is on average higher than that of other online merchants, often by a substantial amount.²³

For example, a 2015 analysis shows that 1-800 Contacts' net prices were { [REDACTED] } than IECPs and { [REDACTED] } LensCrafters, but higher than those of its { [REDACTED] }.²⁴ The price differential between 1-800 Contacts and its online competitors has persisted over time. For example, an internal 1-800 Contacts analysis shows that the gross prices of 1-800 Contacts' three major online rivals were { [REDACTED] } in 2006, while { [REDACTED] } by 2011.²⁵ 1-800 Contacts' customers are generally unaware of this price gap, and generally believe that 1-800 Contacts' prices are comparable to those of other pure-play online retailers.²⁶ This information deficit contributes to 1-800 Contacts' ability to charge a price premium.²⁷

²³ Bethers, Tr. 3544-3545; Murphy, Tr. 4119 (“There was a brand premium in this case; that is, typically we saw 1-800's prices higher than many of the pure-play online sellers.”); CX0439 at 036 (2015 staff update reports that { [REDACTED] } *in camera*; Alovio, Tr. 989 (“sometimes [1-800 Contacts is] selling something 20 percent over what [Lens Direct is] selling, sometimes even more. It's usually a wow factor when people look at our price point versus 1-800 Contacts,”); Holbrook, Tr. 1901 (“[Memorial Eye's] prices were typically quite a bit less” than 1-800 Contacts' prices); CX8003 at 001 (¶ 4) (Mitha, Decl.) (“In general, 1-800 Contacts' prices are higher than Lens Discounters' by a significant amount. In the past, we have found that 1-800 Contacts' prices were almost double Lens Discounters' prices for some products.”); Athey, Tr. 741 (“I concluded that there was a price premium.”).

²⁴ RX1228 at 036, *in camera* ({ [REDACTED] }). Likewise, a 2014 analysis of pricing showed that based on a subset of high-volume products, 1-800 Contacts prices were { [REDACTED] } than eye doctors for an annual supply and **{ 9 percent lower }** for a 6-month supply than IECPs { [REDACTED] }, but that its { [REDACTED] }, CX0549 at 063, *in camera*. See also Athey, Tr. 822-824 (discussing CCXD0003 at 076).

²⁵ CX0547 at 032, *in camera*. Expert analysis of current pricing confirms this price differential. Athey, Tr. 821-823 (discussing CCXD0003 at 075); CX8007 at 045 (Ex. D-1) (Athey Expert Report) (calculating price differences between 1-800 Contacts and its major online rivals).

²⁶ CX0439 at 036, *in camera* ({ [REDACTED] }); CX0547 at 034, *in camera* ({ [REDACTED] }); CX1449 at 057, 148, *in camera*

1-800 Contacts is the largest internet seller of contact lenses in the United States, with annual sales in 2015 of approximately \$460 million.²⁸ 1-800 Contacts has approximately 54 percent of the market for online contact lens sales, nearly [REDACTED] of its next-largest rival.²⁹ The other major online retailers are listed in Exhibit A, attached.

2. Overview of Search Advertising

a. Search Engines and the Search Engine Results Page (“SERP”)

Consumers utilize search engines to access the vast amount of information on the internet. Search engines employ sophisticated algorithms to identify websites likely to be relevant to consumer’s request for information, referred to as a “search query.”³⁰ Search engines rank websites based on the predicted likelihood of their relevance, displaying the websites on a search engine results page (“SERP”) to the consumer in response to her query.³¹ Critically, all of this complex activity occurs rapidly and automatically, without any direct human intervention.³²

[REDACTED]; CX8006 at 085 (¶ 189 & n.197-200) (Evans Expert Report). Indeed, evidence indicates that a substantial portion of customers selected 1-800 Contacts because they were not aware of any other online contact lens retailers. CX1109 at 039 (34.7 percent of customers chose 1-800 Contacts because “[i]t was the only online contacts site of which I was aware”).

²⁷ Athey, Tr. 756-758, 797-798; *see id.* at 730-733, 737-741; CX8007 at 019 (¶¶ 51-73) (Athey Expert Report) (explaining how Professor Athey “concluded that the Agreements reduce consumer information and sustain a price premium for 1-800 Contacts.”). *See also* CX8006 at 011, 085 (¶¶ 24, 188-190) (Evans Expert Report).

²⁸ JX0001 at 002 (¶ 6).

²⁹ CX8006 at 022-023 (¶ 54 Table 1) (Evans Expert Report).

³⁰ Joint Stipulation on Search Engine (“JX0003”) (¶¶ 1, 4).

³¹ JX0003 (¶¶ 4-5).

³² JX0003 (¶ 6).

Google is the largest search engine in the United States by a significant amount, in terms of both query share (64 percent as of February 2016)³³ and search advertising revenues (82 percent as of the second quarter of 2015).³⁴

Microsoft's Bing is the second largest search engine in the United States, with approximately 21 percent of the query share as of February 2016.³⁵ In addition, Bing generates organic search results, and provides some advertising results, for Yahoo!'s search engine,³⁶ which had approximately 12 percent query share as of February 2016.³⁷

Search engines provide information (search results) to consumers for free, obtaining revenue from advertisers.³⁸ A SERP displays "natural" or "organic" search results. In addition, when advertisements meet criteria indicating that they are likely relevant to the search query, a SERP also displays "sponsored listings" or "ads," which may appear at the top and/or the bottom

³³ *comScore Releases February 2016 U.S. Desktop Search Engine Rankings* (Mar. 16, 2016) ("2016 comScore Search Engine Rankings"), <https://www.comscore.com/Insights/Rankings/comScore-Releases-February-2016-US-Desktop-Search-Engine-Rankings> ("*comScore Feb. 2016 Search Engine Rankings*").

³⁴ Evans, Tr. 1373-1374; CX 8006 at 024 (¶ 56) (Evans Expert Report).

³⁵ 2016 comScore Search Engine Rankings.

³⁶ "In February 2016, 64.0 percent of searches carried organic search results from Google . . . while 31.9 percent of searches were powered by Bing." *comScore Feb. 2016 Search Engine Rankings*. See also *Microsoft Corporation and Yahoo! Inc.*, (Dep't of Justice, Feb. 18, 2010) (statement on decision to close investigation), <https://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-its-decision-close-its-investigation-internet>) (dealing with agreement between Microsoft and Yahoo for Yahoo to show Bing search results and advertisements on its search engine); *Microsoft and Yahoo seal web deal*, BBC News (July 29, 2009), <http://news.bbc.co.uk/2/hi/business/8174763.stm>. Although the Bing search engine provides Yahoo! websites with results, Yahoo! controls the layout of the SERP displayed on those websites, which is different from the Bing layout.

³⁷ 2016 comScore Search Engine Rankings.

³⁸ Juda, Tr. 1065. For many search queries, ads do not appear on the page. However, for queries that are interpreted by the search engine as "commercial" in nature, e.g., shopping queries, advertisements almost always appear. Juda, Tr. 1080-1081.

of the SERP.³⁹ Attached as Exhibit B is a screen shot of a typical SERP, in response to a search for “contact lenses,” taken from the Google search engine on March 24, 2017.⁴⁰

Search engines must balance the interests of at least two groups: **consumers** (users) and **advertisers**. On the one hand, search engines need to attract advertisers to bring in revenues. On the other hand, search engines need to attract consumers; otherwise, they will not attract advertisers.⁴¹ Search engines generally operate on a “cost-per-click” model, which means that they get paid by the advertiser only if a consumer *clicks* on an advertisement.⁴² This means that they must pair advertisers with consumers who actually find the ads relevant: a consumer will only click on an ad if she finds it relevant or helpful to her search query; and an advertiser will only advertise on the search engine if it can get its products in front of potential customers who may be interested in the products it offers. Search engines thus have an incentive to ensure that consumers are getting what they want (relevant content) without undesirable clutter that might degrade the user experience, and that advertisers are getting what they want (potential customers).⁴³

Search engines continuously attempt to improve their algorithms using enormous volumes of data on consumer behavior. For example, Google continuously evaluates consumers’ responses to SERPs to identify which links consumers click on after entering search queries, as

³⁹ Up until February 2016, Google also displayed advertisements on the right-hand side of the SERP. CX9019 (Juda, Dep. at 183).

⁴⁰ This screen shot was first used in Complaint Counsel’s Pretrial Brief, submitted to the Court on March 27, 2017.

⁴¹ See RX0612A at 004; CX9019 (Juda, Dep. at 126-130), *in camera*.

⁴² Juda, Tr. 1068.

⁴³ See RX0612A at 0004-0006 (Varian Transcript); Juda, Tr. 1072, 1084.

well as other information relating to consumer behavior, such as how long the consumer stays on the “landing page” (the website to which the consumer is taken after clicking on the link).⁴⁴ In effect, consumers are continuously “voting” with their clicks on what is useful to them and what is not, and Google is continuously reacting to those votes, revising its SERP accordingly. Thus, for example, using the SERP in Ex. B, if consumers tend to click on the *third* organic link (for the retailer Lens Direct), Google learns that consumers who type in the query “contact lenses” tend to be interested in retailers of contact lenses (and in particular, Lens Direct). Eventually, that link will migrate toward the top of the SERP, as other links drop down, or off the SERP altogether.⁴⁵ Google evaluates ads in the same fashion. When consumers are not clicking on a particular ad, Google learns that that ad is not relevant to consumers, and that ad will be demoted or eliminated from the SERP altogether.⁴⁶ Through such processes, Google and other search engines attempt to generate SERPs relevant to consumer queries by analyzing how other consumers have behaved in response to similar SERPs constructed in response to similar search queries.⁴⁷

b. Search Advertising Auction Model

Bidding on Keywords. Advertisers indicate their interest in displaying ads against various search queries by “bidding” on keywords in an auction. For example, a bid on the keyword “contact lenses” instructs Google that the advertiser wishes to display an advertisement

⁴⁴ Google also has human reviewers who are constantly analyzing relevance and quality, and feeding that information back into the system. CX9019 (Juda, Dep. at 113-114).

⁴⁵ See RX0612A at 0010 (Varian Transcript); Juda, Tr. 1077.

⁴⁶ See Juda, Tr. 1103, *in camera*.

⁴⁷ See RX0612A at 0006 (Varian Transcript) at 6; Juda, Tr. 1098, *in camera*.

to any consumer who types a query into Google relating to contact lenses, such as “where to buy contact lenses,” “are contacts right for me,” or “Acuvue Oasys” (a brand of contact lenses).

When a consumer searches for “contact lenses,” Google takes all of the advertisers’ bids on keywords relating to contact lenses and determines which ads to display based on the amount each advertiser has bid, combined with Google’s own determination of the relevance of each ad to the query entered by the consumer. Significantly, an advertiser deemed more “relevant” by Google actually pays *less* per click than a less relevant advertiser in the same spot on the SERP.⁴⁸

Keyword Matching. Bidding on keywords and running (often massive) search advertising campaigns is a complex business. The advertiser must decide what keywords are relevant to its products, as well as how much to bid in any particular auction. Google assists advertisers in determining where, when, and how to display their advertisements by offering different types of keyword matching, which provides the advertiser with great flexibility in choosing how – and when – the keywords it bids on will result in ads being displayed on the SERP.⁴⁹

Google’s default setting enters keywords in “broad match,” which essentially allows Google to serve as an agent to the advertiser. Google brings its own algorithms and expertise to bear to determine whether a particular advertisement is relevant to a specific search query, regardless of the exact keyword on which the advertiser bid.⁵⁰ Recall the example of an advertiser bidding on the keyword “contact lenses.” Under the “broad match” scenario, Google

⁴⁸ See RX0612A at 0010-0011 (Varian transcript).

⁴⁹ Juda, Tr. 1082, *in camera*.

⁵⁰ *Id.* at 1124; CX9019 (Juda Dep. at 76-77), *in camera*.

may determine that a retailer that bids on the term “contact lenses” would also be relevant to a search for “Acuvue Oasys” (a brand of contact lenses), and as such, enter the advertiser into an auction for this search query, even if the advertiser has *not bid* on the term “Acuvue Oasys.”⁵¹

Negative Keywords. Advertisers can also instruct Google *not* to display their ads in response to certain search queries. They do this by using “negative” keywords. Typically, negative keywords are used to prevent advertisements from being displayed in response to search queries that are associated with negative connotations that the advertiser would prefer to avoid. For example, a contact lens retailer might specify “eye infection” as a negative keyword phrase to ensure that its ad does not surface in response to a search query for “contact lens eye infection.”⁵²

⁵¹ See generally CX9019 (Juda, Dep. at 73-75), *in camera* (explaining match types); *id.* at 76-77, *in camera* (explaining broad match). If an advertiser wants more control over the bidding process, the advertiser might choose “**phrase match**,” which means that Google will only enter the advertiser into an auction if the exact keyword on which the advertiser bid appears *as part* of a search query entered by the consumer. For example, going back to the advertiser bidding on the keyword “contact lenses,” the advertiser’s ad would not appear against a search query for “Acuvue Oasys” (where the advertiser had not bid on the term “Acuvue Oasys”) but *could* appear in response to a query for “where to buy contact lenses,” because the term “contact lenses” is part of the search string entered by the consumer, and the advertiser has specifically bid on that term.

If the advertiser wants complete control over the bidding process, the advertiser may choose “**exact match**,” which is the most restrictive form of bidding. In this type of matching process, Google will only enter the advertiser into an auction if the exact keyword on which the advertiser bid appears as *the exact* search query typed in by the consumer (or a very close variation thereof). Going back to the advertiser who bid on the term “contact lenses,” under “exact match,” the advertiser’s ad would *not* be entered into an auction for the search query “where to buy contact lenses,” because, although the search query *includes* the keyword bid on by the advertiser, it is *not* an “exact match” for the advertiser’s keyword. In this scenario, the advertiser’s ad will *only* appear in response to searches specifically for the exact query “contact lenses” (or a close misspelling of “contact lenses”).

⁵² Negative keywords can also be applied in exact, phrase, or broad match types. As with bidding, an **exact match** negative keyword will preclude an advertiser’s ad from being displayed only in response to a search query that *exactly* matches the advertiser’s negative keyword or keyword phrase. Thus, if a contact lens retailer enters “eye infection” as an “exact match” negative keyword, its ad will not appear in response to a search query that exactly matches “eye infection,” but *might* appear in response to a search query for “contact lens eye infection,” because that search query includes additional terms. To prevent its ads from appearing in relation to *any* search query with the phrase “eye infection” in it, the advertiser would have to enter “eye infection” as a **phrase match** negative keyword, which ensures that no search query with the phrase “eye infection” – including the search query “contact lens eye infection” – will return one of its ads. Still, if a consumer enters the search query “contact lenses infection

c. Unique Value of Search Advertising to Online Advertisers

Search advertising is uniquely valuable to advertisers because it puts an advertisement in front of a consumer at the precise moment the consumer is signaling (through a search query) her interest in a product: it is literally the *right* ad, for the *right* user, at the *right* time.⁵³ Search advertising is especially valuable to firms that sell products online. Online contact lens retailers uniformly testified that search advertising was “essential” and “critical” to their business success, and that they devoted significant resources to it.⁵⁴ 1-800 Contacts is no exception. Between 2004 and 2014, 1-800 Contacts spent over { [REDACTED] } on internet advertising, a significant portion of which was for internet search advertising.⁵⁵

of the eye,” the advertiser’s ad *may* be displayed because the consumer did not enter the phrase in order selected by the advertiser. To prevent this, Google also offers a **broad** match negative keyword option, which prevent ads from being displayed if the words in the negative keyword phrase are used in any order. *See generally* CX9019 (Juda, Dep. at 81-82), *in camera*.

⁵³ Evans, Tr. 1705-1706 (“There’s a difference between people receiving information at some point in time and people receiving information right before the point in time at which they’re going to make an actual purchase, so the context in which people obtain information and the immediacy of it really, really matters. So the . . . awareness, if there is, of the existence of competitors is different than an ad on a 1-800 query where, at the point in time the consumer is thinking about purchasing, [he] sees an ad from a competitor that not only provides information immediately but enables that person to click on the ad and make a purchase.”).

⁵⁴ *See, e.g.*, CX9039 (Clarkson, Dep. at 112) (AC Lens markets almost exclusively through direct channels like search and affiliates); Holbrook, Tr. 1903 (Memorial Eye marketed almost exclusively through search advertising for its online business because “that was the best way to attract new customers. Online search advertising was the most efficient, the most practical way to attract new customers.”); *id.* at 1903 (search advertising was “critical to [Memorial Eye’s] growth”); CX8002 at 003 (¶¶ 8-9) (Hamilton (Vision Direct), Decl.) (“online paid search advertising has been a major driver in building Vision Direct’s business over the years”; “online paid search advertising is a very important tool for acquiring new online customers, and is an essential tool to a company that wants to become a significant online seller of contact lenses”); CX8003 at 002 (¶ 6) (Mitha, Decl.) (paid search advertising is Lens Discounters’ “preferred method of acquiring new customers” and is “essential to our ability to attract new customers”).

⁵⁵ RX0739 at 0092 (Ex. 8) (Murphy Expert Report), *in camera*. *See* CX9034 (Roush, Dep. at 10-14) (in 2016, 1-800 Contacts spent approximately \$6 million on search advertising, compared to roughly \$2 million for online display, less than \$1 million for “social media,” and less than \$1 million for email).

B. Evolution of 1-800 Contacts' Campaign to Restrain Competitors

1. 1-800 Contacts Charges High Prices, Creating a Business Opportunity For Online Competitors

As the internet exploded in the early 2000s, numerous online contact lens sellers emerged.⁵⁶ These online competitors offered considerably lower prices than 1-800 Contacts,⁵⁷ and equivalent service quality.⁵⁸ Search engines – and search advertising more specifically – made the lower-price online retailers more visible to potential customers, and facilitated price comparison.⁵⁹

⁵⁶ See generally CX8006 at 014-016 (¶¶ 33-38) (Evans Expert Report); CX9004 (Coon, IHT at 82-84) (identifying Coastal Contacts and Vision Direct as internet competitors from the early 2000s); CX9003 (Clarkson, IHT at 6-8) (describing founding of AC Lens in 1996); Bethers, Tr. 3650 (identifying Vision Direct, Coastal Contacts, AC Lens, and Lens.com as online competitors in 2004).

⁵⁷ See, e.g., CX9001 (Bethers, IHT at 79-80) (“We always try to keep track of where your prices are, but we were never trying to compete with our online competitors on price. We basically came back and said our online competitors are going to have lower prices than we do.”); CX9003 (Clarkson, IHT at 47-48) (“[W]e feel like we have a very strong price differentiation factor relative to 1-800 Contacts because within the online space, there is different pricing stratification there too, and 1-800 Contacts has historically had the highest price among the online competitors.”); CX9000 (Batushansky, IHT at 65), *in camera* [REDACTED]; Holbrook, Tr. 1901, *in camera* [REDACTED].

⁵⁸ While 1-800 Contacts claims to offer better service than its online rivals, evidence from its online rivals and other industry participants undercut this claim. Clarkson, Tr. 188 (“we think that 1-800 [Contacts] has excellent service and we aspire to a similar level. But we also think Vision Direct and Coastal probably do a pretty good job, too. There’s not a ton of differentiation.”); *id.* 205-209 (discussing CX1109 at 009, Berkshire Investment Partners presentation concluding that 1-800 Contacts offered “insufficiently distinguishable service,” based in part on Net Promoter Score “data aggregated from a variety of sources [that] suggests that while 1-800’s customers are generally highly satisfied, so are customers of AC Lens and Vision Direct.”). See also CX9000 (Batushansky, IHT at 65-66), *in camera* [REDACTED]; CX9024 (Holbrook, Dep. at 12-14) (“[Memorial Eye] spent a lot of time paying attention to the customer service responses. We also had opticians and doctors available on staff to be able to call on if there were any technical questions about contacts. . . . [W]e trained our customer service reps quite a bit. We . . . tried to make sure that they were providing the best customer service possible. As we always responded to any issues immediately and we just felt like we were . . . providing top-notch customer service.”); Alovis, Tr. 979-980 (“. . . we’ve done a few big changes over the past I would say two years that I believe have cemented [Lens Direct] as the leader in service for the optical space.”).

⁵⁹ See, e.g., CX9001 (Bethers, IHT at 62-63); CX9004 (Coon, IHT at 194); CX9013 (Aston, Dep. at 226-227) (testifying that search advertising created more competition for 1-800 Contacts); CX0646 at 002 (“Capturing extra orders in [paid search] channel is extremely difficult because of the amount of transparency around price. Other

This was a problem for 1-800 Contacts because 1-800 Contacts' strategy involved investing heavily in television advertising in order to drive consumers *into* the online channel.⁶⁰ Now, the premium-price 1-800 Contacts faced a serious threat: lower-price online competitors that could compete for online shoppers that 1-800 Contacts had, perhaps, helped to lure from the brick-and-mortar world.⁶¹

By 2003, 1-800 Contacts was facing significant competitive pressure from emerging online sellers such as Vision Direct.⁶² Thus, in July 2003, 1-800 Contacts' search advertising manager warned the company's chief marketing officer of a "major problem": "our conversions

competitors' prices are shown prominently on Google and are usually much lower than ours."); CX1036 at 003 ("Changes in the way Google is presenting paid search ads as well as increased competition in paid search continues to present [paid search] channel with an especially difficult competitive landscape. For example, right now Visiondirect.com is offering a 25% off + free shipping. This ad is presented right next to our "Free shipping on all web orders" paid search ad. . . ."); CX0657 at 002 ("In Google Product Search, we are now included in the groupings of competitors instead of being listed by ourselves. This is likely the cause [of a] decrease in orders and click traffic. As you can see we are visibly the most expensive retailer."); CX0983 at 002 (Google's feature of showing product price comparisons has "negatively affected us, due to our lack of competitive prices in the online space").

⁶⁰ See, e.g., CX9004 (Coon, IHT at 40) ("if we spend money on TV it drives internet revenue"). This strategy has largely worked for 1-800 Contacts. Its business documents tout "direct" traffic sources, including paid trademark search, as highly efficient at converting interest generated by broadscale advertising into sales. Direct traffic accounts for more than {█} percent of 1-800 Contacts' sales. See, e.g., CX1743 at 030, *in camera* (2015 1-800 Contacts Management Presentation). Approximately {█} percent comes from trademark paid search alone. *Id.*

⁶¹ CX0055 at 015 (1-800 Contacts faces a "[s]ignificant pricing disadvantage on the Internet, [because it was the] highest of all entities on the Web"); CX9001 (Bethers, IHT at 98) ("[A]mong the ones that I was aware of, yes, we were the highest in 2004"); CX9004 (Coon, IHT at 212) ("Q: Highest of all entities on the web. Was this already true in 2004? A: I mean, probably. Most of the on-line competitors, they didn't invest much in advertising . . . So really all they had was price."). See CX0646 at 002 ("Capturing extra orders in [paid search] channel is extremely difficult because of the amount of transparency around price. Other competitors' prices are shown prominently on Google and are usually much lower than ours."); CX0983 at 002 (Google's feature of showing product price comparisons has "negatively affected us, due to our lack of competitive prices in the online space").

⁶² See, e.g., CX0787 (discussing competitive pressure from Vision Direct on affiliate websites); CX0459 (noting that affiliates that advertised for 1-800 Contacts on search engines were "finding that [Vision Direct] provided higher conversions").

[sales] are horrible . . . conversions have dropped by more than half (if you compare July 2002 to July 2003[)].”⁶³

2. Rivals Successfully Promote Their Own Brands By Advertising Directly In Response To Search Queries For “1-800 Contacts”

It was against this backdrop that 1-800 Contacts first began to notice ads for lower-price competitors appearing on search engine results pages generated by searches using the query “1-800 Contacts.” This trademark search advertising was a particularly important source of business to 1-800 Contacts. More than 80 percent of 1-800 Contacts’ paid search orders,⁶⁴ and {█} percent of *all* of its orders,⁶⁵ come from paid trademark search. Thus, 1-800 Contacts was quite concerned about competitors advertising against its trademarks. 1-800 Contacts frequently lamented that advertising in response to 1-800 Contacts trademarks “allow[ed] competitors to grow rapidly with limited marketing expenditures,” while simultaneously “restrain[ing] 1-800 CONTACTS[’] [own] growth.”⁶⁶ In other words, 1-800 Contacts was concerned that consumers were *responding* to the lower-price offers from its competitors, which helped 1-800 Contacts’ competitors grow their businesses, while hurting its own.

1-800 Contacts’ internal presentations highlight its concern over the appearance of competitors’ advertisements touting low prices in response to search queries for 1-800 Contacts,

⁶³ CX0459. At the earlier, higher conversion rate, 1-800 Contacts “would have received 2100 orders, rather than the actual 1411 that we are sitting at this month.” *Id.*

⁶⁴ *E.g.*, CX0906 at 001 (“Orders through TM terms (5,347) improved slightly over last week and contributed 81% of all our paid search volume.”).

⁶⁵ CX1743 at 030, *in camera* (2015 1-800 Contacts Management Presentation).

⁶⁶ CX0621 at 118.

posing the question: “Losing [New Internet] customers to aggressive competitor offers?”⁶⁷

Naturally, 1-800 Contacts understood that the answer to this question was “yes.” Indeed, a 2008 presentation to the Board of Directors highlights the challenge posed by low-priced rivals’ search advertising triggered by queries for 1-800 Contacts’ trademarks, noting that such advertising allowed rivals to “successfully gain market share.”⁶⁸ As an example, the presentation highlighted Lens.com’s almost-overnight success:

Lens.com uses trademark advertising on 1-800 CONTACTS as their primary marketing tool for growth. Since 2004, their sales have increased 475%, making them the third largest online seller.⁶⁹

According to 1-800 Contacts, this was a real “problem,”⁷⁰ one that seemingly grew as 1-800 Contacts increased its own advertising spend:

[Lens.com’s] ability to divert customers using our trademarks increases as we increase 1-800 [Contacts’] brand awareness, and their infringement is directly correlated with our advertising spending.⁷¹

⁶⁷ CX0946 at 011; *see id.* at 019 (“Next steps in Natural Search: . . . Reduce competitors on TM ads?”). *See also id.* at 001-002 (president Brian Bethers emails CEO Jonathan Coon, noting: “We have competitors touting 70% percent off normal prices or 20% off for new customers. For individual products, the[y] will always be able to quote a price lower than our price. This definitely impacts our conversion when we extend search out.”).

⁶⁸ CX0621 at 118; *see Coon*, Tr. 2752-2753.

⁶⁹ CX0621 at 121. Although Mr. Bethers testified at trial that, *post-hoc*, he attributes Lens.com’s enormous success to other metrics, rather than trademark advertising, he did not dispute that, *at the time he presented this document to the Board of Directors*, he believed it to be true that Lens.com’s enormous revenue growth was directly attributable to bidding on 1-800 Contacts’ trademarks as keywords in search advertising. Bethers, Tr. 3650. Not surprisingly, 1-800 Contacts believed that the issue was important enough to sue Lens.com in 2007. *See infra* Section II.B.4.

⁷⁰ CX0621 at 119.

⁷¹ CX0621 at 123.

Recognizing that search advertising allowed its rivals to “benefit[]” from 1-800 Contacts’ television advertising,⁷² and seeking to address the growing threat of competition from lower-price online sellers, 1-800 Contacts first sought assistance from search engines.

3. In the Face of Unprecedented Competition, 1-800 Contacts Pursues Online Competitors With Trademark Infringement Claims

a. 1-800 Contacts Unsuccessfully Attempts to Enlist Google’s Aid In Removing Competitors From Search Queries Relating to “1-800 Contacts”

In early 2004, 1-800 Contacts emailed Google to ask what 1-800 Contacts could do “to eliminate” trademark keyword advertising.⁷³ Unfortunately for 1-800 Contacts, Google was developing a new trademark policy, based on internal studies showing that allowing advertisers other than the trademark holder to place ads in response to searches for the trademark did not cause consumer confusion.⁷⁴ Instead, Google concluded that consumers would find such ads relevant and useful:

Google’s mission is to organize the world’s information and make [it] universally accessible and useful. To accomplish this goal, we have always focused on the user and making as much information available to them as possible. By preventing advertisers from using trademarked terms as keywords, Google has been reducing the relevant information about products and services users see and thus limiting user choice. We believe the right approach is to give users more choices and access to as much information as is relevant to their search or interest.

⁷² CX1771 (1-800 Contacts search manager asks Google what can be done “to eliminate our competitors benefitting off of our trademarked name”). *See, e.g.*, CX9001 (Bethers, IHT at 124) (“If an advertisement comes to me and I’m ready to go into a store, I’m not looking to have five other people run up to me at the entrance of the door and say, ‘By the way, I’m so and so, and I’m so and so, and I’m so and so.’”).

⁷³ CX1771. Pursuant to Google’s policies at the time, 1-800 Contacts submitted a “trademark complaint” letter to Google, requesting that Google block “any advertisement that triggers off the 1-800 CONTACTS trademark” by any advertiser. *See* CX1397 at 003.

⁷⁴ CX0582, *in camera* {

[REDACTED] }.

With this idea in mind, the new AdWords trademark policy does not limit the use of trademark terms [as] keywords.⁷⁵

As Google further explained:

Our trademark policy is designed to provide greater choice to users via Google ads. This is similar to the way a shopper benefits when they see a variety of brands' products on a store shelf. Even if they are looking for a particular brand of running shoe, for example, seeing many different options enables them to compare features, prices, and more to buy the best running shoe for them. The same idea applies on the web – people searching for one brand of product should be able to easily find information about products from similar brands to make informed decisions.⁷⁶

Based on these considerations, Google did not accede to 1-800 Contacts' request, and instead announced its policy change to 1-800 Contacts on April 9, 2004.⁷⁷ 1-800 Contacts now asserts that *Google* advised and encouraged it to enter into Bidding Agreements with its competitors. But there is not a shred of evidence supporting this assertion, other than self-serving testimony from a former 1-800 Contacts employee.⁷⁸ Google's written policy states only that

⁷⁵ CX0471 (2004 email from Rose Hagan, Google, to Howard Metzenberg regarding AdWords policy update); CX0888, *in camera* { [REDACTED] }. See also CX9022 (Charlston, Dep. at 24), *in camera* { [REDACTED] }.

⁷⁶ Robin Wauters, "Starting April 23, Google will allow trademarks as keywords in AdWords campaigns worldwide," The Next Web, Mar. 22, 2013, https://thenextweb.com/google/2013/03/22/starting-april-23-google-will-allow-trademarks-as-keywords-in-adwords-worldwide/#.tnw_GYSv8l6Z. Initially, Google's revised trademark policy applied only in the United States. In 2010, Google changed its policy in Europe (Leila Abboud and Kate Holton, "Google changes trademark ad policy in Europe," Reuters, Aug. 4, 2010, <http://www.reuters.com/article/us-google-adwords-idUSTRE6732G320100804>), and in 2013, worldwide, to bring global trademark policy in line with its U.S. policy. Since 2011, Bing has also changed its policy to allow bidding on trademark keywords. CX8005 at 007 (¶¶ 41-46 (Iyer, Decl.)).

⁷⁷ See CX0789; CX1785.

⁷⁸ C. Schmidt, Tr. 2904 (testifying that a Google representative told him that "the responsibility for resolving [trademark] disputes was now that of the trademark holder to resolve directly, and that the negative keywords tool on Google's AdWords platform would be effective in implementing any subsequent agreements"). *But see* CX9047 (Hogan, Dep. at 122) (Mr. Hogan is not aware of any evidence that Google advised 1-800 Contacts to enter into

Google “is not in a position to arbitrate trademark disputes between the advertisers and trademark owners. . . . [T]he advertisers themselves are responsible for the keywords and ad text that they choose to use. Accordingly, we encourage trademark owners to resolve their disputes directly with the advertisers. . . .”⁷⁹

b. Rebuffed By Google, 1-800 Contacts Targets Online Competitors Directly

Rebuffed by Google, 1-800 Contacts developed an alternative strategy: it used litigation and threats of litigation to deter its rivals from competing. It began with its two main rivals: Vision Direct and Coastal Contacts. In 2004, as the price of ending then-active lawsuits, 1-800 Contacts extracted from its rivals commitments to curtail their bidding and advertising against 1-800 Contacts’ trademarks. To make this demand more palatable to rivals, 1-800 Contacts offered, reciprocally, to curtail its own bidding and advertising against its rivals’ trademarks.⁸⁰

Over the next few months, 1-800 Contacts succeeded in suppressing competitive advertising from at least four more retailers, albeit without always executing formal agreements: AC Lens,⁸¹ Lens Discounters,⁸² Lens.com,⁸³ and Luxottica subsidiary LensCrafters.⁸⁴ 1-800

agreements with rivals not to bid on one another’s trademarks, or to implement negative keywords against those trademarks). In any event, Google’s purported “advice” is irrelevant to the antitrust analysis.

⁷⁹ CX0789 at 002.

⁸⁰ 1-800 Contacts began by suing Coastal Contacts, one of its main competitors at the time (CX1615 (Coastal complaint), and reached a settlement that barred advertising on 1-800 Contacts’ trademarks by Coastal, and vice-versa. CX0310 (Coastal agreement). Likewise, 1-800 Contacts settled a pre-existing litigation with Vision Direct, incorporating terms specifically prohibiting each party from using the other’s name as a search advertising keyword, even though search advertising had nothing to do with the original dispute. CX0311 (2004 Vision Direct agreement). 1-800 Contacts and Vision Direct entered into a second agreement specifically relating to negative keywords in 2009. CX0314 (2009 Vision Direct agreement).

⁸¹ 1-800 Contacts already had a written agreement with AC Lens, dating back to 2002, settling a case involving pop-up advertising. AC Lens believed that the 2002 agreement also applied to search advertising. CX9039 (Clarkson, Dep. at 85-87). Confirming AC Lens’ belief, 1-800 Contacts sent several demand letters to AC Lens complaining

Contacts thus cultivated a “rep of going after people,” a “worthwhile investment” in the words of 1-800 Contacts’ CEO, because he disliked “having competitors hijack and steal our customers before they get to checkout.”⁸⁵

Most of 1-800 Contacts’ competitors were relatively small online retailers that lacked the resources to battle against 1-800 Contacts. Thus, with one notable exception discussed below,⁸⁶ 1-800 Contacts’ competitors yielded to 1-800 Contacts’ demands. Between 2007 and 2013, this process resulted in 11 additional Bidding Agreements with 1-800 Contacts’ online competitors, all reciprocally barring advertising against the settling parties’ brand names.⁸⁷

about AC Lens ads appearing on searches relating to the term “1-800 Contacts.” *E.g.*, RX0010 (2005 letter from AC Lens responding to 1-800 Contacts); CX1623 (2010 letter from 1-800 Contacts to AC Lens). In 2010, 1-800 Contacts and AC Lens entered into a second agreement that explicitly addressed keyword bidding. RX0028 (2010 AC Lens agreement).

⁸² 1-800 Contacts sent several cease-and-desist letters to Lens Discounters, demanding that Lens Discounters stop bidding on 1-800 Contacts-related keywords, and also demanding that Lens Discounters implement numerous negative keywords. *See* CX8003 at 002-005 (¶¶ 11-28) (Mitha, Decl.). In response, Lens Discounters stopped bidding on 1-800 Contacts’ trademarks, and implemented negative keywords. *Id.*

⁸³ 1-800 Contacts sued Lens.com for breach of contract, claiming that it had an agreement with Lens.com wherein the parties agreed not to bid on one another’s trademarks and to implement negative keywords. RX0415 at ¶ 18 (*1-800 Contacts v. Lens.com* complaint) (“1-800 CONTACTS discovered that Lens.com had purchased sponsored advertisements from Google, and other search engines, for Plaintiff’s Marks to trigger advertising and/or a link to the Lens.com Websites. Such infringing activity was immediately brought to the attention of Lens.com, after which *Lens.com agreed to cease such practices.*”) (emphasis added). In his deposition during the Lens.com litigation, Lens.com’s CEO testified that there was such an agreement. CX1673 (Samourkachian, Dep. at 178-181, *1-800 Contacts v. Lens.com*).

⁸⁴ LensCrafters initially sent a cease-and-desist letter to 1-800 Contacts in 2005, claiming that 1-800 Contacts had “purchased sponsored advertisements at Google . . . for the LensCrafters trademark, to trigger a link to [1-800 Contacts’] directly competitive . . . website.” CX0087 (Apr. 2005 letter from LensCrafters to 1-800 Contacts). Subsequently, the firms engaged in back-and-forth correspondence, through which it appears that they agreed to stop bidding on one another’s trademarks and to implement certain negative keywords. *See, e.g.*, CX0715; CX0117.

⁸⁵ *See* CX0068.

⁸⁶ *See infra* Section II.B.4.

⁸⁷ CX0313 (EZ Contacts agreement); CX0315 (Lensfast agreement); CX0319 (Empire Vision agreement); CX0320 (Lenses For Less agreement); CX0321 (Tram Data d/b/a ReplaceMyContacts agreement); CX0322 (Walgreens agreement); CX0323 (Contact Lens King agreement); CX0324 (Web Eye Care agreement); CX0326 (Memorial Eye

4. In the Only Infringement Case 1-800 Contacts Fully Litigates, The Court of Appeals Rejects 1-800 Contacts' Legal Theory

One prominent early entrant into online contact lens sales was Lens.com. As described earlier, Lens.com was of particular concern to 1-800 Contacts because its strategy of advertising against 1-800 Contacts' trademarks was yielding enormous dividends. Lens.com grew by some 475 percent between 2004 and 2007, a fact that 1-800 Contacts' top management attributed directly to Lens.com's strategy of advertising against 1-800 Contacts' trademarks.⁸⁸

In 2005, 1-800 Contacts believed that it had successfully curbed the inroads made by Lens.com by entering into an informal agreement with Lens.com, in which both parties agreed not to bid on one another's brand names.⁸⁹ But, by 2007, it appeared to 1-800 Contacts that Lens.com was not abiding by that agreement.⁹⁰ In April 2007 1-800 Contacts' search marketing manager informed 1-800 Contacts' outside counsel that Lens.com and another competitor were both bidding on 1-800 Contacts' trademarks, but recommended prioritizing Lens.com as the

agreement); RX0028 (AC Lens agreement); RX0408 (Standard Optical agreement). This list does not include 1-800 Contacts' written agreement with Luxottica. The parties separately entered into a Bidding Agreement in December 2013 as part of a larger Sourcing and Services Agreement between Luxottica and 1-800 Contacts. CX0331.

⁸⁸ CX0621 at 121. Bethers, Tr. 3650 (testifying that he believed, at the time he presented this information to the Board, that Lens.com's 475 percent growth rate was attributable to its strategy of advertising against 1-800 Contacts' trademarks).

⁸⁹ Pratt, Tr. 2567 (in 2005, Mr. Pratt's understanding of the agreement "was that [Lens.com] would take action to make sure that [its] sponsored advertisements did not come up in response to searches for 1-800 Contacts' trademarks."). See also RX0415 at ¶ 18 (Lens.com complaint) ("1-800 CONTACTS discovered that Lens.com had purchased sponsored advertisements from Google, and other search engines, for Plaintiff's Marks to trigger advertising and/or a link to the Lens.com Websites. Such infringing activity was immediately brought to the attention of Lens.com, after which *Lens.com agreed to cease such practices.*") (emphasis added). Lens.com's CEO confirmed the existence of the agreement in his deposition during the Lens.com litigation. CX1673 (Samourkachian, Dep. at 178, *1-800 Contacts v. Lens.com*).

⁹⁰ See RX0415 ¶ 19 (Lens.com complaint) ("*Notwithstanding Lens.com's agreement to cease using the 1-800 CONTACTS Marks to trigger advertising, the infringing behavior recently resurfaced.*") (emphasis added).

“more important offender” because it was “a more viable competitor.”⁹¹ In August 2007, 1-800 Contacts sued Lens.com in the U.S. District Court for the District of Utah, for breach of an agreement not to bid on one another’s trademark keywords and for trademark infringement.⁹²

1-800 Contacts lost. In December 2010, the district court granted summary judgment in favor of Lens.com. *1-800 Contacts v. Lens.com, Inc.*, 755 F. Supp. 2d 1151 (D. Utah 2010). The court specifically found that 1-800 Contacts had not shown that Lens.com’s use of 1-800 Contacts’ trademarks as keywords was likely to cause consumer confusion.⁹³ The district court reasoned that the *content* of the ad is key to the analysis of likelihood of confusion.⁹⁴

The court also found insufficient evidence of an enforceable contract between 1-800 Contacts and Lens.com on trademark keywords.⁹⁵ The court noted, however, that such an agreement (if it existed) would be troubling. Specifically, the U.S. District Court for the District of Utah observed:

Were this actually an agreement entered into by the parties, the court questions whether it would survive an antitrust challenge. [1-800 Contacts] does not seek merely to preclude usage of its trademark. Instead, *it wants to obliterate any other competitor advertisement from appearing on a search-results page* when a consumer types in ‘1800Contacts’ as a search term or some variation of it. This is disturbing given that broad matching of the generic term ‘contacts’ could trigger an advertisement if a consumer enters the search term ‘1800Contacts.’ A

⁹¹ CX0078 at 001 (“Lens.com . . . is a more important offender because they are a more viable competitor.”).

⁹² RX0415; CX1182 (First Amended Lens.com complaint).

⁹³ *Lens.com*, 755 F. Supp. 2d at 1182.

⁹⁴ *Id.* at 1174 (explaining that “the mere purchase of a trademark as a keyword cannot *alone* result in consumer confusion” and that “the relevant inquiry here regarding consumer confusion is . . . the language of the advertisement generated by the keyword”) (emphasis in original).

⁹⁵ *Lens.com*, 755 F. Supp. 2d at 1189 (holding that the evidence “merely confirm[s] an amicable resolution of a disagreement among competitors. Accordingly, the court concludes as a matter of law that no enforceable agreement was entered into by the parties.”).

trademark right does not grant its owner the right to stamp out every competitor advertisement.

Lens.com, 755 F. Supp. 2d at 1188 (emphasis added).

The Court of Appeals for the Tenth Circuit affirmed the district court's decision. *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013).⁹⁶ While not rejecting the possibility that bidding on a trademark could be a component of an infringement claim, the court emphasized that “the labeling and appearance” of an ad and the surrounding context were critical factors in determining likelihood of confusion arising from use of trademarks as keywords.⁹⁷ The Tenth Circuit expressly rejected 1-800 Contacts' contention that the mere appearance of *Lens.com*'s ads on a SERP in response to a search query for “1-800 Contacts” was confusing.⁹⁸

The court concluded:

Perhaps in the abstract, one who searches for a particular business with a strong mark and sees an entry on the results page will naturally infer that the entry is for that business. *But that inference is an unnatural one* when the entry is clearly labeled as an advertisement and *clearly identifies the source*, which has a name quite different from the business being searched for.

Id. at 1245 (emphasis added).

⁹⁶ 1-800 Contacts alleged both direct infringement by *Lens.com* and secondary liability for infringing ads placed by *Lens.com*'s affiliates. Some of the affiliate-placed ads at issue featured variations on 1-800 Contacts' trademarks in the text of the ads themselves. The district court dismissed all of 1-800 Contacts' infringement theories on summary judgment. The Tenth Circuit reversed and remanded on the theory of contributory infringement “related to *ads that did display the mark in their text.*” *Lens.com*, 722 F.3d at 1256-57 (emphasis added).

⁹⁷ *Id.* at 1245.

⁹⁸ The Tenth Circuit also rejected a study proffered by 1-800 Contacts purporting to show evidence of confusion, concluding that the study was unreliable, and that even if it were admissible, the survey's confusion levels were too low to support 1-800 Contacts' claims. *Id.* at 1246-47.

Thus, in the one case 1-800 Contacts has fully litigated its view of trademark infringement, it lost decisively, in the process creating a widely cited authority limiting trademark infringement liability with regard to keyword bidding.⁹⁹

5. 1-800 Contacts' Intent in Entering Into Bidding Agreements Was to Eliminate Competition

1-800 Contacts' ordinary-course business documents show that its intent in entering into the Bidding Agreements was to suppress competition from its online rivals in two ways: first, by suppressing competition in search advertising auctions; and second, by suppressing competition in the sale of contact lenses from lower-price online competitors.

a. 1-800 Contacts Intended to Artificially Reduce Its Search Advertising Costs

1-800 Contacts intended for the Bidding Agreements with its online competitors to suppress competition in search advertising auctions, thereby reducing its search advertising costs. A 2009 email between 1-800 Contacts marketing executives expressly identifies this price distortion as one of the purposes of 1-800 Contacts' trademark enforcement program: "[R]emove competitors which in turn drives down how much we pay per click."¹⁰⁰ Similarly, a 2010 marketing presentation explains that 1-800 Contacts' "bid management" strategy for trademark

⁹⁹ *E.g., Infogroup, Inc. v. Database, LLC*, 95 F. Supp. 3d 1170, 1190-91 (D. Neb. 2015) (rejecting keyword bidding claim, citing *Lens.com*, 722 F.3d at 1245); *M-Edge Accessories LLC v. Amazon.com Inc.*, 2015 U.S. Dist. LEXIS 10095 (D. Md. Jan. 29, 2015) (keyword bidding "cannot serve as a basis for a claim of unfair competition" where there is "legal authority supporting the permissibility of such practice," citing *Lens.com*, 722 F.3d 1229, among other cases); *EarthCam, Inc. v. OxBlue Corp.*, 49 F. Supp. 3d 1210, 1241 (N.D. Ga. 2014) (citing *Lens.com*, 722 F.3d at 1245, for proposition that likelihood of confusion relates to labeling and appearance of advertisements); *3form, Inc. v. Lumicor, Inc.*, 2012 U.S. Dist. LEXIS 27504, at *26 (D. Utah Mar. 1, 2012) ("As this Court previously concluded in *1-800 Contacts*, the fact that a competitor's search results appear as one of many options when conducting a web search will not confuse customers, as they will have different appearances.").

¹⁰⁰ CX0935.

search advertising was to “keep competitors & affiliates off” of 1-800 Contacts’ trademark terms *because* “low competition = low cost.”¹⁰¹ 1-800 Contacts CEO and president Brian Bethers confirmed that this was a top corporate goal for the company.¹⁰²

Numerous other 1-800 Contacts documents reference the impact of competitor advertising on 1-800 Contacts’ own costs for search advertising, including weekly reports distributed by then-search advertising manager Bryce Craven to the chief marketing officer and several other 1-800 Contacts employees. These reports attributed 1-800 Contacts’ lower spending for its trademark terms to “fewer competitors showing [up] on our TM keywords,”¹⁰³ and higher spending to “more advertisers on our [trade]marks . . . which increased competition and CPCs [costs per click] for our top terms.”¹⁰⁴ Mr. Craven confirmed his analysis at trial.¹⁰⁵

¹⁰¹ See CX0051 at 003 (2010 “Search Overview”).

¹⁰² CX9001 (Bethers IHT, at 196-197) (discussing CX0051 at 003); Bethers, Tr. 3762-3763 (testifying that it was a marketing department goal). See, e.g., CX9034 (Roush, Dep. at 60-62) (“Another reason why I wouldn’t want our competitors to bid on our terms is that they would drive up our search costs. . . . If more competitors were bidding on our term, then the costs would go up.”); CX9032 (L. Schmidt, Dep. at 188) (“There is less competitors showing up on our trademark keywords, and our spend – our costs for these terms went down.”).

¹⁰³ CX0658 (2011 email from Joan Blackwood, chief marketing officer of 1-800 Contacts, to Brian Bethers, president of 1-800 Contacts, forwarding Search & Partner Dashboard) (“Compared with recent weeks, we saw fewer competitors showing on our TM keywords this week, which helped drop our spend for these terms.”). See, e.g., CX0657 (2011 email from Blackwood to Jonathan Coon, CEO of 1-800 Contacts, forwarding Search & Partner Dashboard) (“Competition on our TM [trademark] terms is lighter than recent history, which is likely a contributing factor in our lower TM CPO’s [costs per order] -\$1.26 this week.”).

¹⁰⁴ CX0915 (“TM CPCs . . . jumped up by 18% from last week and pushed us to our most costly week yet for trademarks. There were more advertisers on our marks this past week (both local and national retailers), which increased competition and CPCs for our top terms.”). See, e.g., CX0907 at 001 (“We’ve seen TM costs shoot up in the past few weeks. This is mostly due to rising CPCs [costs per click] in Google for our most popular term [1800-contacts]. This could be caused by added competition from Walgreens.com.”); CX0886 (“Spend for our trademarked keywords jumped up by 7% this week and was the highest we’ve seen in Q3. We’re seeing more advertisers on our best TM [trademark] keywords (*1800contacts*, *1800 contacts*, *1800-contacts*) recently, which is pushing up our CPCs [costs per click] and cost for these terms.”) (emphasis in original). CX8006 at 072 (¶ 161 n.169) (Evans Expert Report) (citing CX1080) (“We are still being outbid on keyword ‘800contacts’ but just by one competitor. *I have increased the bid.*”) (emphasis added).

¹⁰⁵ Craven, Tr. 541, 547-549, 551, 559.

And in 2008, 1-800 Contacts estimated that, without competition in the search engine auctions for its trademarks, it would save \$20,434 in search advertising costs each month.¹⁰⁶

b. 1-800 Contacts Intended to Suppress Competition From Lower-Price Online Rivals For Sales of Contact Lenses

1-800 Contacts also intended to suppress competition from lower-price rivals for sales of contact lenses. 1-800 Contacts' business documents routinely identify pricing pressure from online sellers and competitive price transparency as significant concerns.¹⁰⁷ And a 2008 Board presentation confirms that 1-800 Contacts targeted rivals that were successfully bidding on its trademarks *specifically* in order to stem competition from online rivals that were growing their own market shares at the expense of 1-800 Contacts' share.¹⁰⁸ In that presentation, 1-800 Contacts described its successful campaign to suppress competition from online rival Coastal Contacts:

After achieving a market share of over 12% in 2005, Coastal Contacts ceased trademark advertising as a result of a settlement agreement with 1-800. At year end 2007, their market share had fallen in half to just 6%.¹⁰⁹

¹⁰⁶ CX0213_NATIVE_1-800F_00024851 (1-800 Contacts Spreadsheet, Competitor on TM Cost Estimates, Oct. 17, 2008).

¹⁰⁷ See, e.g., CX0055 at 015 (2004 presentation lists “[s]ignificant pricing disadvantage on the Internet – highest of all entities on the web” as a “threat[]”); CX0067 at 006 (2006 strategy includes “reduc[ing] competitive price deficiency transparency”); CX0654 (“Our online search competitors are focusing heavily on price/discounts (‘70% off’ is *everywhere*) which may be hurting us from a[] [New Internet] conversion rate standpoint”) (emphasis in original); CX1086 (2012 email exchange among 1-800 Contacts marketing team, expressing concerns about “all the prices that our much lower than ours,” questioning whether this has led to a decline in paid advertising sales, and noting that 1-800 Contacts could “try to convince customers that our existing prices are better than they really are or worth the cost. Tough challenge considering that we sell the exact same thing as everyone else.”).

¹⁰⁸ CX0621 at 118. See also CX0946 (May 2011 “Search Overview”), at 011 (“Losing NI [New Internet] customers to aggressive competitor offers [on trademark searches?]”); see *id.* at 019 (“Next steps . . . Reduce competitors on TM [trademark] ads?”).

¹⁰⁹ CX0621 at 122.

In other words, the Bidding Agreements were achieving just what 1-800 Contacts intended them to achieve: the suppression of competition from lower-price online retailers.

Numerous internal 1-800 Contacts documents confirm that 1-800 Contacts' "removal" of competitors from the SERP in response to trademark queries was a material factor in generating additional sales for 1-800 Contacts.¹¹⁰ For example, in one weekly report, Mr. Craven observed that 1-800 Contacts "had fewer organizations showing up on our [trademark terms] this week, which *always helps improve performance.*"¹¹¹ He explained that orders from the search query "1800contacts" improved by 44 percent week over week, attributing that improvement to the lack of competitive ads, "with 2-3 competing ads compared to 7-8 competing ads the week before."¹¹²

Unsurprisingly, when advertisements for lower-price competitors did appear in response to searches for 1-800 Contacts' trademark, 1-800 Contacts' click-through rates and conversion rates declined, and 1-800 Contacts lost sales to those competitors.¹¹³ In 2008, 1-800 Contacts

¹¹⁰ See, e.g., CX0564 at 001 ("Contributing to the TM success was the removal of a few competitors who had been showing up on our best TM terms. Walgreens was the most notable of these and dropped off on the 15th of June. Bing TM orders also jumped up drastically."); CX0927 ("Trademark orders (5,706) had another very solid week. . . . This was partially caused by the highest TM CTRs (27.2%) we've ever seen. The removal of ShipMyContacts from our trademarks . . . contributed to our excellent TM CTR this week."); CX0274 ("The TM order boost came despite lower TM searches, and was driven by a jump in TM CTR [click-through rate] and CR [conversion rate]. We saw fewer instances of ShipMyContacts on our TM searches which may have helped our CTR.").

¹¹¹ CX0855 (emphasis added).

¹¹² CX0855 ("Along with FSA season, we also had fewer organizations showing up on our [TM terms] this week, which always helps improve performance. The term 1800contacts improved orders by 44% over last week with 2-3 competing ads compared to 7-8 competing ads the week before.").

¹¹³ See, e.g., CX0510 at 001 ("TM CTR [click-through rate] (24%) wasn't as strong as the five weeks prior, which is likely the result of additional competitor's [sic] ads (Vision Direct, Standard Optical, ShipMyContacts) showing up on our best terms such as 1800contacts and 1800 contacts."); CX0906 ("Google TM orders (and click through rates) were slightly softer than last week because of increased competition on our best branded terms. Google searches for our most profitable term, 1800-contacts, currently yields ads for six other advertisers."); CX0864 at 002 ("Our comps continue to be quite difficult. . . . We've seen particularly sharp declines in Trademark orders, which has

estimated that it lost more than \$68,000 in sales each month to competitors advertising against its trademarks.¹¹⁴

6. Overview of Bidding Agreements

Between 2004 and 2013, 1-800 Contacts entered into at least 14 written Bidding Agreements, including agreements with all of its “major competitors.”¹¹⁵

a. 1-800 Contacts Enters into 14 Basically Identical Bidding Agreements

Thirteen of 1-800 Contacts’ Bidding Agreements settled threatened or actual trademark litigation brought by 1-800 Contacts against a competing retailer of contact lenses. Exhibit C lists the agreements, by date, which resulted from lawsuits, or threats of lawsuits, by 1-800 Contacts against its rivals. The fourteenth agreement challenged in the Complaint resides in a Sourcing and Services Agreement between Luxottica and 1-800 Contacts, entered in December 2013, that contains a reciprocal search advertising restriction that is substantially similar to the other 13 Bidding Agreements.¹¹⁶ There is, however, no indication that this horizontal agreement was connected in any way with an allegation of trademark infringement.¹¹⁷

dropped to less than 80% of our total orders for the past few weeks. This decline comes from a decreasing conversion rate on trademark – likely the result of competitive pressure and pricing.”).

¹¹⁴ CX0213 _NATIVE_1-800F_00024851 (1-800 Contacts Spreadsheet, Competitor on TM Cost Estimates, Oct. 17, 2008).

¹¹⁵ Bethers, Tr. 3724-3728 (discussing CCXD0032 (Radio Interview, “The Bottom Line,” KCPW-FM, Salt Lake City, Utah, air date Oct. 18, 2016) (“But when you go to Google and type in 1-800 Contacts you might have a competitor’s ad show under trademark search. So very early on we went to Google and said ‘how are we supposed to take care of this?’ And they basically said ‘work that out with your competitors.’ So we did. We went to our competitors and we said ‘This isn’t right. We are not going to advertise on your trademark. Don’t advertise on ours.’ So we had to sue a couple of competitors and eventually *we signed settlement agreements with all of our major competitors.*”) (emphasis added)).

¹¹⁶ CX0331 at 045-047 (§ 17.10-11) (Dec. 23, 2013, Contact Lens Sourcing and Services Agreement between Luxottica and 1-800 Contacts).

b. Bidding Agreements Reciprocally Prohibit Bidding on Trademark Terms and Require Implementation of Negative Keywords

There is no serious dispute over the basic terms of the Bidding Agreements. Each of the Bidding Agreements prohibits competitors from presenting paid advertisements on the SERP in response to searches for 1-800 Contacts’ trademarks. Although the precise language of the agreements varies slightly, each imposes the same functional restrictions on the parties.

First, each of the Bidding Agreements forbids a competitor of 1-800 Contacts from using 1-800 Contacts’ trademarks, URLs (*i.e.*, website address), and variations thereof as search advertising keywords. In other words, the competitors cannot bid on 1-800 Contacts’ trademark terms in a search advertising auction under any circumstances.¹¹⁸

Second, each of the Bidding Agreements requires a competitor of 1-800 Contacts to affirmatively prevent its ads from appearing (through the use of “negative” keywords) *any time* a consumer’s search query relates to 1-800 Contacts.¹¹⁹ This is true even when the competitor is *not bidding* on 1-800 Contacts’ trademarks.¹²⁰ For example, as described earlier, a search engine may deem a competitor’s ad relevant to a search for “1-800 Contacts” when the competitor bids

¹¹⁷ Indeed, it appears that, as of 2005, 1-800 Contacts and Luxottica already had an unwritten agreement not to bid on one another’s trademarks, and to implement those trademarks as negative keywords, evidenced by correspondence going back and forth between the parties. *See supra* n.84.

¹¹⁸ *See, e.g.*, RX0028 at 001-002 (§ 2(A)(a)) (AC Lens agreement); CX0313 at 003-004 (§ 5(A)(a)-(b)) (EZ Contacts agreement); CX0326 at 002-003 (§ 3(a)) (Memorial Eye agreement).

¹¹⁹ *See, e.g.*, RX0028 at 002-003 (§ 2(C)) (AC Lens agreement); CX0313 at 004-005 § 5(B) (EZ Contacts agreement); CX0326 at 002-003 (§ 3(b)) (Memorial Eye agreement).

¹²⁰ *E.g.*, RX0028 at 002 (§ 2(A)(c)) (AC Lens agreement) (AC Lens may not bid on “generic, non-trademarked keywords” that result in ads being displayed against consumer search queries that “include” a 1-800 Contacts trademark or variation thereof).

only on the generic term “contact lenses.”¹²¹ The Bidding Agreements expressly require a competitor to add negative keywords to its search advertising accounts to ensure that its ads are *not* displayed whenever a consumer conducts any search relating to 1-800 Contacts’ trademarks.¹²²

Third, all 14 of the written Bidding Agreements impose identical (reciprocal) restrictions on 1-800 Contacts.¹²³

c. The Bidding Agreements Are Broadly Written

The Bidding Agreements are written quite broadly to ensure that *no* advertisement will appear in response to *any* search query relating to a 1-800 Contacts trademark (or a variation thereof). A representative Bidding Agreement explicitly requires the settling parties to “refrain from . . . engaging or participating in internet advertising or any other action that causes any . . . advertisement . . . to be displayed in response to or as a result of any internet search that *includes* the other Party’s trademark keywords or URLs. . . .”¹²⁴

In addition, at least seven of the Bidding Agreements explicitly require the implementation of negative keywords “to the fullest extent allowable by the internet search provider, in order to prevent the display of advertisements and/or internet links in response to or

¹²¹ *See supra* pp. 12-13 & n.51.

¹²² Except in 1-800 Contacts’ agreement with Coastal, the obligation to use negative keywords is explicit. The Coastal agreement, as interpreted by 1-800 Contacts and Coastal, also requires the use of negative keywords, based on the agreement’s general requirement that Coastal prevent its ads from appearing any time a search query includes 1-800 Contacts’ restricted terms. CX0092 (May 30, 2014, Letter from Mark Miller, counsel, 1-800 Contacts, to Steven Bochen, Coastal Contacts).

¹²³ *See, e.g.*, RX0028 at 001 (§ 2) (AC Lens agreement); CX0313 at 003 (§ 5) (EZ Contacts agreement); CX0326 at 002 (§ 3) (Memorial Eye agreement).

¹²⁴ RX0028 at 001 (§ 2(A)(a)) (AC Lens agreement) (emphasis added).

as a result of any search that *includes* the other Party’s trademark keywords or URLs. . . .”¹²⁵

This means that a settling party must withdraw from any search advertising auction in response to any consumer search query, so long as the search query *includes* a variation on the term “1-800 Contacts,” regardless of what *other* terms the search query contains. Thus, on their face, many of the Bidding Agreements *require* a settling party to implement negative keywords in “phrase match.” If the settling party were to implement 1-800 Contacts’ trademarks as negative keywords in “exact match” (as 1-800 Contacts now contends any settling party *could* have done¹²⁶), a settling party’s ad could surface in response to *numerous* search queries that “include” the term “1-800 Contacts.” The surfacing of *any* such ad would be in express contravention of the *plain language* of 1-800 Contacts’ Bidding Agreements with its rivals.¹²⁷

¹²⁵ RX0028 at 002 (§ 2(C)) (AC Lens agreement) (emphasis added); CX0320 at 004 (§ 4(C)) (Lenses For Less agreement) (same); CX0321 at 003 (§ 3(C)) (Tram Data d/b/a Replace My Contacts agreement) (same); CX0323 at 003 (§ 4(C)) (Contact Lens King agreement) (same); CX0319 at 003 (§ 2(C)) (Empire Vision agreement) (same); CX0324 at 003 (§ 4(C)) (Web Eye Care agreement) (same); RX0408 at 003-004 (§ 5(C)) (Standard Optical agreement) (same).

¹²⁶ See 1-800 Contacts Second Corrected Pretrial Brief (“1-800 Contacts Pretrial Brief”) at 22-23.

¹²⁷ As noted above, seven of the Bidding Agreements make this point expressly. See *supra* n.125. Five of the Bidding Agreements do not expressly use the term “include,” but implicitly cover *all* 1-800 Contacts-related queries. See, e.g., CX0313 at 003 (§ 5(B)) (EZ Contacts agreement) (“[W]hen any keyword purchase of any kind . . . is made through any internet search provider, the Parties shall use the prohibited key words . . . as negative keywords *in order to prevent the generation of advertisements and internet links triggered by keywords that are prohibited under this agreement*”) (emphasis added); CX0326 at 003 (§ 3(b)) (Memorial Eye agreement) (“the parties mutually agree to “implement all of the terms the other Party has listed in Exhibit 2 as negative keywords *in all internet search engine advertising campaigns*”) (emphasis added). Only 1-800 Contacts’ 2013 Bidding Agreement with Luxottica – incorporated as part of a sourcing agreement between the firms – states that negative keywords may be implemented in “exact match.” See CX0331 at 045-046 (§ 17.10) (Luxottica “agrees that it shall . . . implement all of the 1-800 Trademarks or confusingly similar variations as listed in Schedule 17.10 as exact match negative keywords in all internet search engine advertising campaigns. . . .”). However, 1-800 Contacts itself implemented Luxottica’s trademarks as “phrase match” negative keywords. CX0406 (1-800 Contacts Negative Keyword Report). Moreover, the parties had been operating under an *unwritten* agreement dating back to at least 2005, under which both parties had already agreed not to appear on search engine results pages in response to queries including each other’s trademark terms. No such limitation was placed on the original agreement between 1-800 Contacts and Luxottica, as evidenced by the correspondence between the two firms. See *supra* n.84.

Unsurprisingly, each of the settling parties that testified at trial (and most others) interpreted and implemented the Bidding Agreements *exactly* the way they were written: to require each settling party to ensure that its ad did not surface against *any* search query “including” a 1-800 Contacts trademark.¹²⁸ In order to satisfy the terms of those Bidding Agreements, each of the settling parties implemented negative keywords in at least “phrase match.”¹²⁹ Some advertisers went so far as to implement negative keywords across all three “matching” categories (“exact,” “phrase,” and “broad”), introducing significant redundancy in their instructions to the search engines in order to ensure that they would not violate the Bidding Agreement.¹³⁰

¹²⁸ See, e.g., Holbrook, Tr. 1937-1938 (Memorial Eye implemented agreement in “all match types” consistent with its understanding of paragraph 3 of agreement); Holbrook, Tr. 2063 (Memorial Eye implemented negative keywords in all three match types “[b]ecause it was my interpretation of the settlement agreement that that was required”); CX8002 at 004 (¶ 14) (Hamilton (Vision Direct), Decl.) (Vision Direct implemented negative keywords in “phrase match” to “comply with the intent of the settlement agreement”); CX8001 at 05 (¶ 14) (Hamilton (Walgreens), Decl.) (Walgreens implemented negative keywords in “phrase match” to “comply with the intent of the settlement agreement”); CX9039 (Clarkson Dep., at 145-146) (AC Lens understood agreement to require “phrase match”); CX9014 (Batushanksy, Dep. at 158-160), *in camera* { [REDACTED] }; CX8003 at 003 (¶ 14) (Mitha, Decl.) (Lens Discounters implemented negative keywords in “phrase match” to comply with 1-800 Contacts’ demands).

¹²⁹ See, e.g., Holbrook, Tr. 1938; *id.* at 2063; CX8002 at 004 (¶ 14) (Hamilton (Vision Direct), Decl.) (Vision Direct implemented negative keywords in “phrase match” to “comply with the intent of the settlement agreement”); CX8001 at 005 (¶ 14) (Hamilton (Walgreens), Decl.) (Walgreens implemented negative keywords in “phrase match” to “comply with the intent of the settlement agreement”); CX9039 (Clarkson Dep., at 145-146) (AC Lens understood agreement to require “phrase match”); CX9014 (Batushanksy, Dep. at 158-160), *in camera* { [REDACTED] }; CX8003 at 003 (¶ 14) (Mitha, Decl.) (Lens Discounters implemented negative keywords in “phrase match” to comply with 1-800 Contacts’ demands).

¹³⁰ E.g., Holbrook, Tr. 1938; Holbrook, Tr. 2063 (“Q: Why did you implement the negative keywords in all three match types? A: Because it was my interpretation of the settlement agreement that that was required.”); CX8002 at 004 (¶ 14) (Hamilton (Vision Direct), Decl.) (Vision Direct implemented negative keywords in both “exact match” and “phrase match” to “comply with the intent of the settlement agreement”); CX8001 at 005 (¶ 14) (Hamilton (Walgreens), Decl.) (Walgreens implemented negative keywords in both “exact match” and “phrase match” to “comply with the intent of the settlement agreement”). A negative keyword implemented in “broad match” would necessarily eliminate any ad that would be eliminated by “phrase match” or “exact match.” Similarly, a negative keyword implemented in “phrase match” would necessarily eliminate any ad that would be eliminated by “exact match.” See *supra* p. 13 & n.52.

1-800 Contacts asserts that there is a written “carveout” for “comparative advertising” in most (although not all¹³¹) of the Bidding Agreements.¹³² However, the “carveout” is meaningless: it simply clarifies that the settling parties may bid on generic terms as keywords, *provided that* such bids on generic terms does not cause the rival’s ad to appear in response to *any search query* relating to “1-800 Contacts.”¹³³ In other words, bidding on the generic term “contacts” is permissible *only* where the *search query* relates to “generic” terms, such as a general query for “contact lenses.” Bidding on the generic term “contacts” is *prohibited* if the advertisement appears in response to a search query for “1-800 Contacts,” or any search query that *includes* “1-800 Contacts” (or any variation on that term).¹³⁴

Consistent with the plain language of the “carveout,” the parties assigned no meaning to the clause, and the so-called “carveout” never resulted in the display of a single “comparative” advertisement.¹³⁵ 1-800 Contacts has not identified a single competitor that displayed an

¹³¹ There is no express “carveout” in the following Bidding Agreements: Coastal (CX0310); Walgreens (CX0322), and Memorial Eye (CX0326).

¹³² The so-called “carveout” provides: “The Prohibited Acts shall not include (i) use of the other Party’s trademarks on the Internet in a manner that would not constitute an infringing use in a non-Internet context, e.g., comparative advertising, parodies, and similar non-Infringing uses; and (ii) the purchase by either Party of keywords that are generic, non-trademarked words, such as ‘contacts,’ ‘contact lens,’ ‘lenses’ and ‘lens.’ The Parties acknowledge that any advertisements triggered by such keywords are not prohibited under this agreement as long as the appropriate negative keywords are also being used as set forth in subsection (C).” CX0319 at 002-003 (§2(B)) (Empire Vision Center agreement).

¹³³ *See, e.g.*, RX0028 at 001-002 (§ 2(A)(c)) (AC Lens agreement) (expressly providing that AC Lens may *not* bid on “generic” terms where such bids will result in ads being displayed against search queries that “include” a 1-800 Contacts trademark).

¹³⁴ *See supra* pp. 32-35.

¹³⁵ *See, e.g.*, Holbrook, Tr. 1939 (Memorial Eye understood “carveout” provision in agreement to prohibit bidding on generic keywords if those keywords resulted in Memorial Eye advertisement appearing in response to a search query that included the term “1-800 Contacts”).

advertisement pursuant to the “carveout.” Nor was a single competitor able to explain how the supposed “carveout” actually affected the operation of the Bidding Agreement, since each competitor clearly understood that it was not permitted to appear in response to any search query that contained a 1-800 Contacts-related term, *even where* that competitor was *only* bidding on generic terms.¹³⁶

Indeed, when Vision Direct interpreted its 2004 agreement with 1-800 Contacts to *permit* bidding on generic keywords for “comparative” purposes, 1-800 Contacts sued Vision Direct for a second time, demanding that it implement negative keywords *specifically to prevent* Vision Direct ads from appearing in response to bids on *generic* keywords that caused Vision Direct ads to be displayed against 1-800 Contacts-related search queries.¹³⁷

Similarly, ads sponsored by Memorial Eye and Walgreens appeared in response to search queries relating to “1-800 Contacts” *only* based on the retailers’ bids on *generic* keywords, a point that was *expressly conveyed* to 1-800 Contacts by Memorial Eye in its response to 1-800

¹³⁶ See, e.g., Holbrook, Tr. 1939 (Memorial Eye understood “carveout” provision in agreement to prohibit bidding on generic keywords if those keywords resulted in Memorial Eye advertisement appearing in response to a search query that included the term “1-800 Contacts”); *id.* at 1937-1938, 2063 (Memorial Eye understood agreement to require that negative keywords be implemented broadly, and Memorial Eye implemented negative keywords in “exact match,” “phrase match,” and “broad match”); CX9039 (Clarkson, Dep., at 145-146) (AC Lens understood agreement to require “phrase match,” which eliminated possibility of comparative advertising); CX9014 (Batushanksy, Dep. at 158-160), *in camera* { [REDACTED] }; CX8002 at 004 (¶ 14) (Hamilton (Vision Direct), Decl.) (Vision Direct implemented negative keywords in both “exact match” and “phrase match” to “comply with the intent of the settlement agreement”); CX8001 at 005 (¶ 14) (Hamilton (Walgreens), Decl.) (Walgreens implemented negative keywords in both “exact match” and “phrase match” to “comply with the intent of the settlement agreement”); CX8003 at 003 (¶ 14) (Mitha, Decl.) (Lens Discounters implemented negative keywords in “phrase match” to comply with 1-800 Contacts’ demands).

¹³⁷ See, e.g., CX0134 (Sep. 25, 2007, email from Brandon Dansie, 1-800 Contacts, to Amy Reischauer, Drugstore.com); CX0135 (Oct. 22, 2007, email from Bryan Pratt, outside counsel, 1-800 Contacts, to Cindy Caditz, outside counsel, Drugstore.com).

Contacts' first demand letter.¹³⁸ Nevertheless, even for competitors like Memorial Eye and Walgreens that were only bidding on *generic* keywords, and clearly showing up in a “comparative” fashion, the Bidding Agreements required the implementation of negative keywords to block all such occurrences.¹³⁹

d. 1-800 Contacts Broadly Enforces the Bidding Agreements

The overwhelming record evidence shows that 1-800 Contacts intended to, and did, broadly enforce the Bidding Agreements, resulting in a sweeping suppression of truthful, non-deceptive advertising, relating to a broad range of consumer searches, not limited to search queries that were specifically *for* the term “1-800 Contacts.” In addition to the sweepingly broad language of the Bidding Agreements themselves, 1-800 Contacts actively targeted competitors that advertised against any search query containing its trademarks, even where the search queries included additional generic terms. For example, 1-800 Contacts' outside counsel sent formal “violation” notices to Coastal Contacts and Walgreens, asserting that they were in violation of their respective Bidding Agreements because their ads appeared in response to searches for “1-800 Contacts *coupon*” or “1-800 Contacts *rebate*.”¹⁴⁰

¹³⁸ CX1752 at 001 (Oct. 13, 2005, letter from Randall Luckey, outside counsel, Memorial Eye, to David Zeidner, 1-800 Contacts) (“Memorial Eye has never used, or even considered using, [1-800 Contacts'] trademark in its sponsored advertisements, or even as a search phrase trigger. The fact that your Company's ‘mark’ includes the generic word ‘contacts’ will obviously result in a search triggering a multitude of other contact lens sites, including legitimate sponsored advertisements.”).

¹³⁹ Holbrook, Tr. 1937-1939, 2063, *in camera* (Memorial Eye interpreted agreement to require negative keywords to be implemented broadly; and Memorial Eye implemented negative keywords { [REDACTED] }); CX8001 at 005 (¶¶ 14-15) (Hamilton (Walgreens), Decl.) (Walgreens implemented negative keywords in exact and phrase match because it believed that doing so “was needed to comply with the intent of the settlement agreement”).

¹⁴⁰ See, e.g., CX0092 (May 30, 2014, letter from Mark Miller, counsel, 1-800 Contacts, to Steven Bochen, Coastal Contacts); CX1521 (Dec. 20, 2010, email from Mark Miller, counsel, 1-800 Contacts, to Pete Wilson, Walgreens). At other times, 1-800 Contacts employees simply asserted that ads appearing on a term outside the list was a breach.

Third party documents and testimony confirm that 1-800 Contacts' conduct had the effect of barring ads from appearing in response to *any* search that contained *any* variation on "1-800 Contacts," *even where* the search query contained additional *generic* words.¹⁴¹ The prohibition against advertisements appearing in response to search queries that contain *generic* terms, in addition to 1-800 Contacts' trademark, belies the notion that the Bidding Agreements impact *only* those consumers who wanted to "navigate" (in the words of 1-800 Contacts) to a particular website.¹⁴² The Bidding Agreements suppress advertisements even to those consumers using price-sensitive terms like "coupon" or "rebate," or employ language seeking comparative information, such as "competitors."¹⁴³

1-800 Contacts' enforcement of its Bidding Agreements with rivals extended beyond even paid search advertising. For example, 1-800 Contacts notified a competitor that it was in

For example, 1-800 Contacts search manager Bryce Craven contacted Coastal directly to demand that its competitive ad against a search for "1-800 Contacts coupon" be removed. CX0432.

¹⁴¹ See, e.g., Holbrook, Tr. 1937-1939, 2063; CX9039 (Clarkson, Dep. at 144-146); CX9014 (Batushansky, Dep. at 155, 158); CX8003 at 003 (¶¶ 14-15) (Mitha, Decl.); CX8001 at 004-005 (¶¶ 12, 14-15 (Hamilton (Walgreens), Decl.); CX8002 at 004-005 (¶¶ 12, 14-15 (Hamilton (Vision Direct), Decl.).

¹⁴² 1-800 Contacts Pretrial Brief at 47-48.

¹⁴³ For an example of the effect of 1-800 Contacts' sweeping Bidding Agreements and its enforcement efforts, see Compl., Ex. 1 (screen shot showing that a search for "1-800 Contacts cheaper competitors" returns an ad only for 1-800 Contacts). While 1-800 Contacts asserts that most users would not run such a search, that is beside the point. This example shows the impact that 1-800 Contacts' agreements have on a consumer's ability to run a search and get relevant, helpful search advertising. The fact that 1-800 Contacts routinely enforces its Bidding Agreements against search queries that *include* additional generic keywords means that its rivals *have no choice other than* to implement their negative keywords in "phrase" match, which – by definition – knocks those ads out of the auction *any time* the term "1-800 Contacts" appears in a search query, whether the search is for the phrase "1-800 Contacts coupon" or for the phrase "1-800 Contacts cheaper competitors." See *supra* pp. 32-38 (Bidding Agreements are broadly written and broadly enforced); see *supra* p. 13 & n.52 (discussing the effects of implementation of phrase match).

violation of its Bidding Agreement with 1-800 Contacts based on an ad that appeared on a Facebook page.¹⁴⁴

In addition to seeking to expand its Bidding Agreements beyond the scope of paid search advertising, 1-800 Contacts also attempted to expand the Bidding Agreements to parties that were not covered by the terms of the agreements. For example, when competitor AC Lens entered into an agreement with Walmart to perform back-end fulfillment for Walmart’s online sales, 1-800 Contacts asserted (ultimately, without success) that *Walmart* should be subject to the terms of 1-800 Contacts’ Bidding Agreement *with AC Lens*.¹⁴⁵

In short, 1-800 Contacts interpreted and enforced its Bidding Agreements broadly, attempting to build a moat around itself such that *no* competitive ad would ever be displayed to *any* consumer who had entered into a search engine *any* search query containing the term “1-800 Contacts” or a variation thereof.

7. Competitive Effect of Bidding Agreements on Online Contact Lens Industry

a. Search Advertising Is Critical to 1-800 Contacts’ Online Competitors’ Ability to Attract New Customers

As described earlier, search advertising is “essential” for online sellers of contact lenses because of its effectiveness in capturing new customers who have a present interest in purchasing

¹⁴⁴ CX1536. On another occasion, one of the settling parties notified 1-800 Contacts that it was in violation of its Bidding Agreement based on an ad that appeared on the Google Display Network. CX0960. It appears that 1-800 Contacts acknowledged the issue (“Looks like it’s us”), and addressed it. *See* CX09011 (Roundy, IHT at 61-65) (discussing CX0960).

¹⁴⁵ CX0007.

contact lenses.¹⁴⁶ By contrast, other forms of advertising, such as print or television advertising, are significantly less efficient for online sellers of contact lenses, particularly for smaller online sellers or those sellers with limited advertising budgets.¹⁴⁷ As 1-800 Contacts CEO and president Brian Bethers testified:

Contact lens consumers represent only 13 percent of the population, so when you do television advertising, you're trying to attract a fraction of total viewers. They're not in the market for contact lenses when you might show a commercial. If you wear contact lenses, you might go in to buy contact lenses on average twice a year. That's the only time that you're in the market, and so our commercials will be shown time after time after time, building general awareness of who we are. . .
¹⁴⁸
 ..

While 1-800 Contacts viewed television advertising as effective for developing its brand awareness,¹⁴⁹ it viewed search advertising (particularly trademark search advertising) as the main driver of new customer conversions.¹⁵⁰ Former chief marketing officer Joan Blackwood testified:

¹⁴⁶ See *supra* p. 14 (discussing unique value of search advertising to online sellers of contact lenses). See, e.g., CX8002 at 003 (¶¶ 8-9) (Hamilton (Vision Direct), Decl.) (“online paid search advertising has been a major driver in building Vision Direct’s business over the years”; “online paid search advertising is a very important tool for acquiring new online customers, and is an essential tool to a company that wants to become a significant online seller of contact lenses”); See also, e.g., CX9039 (Clarkson, Dep. at 112) (AC Lens markets almost exclusively through direct channels like search and affiliates); Holbrook, Tr. 1903-1904 (for Memorial Eye, search advertising “was the best way to attract new customers. . . . Online search advertising was the most efficient, the most practical way to attract new customers. . . . It was critical to our growth.”); CX9024 (Holbrook, Dep. at 74) (search advertising was “critical” to Memorial Eye’s business); CX8003 at 002 (¶ 6) (Mitha, Decl.) (paid search advertising is Lens Discounters’ “preferred method of acquiring new customers” and is “essential to our ability to attract new customers”).

¹⁴⁷ See, e.g., CX9029 (Bethers, Dep. at 55) (“When you conduct broadscale advertising, television, radio, 87 percent of the people that are listening to those ads or viewing those ads could care less about contact lenses. That makes advertising in a broadscale fashion very inefficient for contact lenses.”); CX9017 (Blackwood, Dep. at 207) (smaller advertisers with limited budgets may find it more cost efficient to just do trademark advertising).

¹⁴⁸ Bethers, Tr. 3690.

¹⁴⁹ See, e.g., CX0428 at 050, *in camera* { [REDACTED] }.

¹⁵⁰ See *supra* p. 17 ({ [REDACTED] } percent of 1-800 Contacts’ total sales came from trademark search advertising).

“Search . . . is an important part of the marketing strategy because that is where you actually convert a lot of the demand that you are generating through your other marketing channels.”¹⁵¹ In other words, paid search advertising is the critical last step in the advertising process to get the consumer actually to *buy* the product.¹⁵²

Online contact lens sellers have testified that search advertising is by far the most effective and most efficient means for obtaining new customers and achieving new customer “conversions,” or sales. For example, Peter Clarkson, CEO of AC Lens, and Eric Holbrook, general manager of Memorial Eye, each testified at trial that they have primarily or solely relied on search advertising to expand their online businesses because of search advertising’s unique ability to attract new customers.¹⁵³ Their testimony is confirmed by the experience of numerous other retailers, including Walgreens;¹⁵⁴ Vision Direct;¹⁵⁵ {REDACTED};¹⁵⁶ and Lens

¹⁵¹ CX9017 (Blackwood, Dep. at 22).

¹⁵² *Id.* at 22-25).

¹⁵³ CX9039 (Clarkson, Dep. at 112) (AC Lens markets almost exclusively through direct channels like search and affiliates); Holbrook, Tr. 1903-1904 (for Memorial Eye, search advertising “was the best way to attract new customers. . . . Online search advertising was the most efficient, the most practical way to attract new customers. . . . It was critical to our growth.”); CX9024 (Holbrook, Dep. at 74) (search advertising was “critical” to Memorial Eye’s business).

¹⁵⁴ CX8001 at 003 (¶¶ 8-9) (Hamilton (Walgreens), Decl.) (“online paid search advertising has helped to increase consumer awareness that Walgreens sells contact lenses through Walgreens.com. This was particularly important when Walgreens first entered into the business of selling contact lenses online because Walgreens was already a well-known, trusted brand, but was not known as a retailer of contact lenses.”; “I believe that online paid search advertising is a very important tool for acquiring new online customers.”).

¹⁵⁵ CX8002 at 003 (¶¶ 8-9) (Hamilton (Vision Direct), Decl.) (“online paid search advertising has been a major driver in building Vision Direct’s business over the years”; “online paid search advertising is a very important tool for acquiring new online customers, and is an essential tool to a company that wants to become a significant online seller of contact lenses”).

¹⁵⁶ CX9000 (Batushansky, IHT at 52-53), *in camera* {REDACTED}.

Discounters.¹⁵⁷ All of these retailers attest that paid search advertising was “critical” to growing their respective businesses.¹⁵⁸ According to Glen Hamilton, who ran the paid search campaigns for both the second-largest online contact lens seller, Vision Direct, and for Walgreens: “[O]nline paid search advertising is . . . an *essential tool* to a company that wants to become a significant online seller of contact lenses.”¹⁵⁹

b. Advertising In Response to 1-800 Contacts’ Trademark Keywords Promotes Rivals’ Brands and Provides Strong Return on Investment

Prior to entering into the Bidding Agreements, 1-800 Contacts’ online competitors bid on keywords that made competitive sense for them, including – in many cases – 1-800 Contacts’ trademarks.¹⁶⁰ Even retailers who may not have *bid* on the trademarks (Walgreens, Memorial Eye) found it beneficial to appear in response to search queries relating to 1-800 Contacts when

¹⁵⁷ CX8003 at 002 (¶ 6) (Mitha, Decl.) (paid search advertising is Lens Discounters’ “preferred method of acquiring new customers” and is “essential to our ability to attract new customers”).

¹⁵⁸ *E.g.*, Holbrook, Tr. 1903 (search advertising was “critical to [Memorial Eye’s] growth”); CX9024 (Holbrook, Dep. at 74) (same); Clarkson, Tr. 230 (“I think that [search advertising] has been historically the lifeblood of [our company’s] growth.”); CX8002 at 003 at (¶¶ 8-9) (Hamilton (Vision Direct), Decl.) (“online paid search advertising has been a major driver in building Vision Direct’s business over the years” and “is a very important tool for acquiring new online customers”); CX8001 at 003 (¶¶ 8-9) (Hamilton (Walgreens), Decl.); CX9014 (Batushansky, Dep. at 119), *in camera* { [REDACTED] }; CX9000 (Batushansky, IHT at 52-53), *in camera* { [REDACTED] }; CX8003 at 002 (¶ 6) (Mitha, Decl.) (paid search advertising is “essential to our ability to attract new customers”); Alovis, Tr. 992 (paid search advertising has been effective in generating growth for Lens Direct).

¹⁵⁹ CX8002 at 003 (¶¶ 8-9) (Hamilton (Vision Direct), Decl.) (emphasis added).

¹⁶⁰ *E.g.*, CX9000 (Batushansky, IHT at 64-65), *in camera* { [REDACTED] }; CX8003 at 002 (¶¶ 9-10) (Mitha, Decl.) (Lens Discounters bid on 1-800 Contacts trademarks because it was able to generate “a significant number of ad impressions” and because “it was a profitable strategy,” from which Lens Discounters received “a good amount of traffic, as well as resulting orders”). 1-800 Contacts’ trademark expert Howard Hogan agrees that “advertisers are in the best position to determine which keywords support their competitive interests” RX0734 at 0096-0097 (¶ 145) (Hogan Expert Report).

Google's algorithms determined that their ads would be relevant and useful to consumers.¹⁶¹ This was for two reasons. First, queries relating to 1-800 Contacts were significant in volume,¹⁶² which provided immediate (and numerous) opportunities for these lesser-known retailers to get their own brand names in front of millions of consumers who had indicated interest in purchasing contact lenses. As Lens Discounters founder and chief operating officer Sean Mitha explained:

[E]ven if consumers did not purchase from us in response to any particular search query, we were able to get the Lens Discounters name in front of a large audience of potential customers. This gave consumers the choice and view of other cheaper options, similar to a brick-and-mortar shop having a competitor advertise next door.¹⁶³

CEO Peter Clarkson, of AC Lens, and general manager Eric Holbrook, of Memorial Eye, also emphasized the importance of appearing in response to the large volume of search queries relating to 1-800 Contacts as a way to promote their own brands to a large audience of potential customers.¹⁶⁴ According to Mr. Holbrook: “[I]t put our brand in [consumers’] mind[s], and the next time they were looking for contact lenses they would be more likely to remember our name,

¹⁶¹ CX8001 at 003 (¶¶ 8-9) (Hamilton (Walgreens), Decl.); Holbrook, Tr. 1907-1908. Mr. Holbrook testified that Memorial Eye did not bid directly on 1-800 Contacts’ trademarks because 1-800 Contacts started sending “threatening letters” soon after Memorial Eye launched its online business. But for 1-800 Contacts’ conduct, Mr. Holbrook testified that Memorial Eye would have considered bidding on the term “1-800 Contacts” as a keyword in search advertising auctions. Holbrook, Tr. 1993.

¹⁶² Google data shows that there were { [REDACTED] }. CX1172, *in camera*.

¹⁶³ CX8003 at 002 (¶ 9) (Mitha, Decl.).

¹⁶⁴ Holbrook, Tr. 1904-1905; *id.* 1909-1910; CX9024 (Holbrook, Dep. at 72-73); CX9039 (Clarkson, Dep. at 104) (“[W]e know from public data that there are an awful lot of people who search for 1-800 CONTACTS. We think that some portion of them would be interested in an offer that said, ‘We’re 20 percent cheaper.’ So it – we think it would be a compelling proposition to consumers.”).

our brand, and possibly look for us again.”¹⁶⁵ 1-800 Contacts’ chief marketing officer, Tim Roush, agrees that getting a retailer’s name in front of the consumer is valuable, even in cases where the consumer chooses another option. He testified:

Search advertising is advertising as well as a channel to drive people directly to your site. And we believe that some people who see that advertising might – it might leave an impression, and then later on they could decide that they want to still go to the site because they remember that search advertisement.¹⁶⁶

Even for better-known retailers – such as Walgreens – appearing in response to search queries relating to 1-800 Contacts offered the opportunity to “introduce” themselves to consumers as sellers of contact lenses. Walgreens was already a trusted brand name, but when it launched its online contact lens business, many consumers were not familiar with Walgreens as a retailer of contact lenses. Search advertising – and advertising against queries relating to 1-800 Contacts in particular – was an efficient and effective way of communicating that information to consumers.¹⁶⁷

Second, each of these retailers independently determined that advertising against search queries relating to 1-800 Contacts was a profitable marketing strategy. Specifically, rival advertisements shown in response to queries relating to 1-800 Contacts resulted in an attractive

¹⁶⁵ Holbrook, Tr. 1905.

¹⁶⁶ CX9034 (Roush, Dep. at 44-45, 47). *See also, e.g.*, CX0296 at 023, *in camera* (2015 “Paid Search Overview” states: { [REDACTED] }) (emphasis added).

¹⁶⁷ CX8001 at 003 (¶¶ 8-9) (Hamilton (Walgreens), Decl.) (“[B]ecause Walgreens’ ads appear when consumers conduct online searches related to contact lenses, online paid search advertising has helped increase consumer awareness that Walgreens sells contact lenses through Walgreens.com. This was particularly important when Walgreens first entered into the business of selling contact lenses online because Walgreens was already a well-known, trusted brand, but was not known as a retailer of contact lenses. By using online paid search advertising, Walgreens has been able to get the message out to consumers interested in buying contact lenses that they could buy those contact lenses through Walgreens.com. I believe that online paid search advertising is a very important tool for acquiring new online customers.”).

return on investment, in terms of actual clicks, conversions (order volume), and advertising cost.¹⁶⁸ This profit opportunity arises because 1-800 Contacts’ online rivals charge prices significantly below 1-800 Contacts for *identical* products.¹⁶⁹ Putting ads in front of consumers who are looking to purchase contact lenses, and making it known that “we’re 20 percent cheaper,” was a winning strategy for these retailers.¹⁷⁰

Memorial Eye’s experience is representative. Memorial Eye was a “discount” online retailer (with prices significantly below those of 1-800 Contacts¹⁷¹), and its advertisements to consumers heavily promoted its low pricing.¹⁷² During the four-and-a-half years in which Memorial Eye advertised against 1-800 Contacts-related queries, { [REDACTED]

¹⁶⁸ See, e.g., Holbrook, Tr. 1907-1908 (Memorial Eye’s advertising against 1-800 Contacts’ trademarks “generated a lot of conversions for us, which led to sales, a lot. It was a large percentage.”); *id.* at 1912 (Memorial Eye generated “[a] large amount of sales” based on the strategy of advertising against 1-800 Contacts’ trademarks); Alovis, Tr. 1014 (“We find great value in bidding on ‘1-800 Contacts.’ A lot of people search for 1-800 Contacts.”); *id.* at 1012-1014 (“1-800contacts coupon” has doubled Lens Direct’s average conversion rate and has a “very attractive” cost per conversion). See also CX1626, *in camera* { [REDACTED] }; CX1641 (Lens Direct AdWords data showing search queries containing 1-800 Contacts trademark terms to be especially valuable).

¹⁶⁹ See *supra* pp. 4, 6-7.

¹⁷⁰ CX9039 (Clarkson, Dep. at 104) (“[W]e know from public data that there are an awful lot of people who search for 1-800 CONTACTS. We think that some portion of them would be interested in an offer that said, ‘We’re 20 percent cheaper.’ So it – we think it would be a compelling proposition to consumers.”). See, e.g., Holbrook, Tr. 1911-1912 (advertising in response to consumers who searched for 1-800 Contacts was a successful sales strategy because it gave consumers “an opportunity to purchases lenses at a lower price as opposed to going to another retailer where they might have to pay more”; this advertising strategy resulted in “[a] large amount of sales” for Memorial Eye); CX8003 at 002 (¶ 9) (Mitha, Decl.) (“[B]y bidding on 1-800 Contacts’ terms, we were able to generate a significant number of ad impressions, which meant that, even if consumers did not purchase from us in response to any particular search query, we were able to get the Lens Discounters name in front of a large audience of potential customers. This gave consumers the choice and view of other cheaper options, similar to a brick-and-mortar shop have a competitor advertise next door.”).

¹⁷¹ Holbrook, Tr. 1901.

¹⁷² *Id.* at 1904.

[REDACTED]}.¹⁷³ Indeed, { [REDACTED]

[REDACTED]

[REDACTED]}¹⁷⁴ Similarly, { [REDACTED]

[REDACTED]

[REDACTED]}¹⁷⁵

In short, Memorial Eye attracted a large volume of new customers, and developed significant business, based on its strategy of advertising against 1-800 Contacts-related queries. In general manager Eric Holbrook’s words: “[T]hose ads generated a lot of conversions for us, which led to sales, a lot. It was a large percentage. It was a way of us attracting new . . .

¹⁷³ CX1626, *in camera* { [REDACTED] }. *See also* Holbrook, Tr. 1979, *in camera* (testifying regarding CX1626); Holbrook, Tr. 1907-1908, 1912 (advertising against 1-800 Contacts’ trademarks resulted in a significant volume of conversions and sales for Memorial Eye).

¹⁷⁴ CX1626, *in camera* { [REDACTED] }. *See also* Holbrook, Tr. 1977-1978, *in camera* { [REDACTED] }; Holbrook, Tr. 1907-1908, 1912 (advertising against 1-800 Contacts’ trademarks resulted in a significant volume of conversions and sales for Memorial Eye).

¹⁷⁵ CX1626, *in camera* { [REDACTED] }. *See also* Holbrook, Tr. 1978-1979, *in camera* { [REDACTED] }; Holbrook, Tr. 1907-1908, 1912 (advertising against 1-800 Contacts’ trademarks resulted in a significant volume of conversions and sales for Memorial Eye).

customers, and building our volume. . . .”¹⁷⁶ Not surprisingly, many of 1-800 Contacts’ rivals found it worthwhile to advertise against these “important” search queries.¹⁷⁷

c. Loss of Traffic Precludes 1-800 Contacts’ Online Competitors From Being Able to Compete Effectively for Consumers

Several of 1-800 Contacts’ competitors testified that not being able to advertise against search queries relating to 1-800 Contacts hampered their ability to compete effectively for consumers of contact lenses. For example, as described further below, Memorial Eye’s general manager Eric Holbrook testified that this source of new customers was so “critical” to Memorial Eye, its online business could not survive without this traffic.¹⁷⁸ Web Eye Care CEO Peter

Batushansky {

[REDACTED]

[REDACTED] }¹⁷⁹ According to Mr.

Batushansky, {

[REDACTED]

[REDACTED] }¹⁸⁰ And Glen Hamilton, who ran the

search advertising strategy for both Vision Direct and Walgreens, testified, based on Google’s estimates of the sales that Walgreens and Vision Direct would earn by having its ads appear

¹⁷⁶ Holbrook, Tr. 1908. *See* CX9024 (Holbrook Dep. at 74) (“Q: How important to your online business . . . was the ability to have one of your ads appear . . . in response to a search for 1-800 Contacts? A. . . . For the online business it was extremely important. It was critical.”).

¹⁷⁷ Holbrook, Tr. 1907. *See supra* pp. 42-46.

¹⁷⁸ Holbrook, Tr. 1992. *See infra* pp. 51-52.

¹⁷⁹ CX9000 (Batushansky, IHT at 105), *in camera*.

¹⁸⁰ CX9000 (Batushansky, IHT at 105), *in camera*.

against search queries for 1-800 Contacts, each firm was losing approximately { [REDACTED] } in sales each month due to the Bidding Agreements.¹⁸¹

Notably, not being able to advertise to a large volume of potential customers has a significant impact even beyond the initial inability to display an ad to a potential customer. Whereas search advertising mainly attracts *new* customers, online contact lens retailers – including 1-800 Contacts – make their profit on *returning* customers.¹⁸² Because of this dynamic, online retailers are willing to invest a significant sum into acquiring new customers (even to the point of losing money on the first order), with the expectation that those customers will become repeat customers, and the retailer will “earn back” the investment through repeat orders.¹⁸³ Thus, by cutting off its rivals’ most significant source of *new* customer traffic, 1-800 Contacts not only impacted their immediate traffic and order volume, 1-800 Contacts significantly limited those rivals’ ability to secure those customers’ *repeat* business – where the bulk of the profits are.

d. One Competitor – Memorial Eye – Shuts Down Its Online Business As a Result of 1-800 Contacts’ Conduct

¹⁸¹ CX8002 at 006 (¶ 19) (Hamilton (Vision Direct), Decl.), *in camera*; CX8001 at 007 (¶ 20) (Hamilton (Walgreens), Decl.), *in camera*.

¹⁸² *See, e.g.*, CX0525 at 022; CX0296 at 024; CX9034 (Roush, Dep. at 45) (testifying that once first-time customers comes through the “high-cost” paid search channel, 1-800 Contacts can retain that customer through “lower-cost” channels like email, trademark paid search, or typed/bookmark, “[a]nd so those customers over time would become from less profitable customers to more profitable customers, better lifetime value”); CX9024 (Holbrook, Dep. at 39) (“[F]rom a cost standpoint [repeat business] was vital [for Memorial Eye] . . . because it’s less expensive to provide a secondary order on somebody that is with us already as opposed to going through search advertising.”); CX9039 (Clarkson, Dep. at 33-34 (new customer is not as profitable for AC Lens as repeat customer because it costs “a lot of money” to get first-time customer; “If – if you only buy from me once, I may actually lose money on the sale because of my marketing expense and may not become profitable until they make a second or subsequent purchase.”)).

¹⁸³ *See supra* n.182.

As a result of 1-800 Contacts' conduct, one competitor – Memorial Eye – went out of business altogether. As described above, Memorial Eye derived a significant portion of its paid search traffic from advertising in response to 1-800 Contacts-related search queries. Indeed, these terms were of “critical” importance to Memorial Eye, { [REDACTED] }¹⁸⁴

Memorial Eye launched its online business in December 2004, after several years of operating as a brick-and-mortar ECP in the Houston area.¹⁸⁵ Although Memorial Eye did not bid directly on 1-800 Contacts' trademarks,¹⁸⁶ many of its ads – featuring low price offers – were “broad-matched” into the SERP by Google, based on its determination that Memorial Eye's ads were relevant to search queries relating to 1-800 Contacts.¹⁸⁷ Consistent with Google's predictions regarding relevance, very quickly, Memorial Eye realized impressive results from this advertising strategy. The company derived significant traffic from consumers on these searches, as well as significant volumes of clicks and sales.¹⁸⁸

In September 2005, just nine months after launching its online business, Memorial Eye received the first of several cease-and-desist letters from 1-800 Contacts, demanding that

¹⁸⁴ See *supra* n.173.

¹⁸⁵ Holbrook, Tr. 1853-1856.

¹⁸⁶ *Id.* at 1905-1906. Mr. Holbrook testified that Memorial Eye did not bid directly on 1-800 Contacts' trademarks because 1-800 Contacts started sending “threatening letters” soon after Memorial Eye launched its online business. But for 1-800 Contacts' conduct, Mr. Holbrook testified that Memorial Eye would have considered bidding on the term “1-800 Contacts” as a keyword in search advertising auctions. *Id.* at 1993.

¹⁸⁷ *Id.* at 1906-1907.

¹⁸⁸ *Id.* at 1907-1908, 1912.

Memorial Eye cease advertising against 1-800 Contacts-related queries.¹⁸⁹ Over the course of approximately three years, 1-800 Contacts repeatedly demanded that Memorial Eye implement negative keywords to prevent its ads from appearing in response to search queries relating to 1-800 Contacts.¹⁹⁰ When Memorial Eye refused to comply,¹⁹¹ 1-800 Contacts filed a lawsuit against Memorial Eye.¹⁹² Over the course of the lengthy litigation, Memorial Eye suffered significant financial losses due to its litigation expenses.¹⁹³

By early 2012, it became clear to Memorial Eye that it could not afford to continue its litigation with 1-800 Contacts. According to Mr. Holbrook, “we couldn’t afford to fight it anymore, and we needed to cut our losses and protect our optometry offices. . . .”¹⁹⁴ It was also clear to Memorial Eye that the only way to stop the bleeding was to settle with 1-800 Contacts on its terms.¹⁹⁵ Of course, Memorial Eye already knew what those terms were: 1-800 Contacts had made clear its demands back in September 2005, and again in 2007, and again in 2008.¹⁹⁶

¹⁸⁹ *Id.* at 1914.

¹⁹⁰ *Id.* at 1914, 1920-1921.

¹⁹¹ Initially, Memorial Eye did implement negative keywords in response to one of 1-800 Contacts’ letters for a “brief” period of time, but removed the negative keywords quickly “when we realized we weren’t doing anything wrong.” *Id.* at 1921-1923.

¹⁹² RX0072 (Memorial Eye Complaint). *See* Holbrook, Tr. 1923.

¹⁹³ Holbrook, Tr. 1931-1933.

¹⁹⁴ *Id.* at 1878.

¹⁹⁵ CX9024 (Holbrook, Dep. at 62-63).

¹⁹⁶ Holbrook, Tr. 1917-1918, 1920-1921, 1942.

As a result, by early 2012, seven years after receiving its first “threatening” letter from 1-800 Contacts,¹⁹⁷ “the writing was on the wall”¹⁹⁸: Memorial Eye knew that it would have to settle the case with 1-800 Contacts or go into significant debt to fight the seemingly unlimited coffers of its much larger competitor.¹⁹⁹ Memorial Eye also knew that in order to settle the case, it would have to implement negative keywords that would deprive it of critical traffic that was the lifeblood of its online business.²⁰⁰ Based on this knowledge and understanding, Memorial Eye started evaluating whether to shut down its online business.²⁰¹

Prior to making the decision to shut down its online business, Memorial Eye had invested heavily into expanding its online business. Not only had Memorial Eye launched a second website, but it was investing significant resources into revamping its websites and promoting its brand, securing larger office space, and launching a complementary eyeglasses business that would manufacture eyeglasses in-house and sell them online.²⁰² In 2012, when Memorial Eye was faced with almost-certain loss of the most effective and efficient way of acquiring new customers – *i.e.*, traffic from consumers searching for “1-800 Contacts” – Memorial Eye was

¹⁹⁷ *Id.* at 1906.

¹⁹⁸ CX9024 (Holbrook, Dep. at 76).

¹⁹⁹ Holbrook, Tr. 1931-1933.

²⁰⁰ *Id.* at 1942 (“[I]t was clear to us that . . . if we were ever going to get the [law]suit [by 1-800 Contacts] stopped it was going to require that we apply the negative – agree to the negative keywords that they had been requesting and demanding from the very beginning, and we knew that that would result in the closing of our business because we wouldn’t be sustainable, so that’s when I made the decision that we would eventually have to close down the business.”).

²⁰¹ *Id.* at 1942.

²⁰² *Id.* at 1943-1944.

forced to reconsider its plans.²⁰³ Without this critical source of new business, Memorial Eye knew its online business “wouldn’t be sustainable,” and could not survive.²⁰⁴

With this possibility now becoming almost-certain reality, rather than continuing to work on its expansion efforts, Memorial Eye made the decision to shut down the online business altogether. And so Memorial Eye began the process of slowly unraveling the enterprise it had successfully built over the previous eight years.²⁰⁵ This process culminated in December 2013, almost immediately after Memorial Eye finally signed the settlement agreement that formalized “the writing on the wall.”²⁰⁶ On December 7, 2013, Memorial Eye posted a notice to its customers on its ShipMyContacts and IWantContacts websites: “It is with earnest regret we inform you that we have decided to suspend our online contact lens operations until further notice.”²⁰⁷

Memorial Eye’s co-founder and general manager Eric Holbrook testified that, but for 1-800 Contacts’ conduct, Memorial Eye would still be operating its online business today.²⁰⁸

8. Bidding Agreements Result in Harm to Consumers of Contact Lenses and Search Engines

a. Bidding Agreements Result in Harm to Consumers

²⁰³ *Id.* at 1947.

²⁰⁴ *Id.* at 1942 (“[I]t was clear to us that . . . if we were ever going to get the suit stopped it was going to require that we apply the negative – agree to the negative keywords that they had been requesting and demanding from the very beginning, and we knew that that would result in the closing of our business because we wouldn’t be sustainable, so that’s when I made the decision that we would eventually have to close down the business.”).

²⁰⁵ *Id.* at 1948.

²⁰⁶ CX9024 (Holbrook, Dep. at 76). *See* Holbrook, Tr. 1942, 1947.

²⁰⁷ CX1317 (Memorial Eye website notice).

²⁰⁸ Holbrook, Tr. 1993, 2063-2064, *in camera*.

The Bidding Agreements directly harm consumers by (i) reducing the quality and quantity of informative advertising displayed to consumers; (ii) causing consumers to pay higher prices for contact lenses; and (iii) artificially inflating online contact lens prices across the board.

i. Bidding Agreements Reduce Quality and Quantity of Informative Advertising Displayed to Consumers

The Bidding Agreements directly harm consumers by reducing the quality and quantity of informative advertising regarding contact lenses.²⁰⁹ Among other things, reducing the availability of informative advertising harms consumers by adding to their search costs and eliminating competitive options.²¹⁰

Although the but-for world cannot be observed directly, it can be “modeled” using economic tools and the available evidence. In order to assess the effects of the Bidding Agreements on consumer welfare, Complaint Counsel’s economic experts, Professor Susan Athey and Professor David Evans, each constructed a model of the but-for world in the absence of the Bidding Agreements.²¹¹ Using different data sets and different methodologies, the two economists reached results consistent with one another, and results consistent with the

²⁰⁹ Evans, Tr. 1422-1423, 1561; CX8006 at 087-088 (¶¶ 191-193) (Evans Expert Report); *id.* at 096 (¶ 208); CX8007 at 023-026 (¶¶ 64-71) (Athey Expert Report); *id.* at 032-033 (¶¶ 92-94 & Table 2) (Athey Expert Report).

²¹⁰ Athey, Tr. 2102-2103; CX8006 at 087-088 (¶¶ 191-193) (Evans Expert Report); *id.* at 096 (¶ 208); *id.* at 102-105 (¶¶ 223-229). *See also, e.g.*, CX0471 (2004 email from Google describing Google’s revised policy regarding bidding on trademarks as keywords) (“By preventing advertisers from using trademarked terms as keywords, Google has been reducing the relevant information about products and services users see and thus limiting user choice. We believe the right approach is to give users more choices and access to as much information as is relevant to their search or interest.”); CX0888, *in camera* { [REDACTED] }.

²¹¹ Athey, Tr. 766-767, 774, 780-781; CX8007 at 006 (¶¶ 13-14) (Athey Expert Report); Evans, Tr. 1618-1620, *in camera*; CX8006 at 098-103 (¶¶ 213-224 & Table 6) (Evans Expert Report)).

conclusion that the Bidding Agreements substantially harm competition. Significantly, 1-800 Contacts and its economic experts provide the Court with no alternative model of competitive effects.²¹²

Athey Model. Professor Athey's empirical economic model of the market without the Bidding Agreements proceeds in two stages: first, Professor Athey constructed a model of consumer click behavior; second, she determined what the search results page would look like *if* rivals of 1-800 Contacts were free to bid.²¹³ In brief, in stage one, Professor Athey estimated an econometric model that accounts for consumer click behavior in the actual world when the user conducts a Google search related to contact lenses. To predict consumer click behavior, the model takes into account (i) the consumer appeal of the advertised brand, (ii) the position of the ad on the search results page, (iii) whether the ad was served by the firm searched for by the consumer, (iv) whether the ad is for 1-800 Contacts, and (v) the propensity of the consumer to click on any ad.²¹⁴ This methodology is referred to by economists as a multinomial logistic regression model.²¹⁵

In stage two, Professor Athey constructed the ad layout that a consumer would likely see in response to a 1-800 Contacts-related search query, *if* rivals were free to bid. The counterfactual ad layout was derived from data showing the actual ad layout displayed by Google following a search for certain generic terms related to contact lenses. In other words, the

²¹² See generally RX0739 (Murphy Expert Report); RX0733 (Ghose Expert Report).

²¹³ Athey, Tr. 766-767, 774, 780-781.

²¹⁴ *Id.* at 766-772.

²¹⁵ CX8007 at 029 (¶¶ 86-87) (Athey Expert Report).

assumption is that, absent the restraints on advertising, the search result page triggered by the query “1800 Contacts” would be akin to the search results page triggered by queries such as “contact lenses” or “contacts.” The econometric model of click behavior derived in step one is then applied to the counterfactual ad layout derived in step two.²¹⁶

Professor Athey concludes that, in the absence of the Bidding Agreements, the number of competitor ads appearing on searches for 1-800 Contacts trademarks increases substantially, from **0.54 to 1.85 competitor ads** per search (an increase of **242 percent**); consumer clicks on the 1-800 Contacts ads decline, by **2 clicks** per hundred searches; and consumer clicks on ads for competitors of 1-800 Contacts increase, by **3.5 clicks** per hundred searches.²¹⁷

Evans Model. Professor Evans’ empirical economic model draws on online retailer Memorial Eye’s bidding experience, briefly described earlier.²¹⁸ Whereas most online competitors restrained their advertising soon after being threatened or sued by 1-800 Contacts, Memorial Eye continued to advertise against 1-800 Contacts’ trademarks for several years. As a result, there is a comprehensive data set showing the extent to which Memorial Eye ads appeared on search results pages generated by 1-800 Contacts’ trademark queries, and the extent to which those ad impressions resulted in clicks for Memorial Eye. Using this real-world data from Memorial Eye’s experience, Professor Evans projected the number of ads and clicks that the 14 online rivals subject to Bidding Agreements would have achieved in the absence of the Bidding

²¹⁶ Athey, Tr. 774-776.

²¹⁷ *Id.* at 775-780; CX8007 at 032-033 (¶¶ 92-94 & Table 2) (Athey Expert Report).

²¹⁸ *See supra* pp. 46-47.

Agreements if, on average, these sellers were comparable to Memorial Eye (*e.g.*, had a similar willingness and ability to advertise against 1-800 Contacts' trademarks).²¹⁹

Absent the Bidding Agreements, Professor Evans concludes that, between January 2010 and June 2015, the number of competitor ads appearing on searches for 1-800 Contacts increases substantially, by some [REDACTED]. As a result of this additional advertising, Professor Evans finds that, over time, consumer clicks on 1-800 Contacts ads decline, and consumer clicks on ads for competitors of 1-800 Contacts increase. For just the first six months of 2015, clicks on competitor ads increase by [REDACTED] per month. Accounting for repeat sales, Professor Evans estimates that 1-800 Contacts' rivals would have realized an increase in sales of [REDACTED] during that six-month time period.²²⁰

Professors Athey and Evans explain that their empirical analyses support the conclusion that the Bidding Agreements have substantially harmed consumers and competition. Recall that the prices charged by 1-800 Contacts are substantially higher than those offered by other online contact lens retailers.²²¹ As Professor Athey explains in her report, the best explanation for 1-800 Contacts' ability to charge a price premium for a commodity product is that consumers lack sufficient information about the presence of competing firms and about the lower prices charged by these competing firms.²²² Unleashing tens of millions of advertisements on behalf of

²¹⁹ Evans, Tr. 1624-1625; CX8006 at 098-101 (¶¶ 213-219) (Evans Expert Report).

²²⁰ CX8006 at 101-103 (¶¶ 220-224 & Table 6) (Evans Expert Report); *id.* at 132 (¶ 287); CX8009 at 084 (¶¶ 117, 155 & n.193) (Evans Rebuttal Expert Report); Evans, Tr. 1619-1623. Professor Evans estimates that the value of sales gained by rivals would be even higher in 2017, largely as a result of the growing value of repeat sales. He did not have data to extend his analysis to 2017.

²²¹ *See supra* pp. 6-7.

²²² Athey, Tr. 754, 2102-2103; CX8007 at 019-023 (¶¶ 51-63) (Athey Expert Report).

numerous discount sellers would help to ameliorate this information deficit, and Professors Athey and Evans' models both show that consumers would respond positively to this information.²²³

Professors Athey's and Evans' common conclusion is supported by ample evidence in the record. For example, a { [REDACTED] } produced by 1-800 Contacts shows that consumers believe there is a significantly smaller price differential between 1-800 Contacts and its online rivals than the price differential that actually exists.²²⁴ Search advertising is the critical component that supplies the missing information.²²⁵ The Bidding Agreements ensure that this information never reaches consumers, and that they are unable to make fully informed choices at precisely the moment they are ready to purchase.²²⁶

ii. Bidding Agreements Cause Consumers to Pay More For Contact Lenses

As described above, the Bidding Agreements remove information about 1-800 Contacts' online rivals that consistently charge lower prices than 1-800 Contacts.²²⁷ Because of this critical

²²³ Evans, Tr. 1644-1645, 1720 (“once you had that intensification of competition, [a consumer who has never used search but is going directly to the website] they’re then an indirect beneficiary of the opening of the competitive advertising”); CX8006 at 098-103 (¶¶ 213-224 & Table 6) (Evans Expert Report); CX8007 at 032-034 (¶¶ 92-98 & Table 2) (Athey Expert Report).

²²⁴ See CX1449, *in camera* { [REDACTED] }. See also CX8006 at 085-086 (¶ 189 & n.197-200) (Evans Expert Report).

²²⁵ Athey, Tr. 761-762, 811-812; CX8007 at 023, 025 (¶¶ 65, 69) (Athey Expert Report); Evans, Tr. 1371-1373; CX8006 at 087 (¶ 191) (Evans Expert Report).

²²⁶ CX8007 at 023-026 (¶¶ 64-71) (Athey Expert Report); Evans, Tr. 1422-1423; *id.* at 165; CX8006 at 087-090 (¶¶ 191-194) (Evans Expert Report).

²²⁷ See *supra* pp. 6-7.

information gap, the Bidding Agreements cause consumers to pay more for contact lenses, either because they would have purchased from a lower-price seller or because they would have sought a price-match from 1-800 Contacts.

The models constructed by Professors Athey and Evans demonstrate that many consumers would respond to the presence of competitor advertisements by shifting their purchases away from 1-800 Contacts to lower-price sellers. Having switched to lower-price sellers, these consumers tend not to switch back, meaning that 1-800 Contacts does not lose (and its competitors do not gain) just *one* sale per diverted click, but potentially many subsequent sales as well.²²⁸

The conclusions of Professors Athey and Evans are bolstered by 1-800 Contacts' own contemporaneous estimate in 2008 that competitive bidding by rivals on 1-800 Contacts trademarks were causing it to lose some \$68,604 in sales per month to its rivals.²²⁹ Similarly, search advertising reports prepared by 1-800 Contacts employees specifically identify competitive advertising as a material factor leading to fewer sales for 1-800 Contacts, and the "removal" of lower-price competitors from the SERP as a material factor in generating additional sales.²³⁰

²²⁸ Evans, Tr. 1452-1454, 1642; CX8006 at 103-104 (¶¶ 225-227) (Evans Expert Report); Athey, Tr. 825-826. *See* CX0466 at 095, *in camera* { [REDACTED] }.

²²⁹ CX0213 _NATIVE_1-800F_00024851 (1-800 Contacts Spreadsheet, Competitor on TM Cost Estimates, Oct. 17, 2008).

²³⁰ *See, e.g.*, CX0864 at 002 ("Our comps continue to be quite difficult. . . . We've seen particularly sharp declines in Trademark orders, which has dropped to less than 80% of our total orders for the past few weeks. This decline comes from a decreasing conversion rate on trademark – likely the result of competitive pressure and pricing."); CX0906 ("Google TM orders . . . were slightly softer than last week because of increased competition on our best branded terms. Google searches for our most profitable term, 1800-contacts, currently yields ads for six other advertisers."); CX0564 ("Contributing to the TM [trademark] success was the removal of a few competitors who had been showing up on our best TM terms. Walgreens was the most notable of these and dropped off on the 15th of

Those consumers who chose to remain with 1-800 Contacts would be more likely to seek a price-match in the face of rival low-price advertisements. 1-800 Contacts widely advertises its price-matching program.²³¹ 1-800 Contacts executives acknowledge that 1-800 Contacts' readiness to "meet or beat" the lower prices of its competitors is particularly critical in the face of rival low-price advertising.²³² Indeed, when 1-800 Contacts observed that it was losing sales to online rivals placing "aggressive" ads (*e.g.*, "70% off"),²³³ 1-800 Contacts responded by changing its price-match to a "We beat by 2%" offer, and by advertising the offer more aggressively online.²³⁴ This led to a substantial increase in consumers obtaining price matches.²³⁵ 1-800 Contacts' price-matching data { [REDACTED]

June."); CX0927 ("Trademark orders (5,706) had another very solid week. . . . This was partially caused by the highest TM CTRs [click through rates] (27.2%) we've ever seen. The removal of ShipMyContacts from our trademarks . . . contributed to our excellent TM CTR this week.").

²³¹ *See, e.g.*, CX9032 (L. Schmidt, Dep. at 131, 217).

²³² *See, e.g.*, CX9012 (L. Schmidt, IHT at 252, 255); CX9032 (L. Schmidt, Dep. at 132-133).

²³³ *See, e.g.*, CX044 at 009-010, 015; CX0654 ("Our online search competitors are focusing heavily on price/discounts ('70% off' is *everywhere*) which may be hurting us from an NI [New Internet] conversion rate standpoint.") (emphasis in original); CX0895 ("As you can see, Shipmycontacts has been using the 70% [off] messaging for a while. . . . Walgreens copy has also been aggressive in the past."); CX0898 ("On the term 'contact lenses' we are in third, behind two aggressive pricing messages."); CX0883 at 002 ("The paid search landscape continues to increase in competitiveness, with some advertisers claiming '70% off' and extremely low price per box."); CX0876 (with "aggressive position[ing]" by online competitors, "more people [are] seeing us but choosing not to click on us"; "what can we do to combat?"); CX0946 at 002 (president Brian Bethers emails CEO Jonathan Coon, noting that "competitors [are] touting 70% off normal prices or 20% off for new customers. For individual products, the[y] will always be able to quote a price lower than our price. This definitely impacts our conversion when we extend search out."); CX9012 (L. Schmidt, IHT 255-256).

²³⁴ *See, e.g.*, CX9032 (L. Schmidt, Dep. at 132-133); CX9012 (L. Schmidt, IHT at 252, 255); CX0946 at 001-002, 011-012; CX1334 at 004, *in camera*; Evans, Tr. 1608-1617, *in camera*; CX0658 (discussing activation of "We Beat Any Online Price" messaging); CX0657 (discussing same); CX0764 at 009; CX0633 at 003 (discussing promotions); CX0017 ("We beat by 5%' would be a big message in search"). *See also* CX8009 at 071-072 (¶ 127) (Evans Rebuttal Expert Report); Evans, Tr. 1608-1617.

²³⁵ *See, e.g.*, CX1334 at 004, *in camera*; CX0946 at 001-002, 011-012; CX9032 (L. Schmidt, Dep. at 132-133). *See also* CX8009 at 071-072 (¶ 127) (Evans Rebuttal Expert Report); Evans, Tr. 1608-1617.

Contacts' price-matching program.²⁴⁰ When consumers change their purchasing behavior, this places downward pressure on prices across the board, and more likely than not, prices would fall.²⁴¹

b. Bidding Agreements Result in Harm to Search Engines

The Bidding Agreements directly harm search engines by (i) reducing their revenues; and (ii) reducing the quality of the product that search engines offer consumers.

i. Bidding Agreements Reduce Revenues to Search Engines

The Bidding Agreements result in economic harm to the search engines. Professor Evans constructed a model showing that the Bidding Agreements reduced 1-800 Contacts' cost-per-click by some { [REDACTED] }²⁴² Professor Evans' conclusion is bolstered by 1-800 Contacts' own 2008 estimate that competitive bidding in search auctions cost it an additional \$20,434 per month in advertising costs.²⁴³

1-800 Contacts' contemporaneous documents also directly link a reduction in competition to lower advertising costs: "low competition = low cost."²⁴⁴ In weekly marketing reports, search advertising manager Bryce Craven attributed 1-800 Contacts' lower spending for its trademark terms in a given week to "fewer competitors showing [up] on our TM

²⁴⁰ CX8007 at 035-036 (¶¶ 104-106) (Athey Expert Report); CX8006 at 103-105 (¶¶ 225-229) (Evans Expert Report).

²⁴¹ Athey, Tr. 797-798; CX8007 at 036 (¶¶ 108-109) (Athey Expert Report); Evans, Tr. 1644-1645; CX8006 at 105 (¶ 229) (Evans Expert Report).

²⁴² Evans, Tr. 1649-1650, *in camera*; CX8006 at 076-077 (¶ 168) (Evans Expert Report), *in camera*.

²⁴³ CX0213_NATIVE_1-800F_00024851 (1-800 Spreadsheet, Competitor on TM Cost Estimates, Oct. 17, 2008).

²⁴⁴ *See* CX0051 at 004 (2010 "Search Overview").

keywords,”²⁴⁵ and higher spending to “more advertisers on our [trade]marks . . . which increased competition and CPCs [costs per click] for our top terms.”²⁴⁶ Mr. Craven confirmed his analysis at trial.²⁴⁷ And a 2009 email between 1-800 Contacts marketing employees explains that one of the *purposes* of the trademark enforcement policy was to “remove competitors[,] which in turn drives down how much we pay per click.”²⁴⁸

Google’s Director For Ads Quality Adam Juda confirms 1-800 Contacts’ own *real-world experience* that, all else being equal, reduced competition in the search advertising auction necessarily reduces the price paid to the search engine by the winning advertiser. Dr. Juda explained that, when advertisers that have previously appeared on the SERP stop appearing,

{ [REDACTED]

[REDACTED]

[REDACTED] }²⁴⁹ Bing’s partner scientist in charge of Bing

Ads concurs:

²⁴⁵ CX0658 at 001 (“Compared with recent weeks, we saw fewer competitors showing on our TM keywords this week, which helped drop our spend for these terms.”). *See, e.g.*, CX0657 at 001 (2011 email from Blackwood to Jonathan Coon, CEO of 1-800 Contacts, forwarding Search & Partner Dashboard) (“Competition on our TM [trademark] terms is lighter than recent history, which is likely a contributing factor in our lower TM CPO’s [costs per order] -\$1.26 this week.”).

²⁴⁶ CX0915 at 001 (Jul. 28, 2008, email from Bryce Craven, 1-800 Contacts, to Brandon Dansie, 1-800 Contacts) (“TM CPCs . . . jumped up by 18% from last week and pushed us to our most costly week yet for trademarks. There were more advertisers on our marks this past week (both local and national retailers), which increased competition and CPCs for our top terms.”). *See, e.g.*, CX8006 at 072 (¶ 161 n.169) (Evans Expert Report) (citing CX1080) (“We are still being outbid on keyword ‘800contacts’ but just by one competitor. I have increased the bid.”).

²⁴⁷ Craven, Tr. 541, 551, 559, 560-563, 573-575.

²⁴⁸ *See* CX0935 (2009 email among marketing team).

²⁴⁹ Juda, Tr. 1157, *in camera*. Conversely, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The experience of the search engines directly mirrors 1-800 Contacts’ own experience. When faced with competing bids for trademark keywords (or for other popular contact lens-related keywords), 1-800 Contacts regularly *increased* the prices of its own bids.²⁵¹

[REDACTED] } *Id.* at 1179, *in camera* (emphasis added).

²⁵⁰ CX8005 at 006 (¶¶ 35-37) (Iyer, Decl.), *in camera*.

²⁵¹ *See, e.g.*, CX8006 at 072-073 (¶ 161 n.169) (Evans Expert Report) (citing CX1080) (“We are still being outbid on keyword ‘800contacts’ but just by one competitor. *I have increased the bid.*”) (emphasis added); CX0921 at 001 (“How did we respond when we would see Walgreens in #3? Did we increase our bid to get us back up in the top 3?” “Yes, *we always will raise our Big 3 bids* if we see we’re getting pushed out of the top bar.”) (emphasis added); CX0543 at 001 (“*It’s pretty easy for a bidding war to increase costs this quickly.* In fact, if I would like to be position 1 right now, all I would have to do is increase my bid to \$20 a click and I’m there. This means that for anyone to be ranked above us, they are going to be paying \$20.01 for each click. *It escalates quickly.*”) (emphasis added); CX0911 at 003 (“We learned that Lens.com in particular is very determined to occupy the 1st position [on the SERP in response to Big 3 keywords] – *we had to raise our bids to \$7-\$9 to surpass their ad.*”) (emphasis added); CX0905 (“Coastal temporarily moved to \$1 in paid search to promote their ‘blowout sale’. *This added competition pushed our Big 3 Google CPC’s up by 24% over the week prior. We were forced to pay ~\$4.00 per click*”).

ii. Bidding Agreements Reduce Quality of Search Engine Product

1-800 Contacts' Bidding Agreements also reduce the quality of the SERP displayed by the search engines. Because they have fewer potentially relevant ads to choose from, the search engines are unable to display information that they believe may be relevant and useful to consumers.²⁵² As described earlier, Professor Evans constructed a model demonstrating that, in the absence of the Bidding Agreements, Google would have served more than one hundred million additional ads between January 2010 and June 2015.²⁵³

Professor Athey's model also concludes that significantly more ads would have been displayed to consumers in the absence of 1-800 Contacts' restraints, and more consumers would have clicked on those ads, to their benefit.²⁵⁴ Together, these models affirmatively demonstrate

to maintain the 3rd position this week in Google.) (emphasis added); CX0927 at 001 ("We've also noticed Walgreens bidding more aggressively lately, particularly in Yahoo, temporarily pushing us out of top bar for Big 3. *We saw Yahoo CPC's [costs per click] jump up by 30% week over week.*") (emphasis added); CX0513 at 001 ("Big 3 performance had another strong week but *CPC's [costs per click] were pushed higher with increased competition from Walgreens.*") (emphasis added); CX0861 at 001 ("*Big 3 CPCs [costs per click] climbed up this week to an average of \$3.17 thanks to more competitive bidding pressure.* This moved our CAC [customer acquisition cost] up slightly. . . .") (emphasis added); CX0858 at 001 ("Due to very stiff competitive bidding, we're now paying around \$5.50-\$6.00 per click for *contact lenses* to maintain top-bar positions. That's a record high. . . . This contributed to our jump in search costs for the week. Big 3 spend was \$2K higher than last week.") (emphasis in original); CX0876 at 001 ("Trends – Overall costs going up and conversion rate going down (both driven by competitive factors). . . . Show CPC [cost per click] increases/ Walgreens/VD [Vision Direct] aggressive positioning"); CX0764 at 009 ("Decreasing CTR [click-through rate] leads to lower Quality Scores – *which leads to increased costs to maintain positions.* Average CPC has increased 15% YoY. Average Position down from 2.08 to 2.34.") (emphasis added).

²⁵² Indeed, Google changed its trademark policy in 2004 to offer consumers "more choices and access to as much information as is relevant to their search or interest." CX0471 at 001 (2004 email from Google describing Google's revised policy regarding bidding on trademarks as keywords); CX0888, *in camera* { [REDACTED] }. See Charlston, Dep. at 40 ("The policy change absolutely would be better for users, as far as providing them with access to more information and choice in response to their queries. . . ."); *id.* at 42-43.

²⁵³ Evans, Tr. 1381; CX8006 at 010 (¶ 21) (Evans Expert Report).

²⁵⁴ CX8007 at 029-034 (¶¶ 85-98) (Athey Expert Report).

that a reduction in the number of relevant ads served to consumers reduces the quality of the search engine's product, thereby also reducing consumer welfare.²⁵⁵

Professors Athey and Evans' conclusions suggest that search engines were harmed financially in a second way by the Bidding Agreements: not only were auction prices depressed because bidders did not compete against one another, search engines were also unable to show consumers additional relevant ads that would have resulted in a greater number of clicks than actually occurred in the real world.

The conclusions of these economic models are bolstered by Google's Dr. Juda, who testified that having access to a larger quantity of relevant ads allows Google to better fill its SERP with more relevant and valuable information for consumers. As such, a greater selection of advertisements improves the quality of Google's SERP; and a smaller selection of advertisements decreases the SERP's quality.²⁵⁶ Bing's Dr. Iyer confirmed this point:

{
[REDACTED]
}

[REDACTED]
}

²⁵⁵ See *supra* pp. 54-57 (describing Athey and Evans models).

²⁵⁶ See Juda, Tr. 1195-1197.

²⁵⁷ CX8005 at 005 (¶ 32) (Iyer, Decl.), *in camera*.

Dr. Iyer further noted that, { [REDACTED] }
[REDACTED]
[REDACTED] }²⁵⁸

In addition to not being able to serve up a large volume of potentially relevant advertising, these artificially-imposed restraints hamper the search engines' ability to learn by analyzing what users are choosing to click on (or not to click on).²⁵⁹ For example, Dr. Juda testified:

{ [REDACTED] }

This problem is particularly acute for Bing, { [REDACTED] }
[REDACTED] }²⁶¹ Dr. Iyer described the problem this way:

{ [REDACTED] }

²⁵⁸ *Id.* at 006 (¶ 34) (Iyer, Decl.), *in camera*.

²⁵⁹ *See supra* pp. 10-12 (describing search engine use of "click" data to improve relevancy algorithms).

²⁶⁰ Juda, Tr. 1190-1198, *in camera*. *See also id.* 1353-1354, *in camera* { [REDACTED] }
[REDACTED] }.

²⁶¹ CX8005 at 007 (¶ 40) (Iyer, Decl.), *in camera*.



9. 1-800 Contacts Continues to Enforce the Bidding Agreements Today

1-800 Contacts continues to enforce its Bidding Agreements today, unmodified.²⁶³

Absent the agreements, Walgreens, Vision Direct, AC Lens, and { [REDACTED] } among other restrained sellers, would bid on 1-800 Contacts trademark keywords, or would consider doing so, and would remove negative keywords relating to “1-800 Contacts.”²⁶⁴ Notably, many of 1-800 Contacts’ competitors already do bid on the trademarks of other competitors.²⁶⁵

²⁶² *Id.* 006-007 (¶¶ 39-40), *in camera*.

²⁶³ *See, e.g.*, CX9001 (Bethers, IHT at 135-136, 150-152, 167-168).

²⁶⁴ *See, e.g.*, CX9008 (Hamilton, IHT at 63-64); CX8001 at 006 (¶ 19) (Hamilton (Walgreens), Decl.); CX8002 at 005-006 (¶ 18) (Hamilton (Vision Direct), Decl.); CX9003 (Clarkson, IHT at 35-38); CX9000 (Batushansky, IHT at 110-112), *in camera*.

²⁶⁵ *See* CX8002 at 006 (¶ 20) (Hamilton (Vision Direct), Decl.), *in camera* { [REDACTED] }; CX8001 at 007 (¶ 21) (Hamilton (Walgreens), Decl.), *in camera* (same); CX9008 (Hamilton, IHT at 33, 35); CX8003 at 005-006 (¶ 31) (Mitha, Decl.) (same). Even for those sellers that do not currently actively bid on the brand names of other competitors, the ability to bid on the brand name “1-800 Contacts” represents a unique opportunity because of the significant volume of search queries relating to 1-800 Contacts’ brand. *See supra* pp. 43-44 (describing high volume of searches for 1-800 Contacts). Thus, the benefit to an online seller of advertising against search queries for “1-800 Contacts” is likely significantly greater than advertising against, say, queries for “Coastal Contacts” or “Lens Discounters.”

III. COMPLAINT COUNSEL HAS ESTABLISHED *PRIMA FACIE* CASE THAT 1-800 CONTACTS' BIDDING AGREEMENTS ARE ANTICOMPETITIVE

1-800 Contacts has unreasonably restrained competition in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, by entering into a series of at least 14 bilateral Bidding Agreements with rival online sellers of contact lenses, preventing the parties from competing against one another in certain online advertising auctions.

The Bidding Agreements have the purpose, capacity, tendency, and effect of harming competition and injuring consumers and others by, among other things:

- Depriving consumers of truthful and non-deceptive information about the prices, products, and services offered by online sellers of contact lenses;
- Depriving consumers of the benefits of vigorous price and service competition among online sellers of contact lenses;
- Preventing online sellers of contact lenses from disseminating truthful and non-confusing information about the availability of, and prices for, their products and services;
- Increasing consumers' search costs relating to the online purchase of contact lenses;
- Causing consumers to pay higher prices for contact lenses than they would pay absent the agreements, acts, and practices of 1-800 Contacts;
- Unreasonably restraining price competition in certain search advertising auctions;
- Distorting prices in, and undermining the efficiency of, certain search advertising auctions;

- Preventing search engine companies from displaying to users on the search engine results page the array of advertisements most responsive to a consumer's search; and
- Impairing the quality of the service provided to consumers by search engine companies, including the search results page.

The Bidding Agreements restrain more competition than is reasonably necessary to protect 1-800 Contacts' trademark rights in at least three respects: (i) the agreements bar even non-confusing uses of the trademark; (ii) the negative keyword provisions bar advertising that does not use the 1-800 Contacts trademark; and (iii) the agreements provide for reciprocal restraints on competition by 1-800 Contacts.

Part A addresses the Commission's jurisdiction over this case. Part B addresses the relevant standards of review and burdens of proof. Part C addresses concerted action. Part D establishes a *prima facie* case of harm through the three methods endorsed by the Commission in *Realcomp*. See *In re Realcomp II., Ltd.*, 148 F.T.C. ___, No. 9320, 2007 WL 6936319, at *17 (F.T.C. Oct. 30, 2009), *aff'd*, 635 F.3d 815 (6th Cir. 2011).

A. Jurisdiction

The Commission has jurisdiction over 1-800 Contacts' acts and practices, including the acts and practices alleged in the Complaint. Under Section 5 of the FTC Act, the Commission may exercise jurisdiction over "persons, partnerships, or corporations," with certain exceptions not relevant here. 15 U.S.C. § 45(a)(2). At all times relevant herein, 1-800 Contacts has been,

and is now, a “corporation” as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.²⁶⁶

The Commission is “empowered and directed to prevent” the use of “unfair methods of competition in or affecting commerce.” 15 U.S.C. § 45(a)(2). 1-800 Contacts acknowledges that its acts and practices with respect to the online sale of contact lenses are in or affect commerce in the United States, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.²⁶⁷

B. Standard of Review and Burden of Proof

In order to establish a violation of Section 1, Complaint Counsel must prove (1) the existence of a contract, combination, or conspiracy among two or more separate entities (*i.e.*, concerted action), that (2) unreasonably restrains trade, and (3) affects interstate or foreign commerce. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 768 (1999); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011).²⁶⁸ Conduct unreasonably restrains trade when it has, or is likely to have, a substantial anticompetitive effect in the market, such as by stabilizing or increasing prices, reducing output, reducing quality or reducing consumer choice. *See, e.g., Standard Oil Co. v. United States*, 283 U.S. 163, 179 (1931); *Realcomp II*, 635 F.3d at 819; *Hahn v. Oregon Physicians’ Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988).

²⁶⁶ 1-800 Contacts Answer and Defenses to Administrative Complaint (“1-800 Contacts Answer”) at ¶ 5.

²⁶⁷ 1-800 Contacts Answer at ¶ 6.

²⁶⁸ Conduct that violates Section 1 or 2 of the Sherman Act is deemed to constitute an unfair method of competition and hence a violation of Section 5 of the FTC Act as well. *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948); *Fashion Originators’ Guild v. FTC*, 312 U.S. 457, 463-64 (1941).

The evaluation of whether a particular horizontal restraint unreasonably restrains trade “takes place along an analytical continuum in which a challenged practice is examined in the detail necessary to understand its competitive effect.” *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 336 (2003) (hereinafter *Polygram I*), *aff’d*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005) (hereinafter *Polygram II*). Complaint Counsel bears the initial burden of establishing a *prima facie* case of competitive harm. Once it has done so, the burden shifts to Respondent to prove that this harm is outweighed by cognizable and plausible procompetitive efficiencies, if any. *United States v. Visa*, 344 F.3d 229, 238 (2d Cir. 2003); *Law v. NCAA*, 134 F.3d 1010, 1021 (10th Cir. 1998).

C. Concerted Action

There is no dispute that there is concerted action in this case. The Complaint challenges 14 written Bidding Agreements between 1-800 Contacts and numerous rival online sellers of contact lenses. Each agreement is executed by a representative of 1-800 Contacts and a representative of a competing online seller of contact lenses.²⁶⁹ 1-800 Contacts does not contend otherwise.

D. Three Alternative Methods of Establishing *Prima Facie* Harm

In *Realcomp*, the Commission identified *three alternative methods* through which *prima facie* harm may be proven. *Realcomp II*, 2007 WL 6936319, at *17-19. *First*, restraints on

²⁶⁹ CX0310 (Coastal Contacts); CX0311 (2004 Vision Direct); CX0314 (2009 Vision Direct); CX0313 (EZ Contacts); CX0315 (Lensfast); RX0028 (AC Lens); CX0319 (Empire Vision); CX0320 (Lenses For Less); CX0321 (Tram Data); CX0322 (Walgreens); CX0323 (Contact Lens King); CX0324 (Web Eye Care); RX0408 (Standard Optical); CX0326 (Memorial Eye); CX0331 (Luxottica). In addition, as described earlier, there are unwritten agreements between 1-800 Contact and certain other retailers. *See supra* p. 21 & n.82-84. However, the existence of those additional agreements does not materially change the analysis of competitive harm. Therefore, Complaint Counsel need not specifically prove their existence.

certain fundamental forms of rivalry are “inherently suspect,” or in other words, presumed to be anticompetitive. Where a particular restraint “give[s] rise to an intuitively obvious inference of anticompetitive effect,” *California Dental Ass’n v. FTC*, 526 U.S. 756, 781 (1999), a court should “place the burden of procompetitive justification on those who agree [to the restraint].” *Id.* at 771. Inherently suspect restraints may be condemned without proof of market power. *Realcomp II*, 2007 WL 6936319, at *18.

Second, in the alternative, the plaintiff may show direct evidence of “actual marketplace effects.” *See id.* at *19 (citing *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986)). For example, in *Indiana Federation*, 476 U.S. 447, there was evidence that, due to the challenged agreement among dentists, insurance companies were unable to obtain x-rays as desired. *Id.* at 459. If a plaintiff shows actual marketplace effects, “that would be a basis for condemnation regardless of whether market power is shown.” *Realcomp II*, 2007 WL 6936319, at *19 (citing *Indiana Federation*, 476 U.S. at 459-60).

Third, in the alternative, the plaintiff may establish that market power, together with the nature of the restraint, is *likely* to have “the potential for genuine adverse effects on competition.” *Realcomp II*, 2007 WL 6936319, at *19 (citing *Indiana Federation*, 476 U.S. at 460).²⁷⁰

In this case, Complaint Counsel has demonstrated under *each* of these three alternative methods that 1-800 Contacts’ Bidding Agreements should be condemned as anticompetitive.

²⁷⁰ To be clear, Complaint Counsel need only use *one* of these methods in order to prove its *prima facie* case and successfully shift the burden to 1-800 Contacts to proffer plausible and cognizable justifications. *See Realcomp II*, 2007 WL 6936319, at *21 (“It is important to note, however, that we could reasonably select just one of these modes of analysis and, if such a methodology supported a finding that the Policies are unlawful, it would be unnecessary for us to engage in the other versions of the rule of reason analysis.”). Complaint Counsel addresses all three modes of analysis for completeness.

1. The Bidding Agreements Are Inherently Suspect

As described above, through the Bidding Agreements 1-800 Contacts and its rivals expressly agreed to restrain participation in search advertising auctions.²⁷¹ These agreements are “inherently suspect” in two respects: *first*, the agreements restrain price competition by allocating to competing sellers the right to bid in particular search advertising auctions. *Second*, the agreements restrain truthful, non-deceptive and non-infringing advertising.

a. The Bidding Agreements Constitute Inherently Suspect Price Restraints

A restraint on price competition is the paradigmatic example of inherently suspect conduct. As the Supreme Court has consistently held, any “agreement that [interferes] with the setting of price by free market forces is illegal on its face.” *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940), and *United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969)). As a matter of law, antitrust courts presume that a horizontal restraint on price competition is anticompetitive, triggering an obligation by the respondent to come forward with some showing of countervailing procompetitive justification. *NCAA v. Bd. of Regents*, 468 U.S. 85, 110 (1984); *PolyGram II*, 416 F.3d 29 at 29, 36.

An agreement that prevents competitors from participating in an auction, sometimes referred to as “bid-rigging,” is simply a form of price fixing. Thus, in *Professional Engineers*, 435 U.S. 679, the Supreme Court treated an agreement among engineers that barred competitive bidding as presumptively anticompetitive. *Id.* at 692 (“no elaborate industry analysis is required

²⁷¹ See *supra* p. 31 (describing keyword bidding provisions); *supra* p. 31-32 (describing negative keyword provisions); *supra* p. 32 (describing reciprocal keyword provisions).

to demonstrate the anticompetitive character” of an “absolute ban on competitive bidding”). *See also United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 325 (4th Cir. 1982) (“Any agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party constitutes bid rigging per se violative of 15 U.S.C. Section 1.”); *United States v. Mobile Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989) (same); *United States v. Capitol Serv., Inc.*, 756 F.2d 502, 506 (7th Cir. 1985) (“anticompetitive character” of a ban on bidding “is readily apparent”); *United States v. Brighton Bldg. & Main. Co.*, 598 F.2d 1101, 1006 (7th Cir. 1979) (“[a]n agreement among competitors to rig bids is illegal”).

The presumption of anticompetitive effects embodied in the caselaw is wholly consistent with the economic consensus that bid-rigging inflicts competitive injury by distorting prices: the seller receives (and the buyer pays) a non-competitive price. *See* CX8006 at 070 (¶ 154) (Evans Expert Report) (the theoretical and empirical literature finds “that a variety of cooperative bidding strategies reduce competition and benefit the firms engaging in these collusive strategies, by raising what they can charge in a supply-side auction, or reducing what they have to pay in a demand-side auction”); Robert S. Pindyck & Daniel L. Rubinfeld, *MICROECONOMICS* 495 (5th ed. 2001) (“In a private value auction [where bidders have different reservation prices for the offered item], [the seller] should encourage as many bidders as possible: Additional bidders increase the expected bid of the winner and the expected valuation of the second-highest bidder as well.”).

In this case, the record evidence confirms the uniform judicial experience with bid-rigging and the economic understanding of its effect on the targets. As explained in detail below, the evidence demonstrates that search engines were harmed because 1-800 Contacts paid less per

click than it would have if it had faced unrestrained competition in search advertising auctions relating to its trademark terms. *See infra* Section III.D.2.

1-800 Contacts does not deny that the Bidding Agreements prevented competition in auctions. Instead, 1-800 Contacts asserts that its Bidding Agreements should be treated differently from other price restraints because its rivals did not benefit financially from the arrangement.²⁷² The evidence on this point is weak. More importantly, no case identifies shared benefit as a prerequisite to liability for the acknowledged ringleader in the scheme. *See, e.g., United States v. General Motors*, 384 U.S. 127, 147 (1966) (in *per se* unlawful boycott, retailers enlisted supplier General Motors to cut off “discounters” in order “to protect franchised dealers from real or apparent price competition”); *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 932 (7th Cir. 2000) (in *per se* unlawful boycott of warehouse clubs organized by toy retailer, “the biggest hindrance [Toys “R” Us] had to overcome was the major toy companies’ reluctance to give up a new, fast-growing, and profitable channel of distribution”) (internal quotation omitted).

Equally unavailing is 1-800 Contacts’ assertion that its *motive* in entering the agreements was not to “rig” the search advertising auctions, but instead to eliminate certain “undesirable” advertising.²⁷³ Similar excuses were rejected in *Professional Engineers*, in which the defendants claimed that they agreed to forgo bidding in order to protect against “undesirable” engineering services. *Professional Engineers*, 435 U.S. at 693-94. Proffering an explanation does not change the reality that the Bidding Agreements expressly require numerous competitors to withhold bids that they would have otherwise submitted in more than *a hundred million* search engine

²⁷² *See* 1-800 Contacts Pretrial Brief at 66.

²⁷³ *See id.* at 15.

auctions.²⁷⁴ While 1-800 Contacts’ motivations might impact the Court’s evaluation of proffered efficiency justifications, it has no bearing on whether the restraints themselves are inherently suspect. The challenged Bidding Agreements are indistinguishable from the price restraints that prior cases have deemed to be inherently suspect. *See, e.g., Professional Engineers*, 435 U.S. at 692 (agreement not to bid *per se* unlawful); *Portsmouth Paving*, 694 F.2d at 317 (same); *NCAA*, 468 U.S. at 109 (“no elaborate analysis is required” to determine that agreement to restrict competitive bidding is unlawful); *Polygram II*, 416 F.3d at 35-37 (agreement not to discount or advertise inherently suspect).

b. The Bidding Agreements Constitute Inherently Suspect Restraints on Procompetitive Commercial Advertising

It is an axiom of modern economics and antitrust law that truthful and non-deceptive advertising plays an important role in facilitating efficient markets, and conversely that a restraint on truthful and non-deceptive advertising is likely to cause competitive harm. Restrictions on truthful and non-deceptive advertising raise consumers’ search costs; that is, the restraint makes it more costly for consumers to discover the prices and services offered by competing sellers, thus resulting in less competition and higher transaction prices.

Professor Evans’ expert report addresses the basic economics of advertising:

“Competition doesn’t just happen. Buyers have to find out who they can buy from and on what terms.”²⁷⁵ Restrictions on advertising interfere with the flow of information from buyers to

²⁷⁴ *See* CX8006 at 101-103 (¶¶ 220-224 & Table 6) (Evans Expert Report) (estimating that 114 million more ads would have been shown in the absence of the Bidding Agreements); CX8007 at 032, 034 (¶¶ 92, 98) (Athey Expert Report) (estimating that, in the absence of the Bidding Agreements, the average number of competitor ads shown per search would increase from 1.07 to 1.62).

²⁷⁵ CX8006 at 080 (¶ 178) (Evans Expert Report).

sellers, raise the costs to consumers of finding the most suitable offering, and, in turn, lead to higher transaction prices.²⁷⁶ Economists James L. Langenfeld and Louis Silvia explain the connection between advertising and price:

Many consumers search the prices of different firms for the lowest quality-adjusted price of a desired product or service. With each additional place searched to determine the price of a product or service, consumers get more information on the likely lowest price. . . . Restrictions on advertising clearly increase the cost of consumers' obtaining information on the lowest price. Consumers are then faced with a trade-off. They must either spend more time and money searching for a lower price (higher quality) supplier or cut their search short when the restriction-induced increase in search costs more than offsets the increased likelihood of finding a lower price. This leads some consumers to pay higher prices for the desired product or service, while others stop their search before they find a price low enough to induce them to buy, thus reducing output.

Federal Trade Commission Horizontal Restraint Cases: An Economic Perspective, 61 ANTITRUST L. J. 653, 672–73 (1993).

This economic theory regarding the harmful effects of advertising restraints has been tested and confirmed many times. Economists have conducted more than 21 studies that assess the effect of advertising restrictions on prices and other aspects of competition.²⁷⁷ These studies typically compare businesses subject to restrictions in a particular area or time period to similar businesses in other areas or time periods that were not subject to those restrictions. Almost all of these studies find that advertising restrictions result in higher prices. Accordingly, “[t]here is a consensus in the economics literature that restrictions on advertising among rivals impair competition and harm consumers.”²⁷⁸

²⁷⁶ *Id.* at 080-084 (¶¶ 178-186).

²⁷⁷ *Id.* at 081-082 (¶¶ 180-181). See *Polygram I*, 136 F.T.C. at 356 n.52 (collecting several empirical studies).

²⁷⁸ CX8006 at 081 (¶ 180) (Evans Expert Report).

The effect on consumer search costs is particularly acute with respect to internet search advertising restrictions. For queries that are interpreted by the search engine as “commercial” in nature (e.g., shopping queries), search advertising is presented to consumers at the precise moment when those consumers are likely to be ready to purchase.²⁷⁹ The consumer can quickly and easily peruse the advertisements and/or navigate from one advertiser’s website to the next in search of the best available price.²⁸⁰ Agreements among advertisers that (unbeknownst to consumers) distort those results rob consumers of the unique value of search advertising. Such search advertising is particularly valuable to consumers who enter search queries relating to 1-800 Contacts because 1-800 Contacts is consistently the highest-priced seller on the internet, and consumers do not know it. As 1-800 Contacts’ own documents observe, { [REDACTED]

[REDACTED]
 [REDACTED] }²⁸¹

The economic consensus that advertising restrictions reduce welfare is mirrored by the legal consensus that horizontal restraints on advertising impair competition and harm consumers. See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 773 (1999) (“*Cal. Dental*”) (“[R]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for [rivals] to compete on the basis of price.”) (quoting *Cal. Dental Ass’n v. FTC*, 128 F.3d 720,

²⁷⁹ See *supra* p. 14.

²⁸⁰ See Eric Goldman, *Deregulating Relevancy*, 54 EMORY L.J. 507, 517-20 (2005).

²⁸¹ CX0439 at 036, *in camera* (Dec. 2015 AEA Investors Fund Presentation: 1-800 Contacts Study) { [REDACTED] } (emphasis added). See CX1449 at 057, 148, *in camera* { [REDACTED] }. See also CX8006 at 085-087 (¶¶ 188-190) (Evans Expert Report), *in camera*.

727 (9th Cir. 1997)); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992) (“it is clear as an economic matter that . . . restrictions on fare advertising have the forbidden significant effect upon fares”); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (advertising “performs an indispensable role in the allocation of resources in a free enterprise system”); *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995) (advertising restraint judged *per se* unlawful); *United States v. Gasoline Retailers Ass’n*, 285 F.2d 688 (7th Cir. 1961) (same); *United States v. The House of Seagram, Inc.*, 1965 Trade Cas. (CCH) 71,517 (S.D. Fla. 1965) (same).

This presumption has been adopted by the Commission’s leading decisions on advertising restraints, which instruct that advertising restraints are presumed to be anticompetitive even where they do not bar all advertising. In *Polygram*, 136 F.T.C. 310 (2003), the Commission concluded that an agreement between music companies not to advertise two recordings for a period of six weeks was inherently suspect. *Id.* at 353-58. And, in *Realcomp*, 2007 WL 6936319 (F.T.C. Oct. 30, 2009), the Commission followed *Polygram*, concluding that an agreement among real estate brokers to impede the dissemination of certain house listings, which “operated as a restraint on advertising,” was inherently suspect. *Id.* at *26-27. In *Realcomp*, as in this case, the challenged restraint eliminated a competitively significant category of advertising, but it did not bar *all* advertising. *See id.* at *23 (“Without the Realcomp MLS, home buyers . . . and home sellers . . . would have to rely on a variety of less comprehensive sources of information, including newspaper ads, television advertising, sales flyers, and word-of-mouth advertising.”). *See also Mass Bd. Of Registration in Optometry*, 110 F.T.C. 549, 598 (F.T.C. 1988) (condemning a licensing board’s ban on advertising); *Am. Med. Ass’n*, 94 F.T.C. 701, 1010 (1979), *aff’d*, *Am. Med. Ass’n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff’d by equally*

divided Court, 455 U.S. 676 (*per curiam*) (1982) (condemning an agreement among physicians not to advertise).

Similarly, in April 2016, the Antitrust Division of the Department of Justice entered into a consent decree with two West Virginia hospitals. Each hospital agreed not to place print or billboard advertisements in the county where the other hospital was located.²⁸² As in *Realcomp*, the hospitals' agreement did not preclude the defendants from using many other marketing channels, such as television, radio, or internet advertising. The Antitrust Division's complaint nonetheless characterized this restriction on billboard placement as *per se* illegal.²⁸³

1-800 Contacts asserts, in defiance of the clear consensus of economists and courts, that the Bidding Agreements in this case are not inherently suspect because they impacted only internet advertising and did not foreclose *other* advertising opportunities (*e.g.*, television, radio, newspapers).²⁸⁴ According to 1-800 Contacts, the presumption of harm generally applicable to restraints on commercial advertising should not apply in this case because a consumer who searches using a trademark query already is fully informed, is interested only in navigating to the website of the trademark owner, and hence is impervious to competitive advertising.²⁸⁵ This novel suggestion is unsupported by evidence or economic learning.

²⁸² Proposed Final Judgment, *United States v. Charleston Area Med. Ctr.*, No. 2:16-cv-03664-JTC (S.D.W. Va. Apr. 14, 2016), available at <https://www.justice.gov/atr/case-document/323547>; Compl. ¶¶ 14-19, *United States v. Charleston Area Med. Ctr.*, No. 2:16-cv-03664-JTC (S.D.W. Va. Apr. 14, 2016), available at <https://www.justice.gov/atr/case-document/323543>.

²⁸³ *Id.* ¶ 23.

²⁸⁴ See 1-800 Contacts Pretrial Brief at 20, 62.

²⁸⁵ *Id.* at 48.

First, 1-800 Contacts' assertion that the Bidding Agreements are not competitively significant is fully disproved by its own outsized reliance on search advertising – specifically *trademark* search advertising – as a critical tool for obtaining new customers.²⁸⁶ More than 80 percent of 1-800 Contacts' paid search orders,²⁸⁷ and {█} percent of *all* of its orders,²⁸⁸ come from paid trademark search. 1-800 Contacts' marketing executives have repeatedly recognized that search advertising's value, particularly with respect to trademark search advertising, comes from “converting” demand (generated by other forms of advertising) into real-world sales.²⁸⁹ 1-800 Contacts' online competitors similarly testified to the unique role that search advertising plays in online sales. Many of them testified that they rely primarily, or even solely, on search advertising to reach new customers, and that it is a “critical” or “essential” way of reaching potential customers.²⁹⁰ This is compounded by the fact that some {█} of 1-800 Contacts' orders comes through “direct traffic sources,” including trademark search advertising.²⁹¹ There is no record evidence that, for an online seller of contact lenses, television, radio, and/or newspapers are an adequate substitute for trademark keyword advertising. In brief,

²⁸⁶ *See supra* p. 17.

²⁸⁷ *E.g.*, CX0906 at 001 (“Orders through TM terms (5,347) improved slightly over last week and contributed 81% of all our paid search volume.”).

²⁸⁸ CX1743 at 030, *in camera* (2015 1-800 Contacts Management Presentation).

²⁸⁹ *See supra* p. 41.

²⁹⁰ *See supra* pp. 14-15, 40-42.

²⁹¹ CX1743 at 030, *in camera* {█
█
█}.

advertising against 1-800 Contacts’ trademarks is the best (and most direct) way for rival retailers to compete for 1-800 Contacts’ existing customer base.

Moreover, the experience of the online sellers in this case is confirmed by economic studies that address the effects of trademark keyword advertising on consumer behavior, specifically, Simonov, A., C. Nosko, and J. Rao, “Competition and Crowd-out for Brand Keywords in Sponsored Search, *Working Paper* (Sept. 8, 2016) (hereinafter referred to as “Simonov”);²⁹² and Bechtold, S. and C. Tucker, “Trademarks, Triggers and Online Search,” 11 *Journal of Empirical Legal Studies* 718 (Dec. 2014) (hereinafter referred to as “Bechtold”).²⁹³ Both studies are cited and relied upon by 1-800 Contacts’ economic expert, Dr. Anindya Ghose;²⁹⁴ and both studies confirm the unique significance to consumers of trademark keyword advertising.²⁹⁵

Employing a large-scale field experiment using the Bing search engine, the Simonov study tested whether consumers who use a trademark in a search query are affected by competitor advertisements on the search results page. Simonov found that, when a full slate of (three) competitive ads appear below the ad for the trademark owner, the competitors took from the website of the trademark owner 4.3 clicks per 100 searches. Simonov at 15.

²⁹² CX1937.

²⁹³ CX1942.

²⁹⁴ RX0733 at 0026 (¶ 60) (Ghose Expert Report) (discussing Simonov); *id.* at 0038 (¶¶ 89-90) (discussing Bechtold).

²⁹⁵ Antitrust courts routinely and properly rely on economic scholarship to inform their understanding of the competitive effects of business conduct. *E.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889-92 (2007); *California Dental Ass’n v. FTC*, 526 U.S. 756, 771-73 (1999); *Polygram I*, 136 F.T.C. at 355-57 (accepting analysis “based on economic learning and the experience of the market”).

The Bechtold study took a different approach, but yielded similar results. Relying on real-world Google data to compare clicks both before and after Google changed its trademark policy in Europe,²⁹⁶ Bechtold tracked consumer click behavior on so-called “navigational” queries (those queries where the consumer is thought to be primarily interested in navigating to the trademark owner’s website).²⁹⁷ Bechtold concluded that, “after the [Google] policy change, there was a 9.2 percent *decrease* in consumers visiting the trademark owners websites who used a search phrase that exactly matched the trademark.” Bechtold at 733 (emphasis added).

These studies disprove 1-800 Contacts’ thesis regarding search advertising. If, as 1-800 Contacts claims, trademark keyword advertising were redundant (due to the availability of other modes of advertising) or unhelpful to consumers (because the consumer is only interested in the website of the trademark owner), then introducing competing ads on the search results page beneath the ad for the trademark owner would not alter consumer behavior. What these studies show, however, is that introducing competitive ads on the search results page had a very substantial effect on consumer click behavior. Simonov concludes: “Smaller firms use the focal brand’s [consumer] awareness as a form of targeting [T]his *enhances competition* in a way that smaller firms, who get very little search traffic themselves, and the platforms [search engines] tend to like and larger firms tend to dislike.” Simonov at 20 (emphasis added).

²⁹⁶ Google changed its trademark policy in Europe in September 2010 to match its U.S. trademark policy. Bechtold at 720-22.

²⁹⁷ For purposes of analysis, Bechtold classified search queries that exactly matched a trademark as “navigational.”

1-800 Contacts responds by claiming that, in these studies, the consumers influenced by competing ads may have been confused.²⁹⁸ Yet there is not a scintilla of evidence to support this contention. Bechtold expressly disclaims this interpretation of the switch in consumer click behavior.²⁹⁹

One can always claim that consumers are confused rather than educated by advertising. This did not impede the Commission from concluding in *Polygram* that advertising restraints are presumptively anticompetitive. *Polygram I*, 136 F.T.C. at 353-58. In any event, 1-800 Contacts' trademark/confusion defense is properly considered later in the analysis, *see infra* Section IV.B. For present purposes, the Simonov and Bechtold studies strongly support the conclusion that the Bidding Agreements and other restraints on trademark search advertising are competitively significant, and thus fall within the general rule presumptively prohibiting horizontal restraints on commercial advertising.

c. *California Dental*, and Subsequent Decisions Applying It, Confirm That the Restraints at Issue Here Are Presumptively Anticompetitive

1-800 Contacts asserts that the Supreme Court's holding in *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999) (hereinafter "*Cal. Dental*"), somehow overturns decades of case law regarding the presumptively anticompetitive nature of horizontal advertising restraints.³⁰⁰ This argument was rejected by the Commission in *Polygram*, *see Polygram I*, 136 F.T.C. at 338-44,

²⁹⁸ *See infra* pp. 140-145 (discussing 1-800 Contacts' evidence regarding confusion).

²⁹⁹ Bechtold at 741 ("In particular, we cannot test whether consumers are confused by third-party keyword advertising. Determining likelihood of confusion is 'an inherently factual issue that depends on the facts and circumstances in each case.' It requires an analysis of actual ad test, which we do not observe in our data.").

³⁰⁰ *See* 1-800 Contacts Pretrial Brief at 2 (suggesting that *Cal. Dental* "held that even bans on almost all price advertising required a full rule-of-reason analysis to account for potential procompetitive effects").

and in *Realcomp*, see *Realcomp II*, 2007 WL 6936319, at *55-56, and must be rejected again here.

In *Cal. Dental*, the Commission challenged rules of a professional dental association that “were designed on their face to avoid false or deceptive advertising.” *Polygram I*, 136 F.T.C. at 340. The association rules policed the content of dentist advertising, but did not bar advertising at any time or in any media. Specifically, the association (1) required that advertisements offering price discounts be verifiable and contain certain clarifying disclosures (*e.g.*, disclose the undiscounted price and the duration of the discount offer); and (2) prohibited inherently unverifiable quality claims. *Cal. Dental*, 526 U.S. at 760-61 n.1-2. The Supreme Court concluded that the anticompetitive effect of these restrictions on professional advertising was not obvious, but it implicitly *confirmed* that ordinary commercial advertising restraints are presumptively anticompetitive.

The Court endorsed the “*general rule*” that “restrictions on advertisement of price and quality generally” have anticompetitive tendencies. The Court found the general rule inapplicable to the specific restraints at issue because “the very issue at the threshold of this case is whether *professional* price and quality advertising is sufficiently verifiable in theory and in fact to fall within such a general rule.” *Cal. Dental*, 526 U.S. at 771 (emphasis added). *See also id.* at 773 (accepting as “unexceptional” the lower court’s conclusion that “price advertising is fundamental to price competition,” and that “[r]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price.”). In the Court’s view, professional dental services presented a “market characterized by striking disparities between the information available to the professional and the

patient,” *id.* at 771, and “significant challenges to informed decisionmaking by the customer for professional services.” *Id.* at 773. Thus, the Court faulted the lower court for “brush[ing] over the professional context” in applying the general rule to the challenged restraints, without considering “the possibility that the particular restrictions on *professional* advertising could have different effects from those *normally found in the commercial world*,” perhaps even by helping to promote competition in the special context of professional advertising. *Id.* at 773-74 (emphasis added).

Far from undercutting the application of an inherently suspect analysis to the Bidding Agreements at issue in this case, *Cal. Dental* wholly supports its application here. Contact lenses are a commodity product,³⁰¹ and no evidence suggests that consumers are unable to understand the price or service differences between retailers. Thus, the “general rule” applies here, not the exception that applied to the professional dental services market at issue in *Cal. Dental*.

Moreover, contrary to 1-800 Contacts’ assertion, *Cal. Dental* in no way suggests that an empirical analysis of potential procompetitive justifications is required to condemn any horizontal advertising restraint.³⁰² Indeed, *even* in the special circumstances present in *Cal. Dental*, the Court expressly disclaimed any intent to require “the fullest market analysis.” *Cal. Dental*, 526 U.S. at 779. Instead, the Court suggested that the lower court’s approach could have

³⁰¹ See *supra* p. 4. This point is acknowledged by 1-800 Contacts’ own executives, including the president and CEO of 1-800 Contacts. CX9029 (Bethers, Dep. at 022-023) (“We sell a commodity . . . [A] consumer can only buy one product. They have no ability to buy a different product.”). See, e.g., CX1086 at 001 (2012 email exchange among 1-800 Contacts marketing team: “The only other option I see is trying to convince customers that our existing prices are better than they really are or worth the cost. Tough challenge considering that we sell the same exact thing as everyone else.”).

³⁰² See also 1-800 Contacts Pretrial Brief at 47 (claiming that “the trademark settlements here are far less restrictive than the broad bans that the Court in *Cal. Dental* held required a full analysis under the rule of reason.”).

sufficed if it had elucidated its reasoning more fully, as in Justice Breyer’s dissent.³⁰³ Thus, the Court simply made it clear that, prior to shifting the burden to the defendant for an empirical demonstration of procompetitive effects, a court must first “properly identif[y] the theoretical basis for the anticompetitive effects and consider[] whether the effects actually are anticompetitive.” *Id.* at 775 n.12.

Here, the theoretical basis for the anticompetitive effects is clear: The suppression of truthful, non-deceptive search advertising for discount sellers of contact lenses leads consumers to purchase unknowingly from the high-priced seller (1-800 Contacts) that is left free to advertise. The restraints at issue in this case are entirely analogous to the restraints condemned by the Commission under the “inherently suspect” standard in *Realcomp*, in which real estate brokers agreed to restrict one competitively significant type of advertising. *See Realcomp II*, 2007 WL 6936319, at *6 (noting that the “effectiveness” of the type of advertising restrained by brokers was “unrivaled by other advertising methods” that were unaffected). Similarly, the agreement not to advertise in *Polygram* – a six-week long advertising ban limited to two albums – was condemned by the Commission under the “inherently suspect” standard. *See Polygram I*, 136 F.T.C. at 353-58. Both *Realcomp* and *Polygram* were decided by the Commission subsequent to *Cal. Dental* (1999), and the cases were upheld on appeal by the Sixth (*Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011)) and D.C. Circuits (*Polygram Holding, Inc. v. FTC*,

³⁰³ *Cal. Dental*, 526 U.S. at 779 (“In light of our focus on the adequacy of the Court of Appeals’ analysis, Justice BREYER’s thorough-going, de novo antitrust analysis contains much to impress on its own merits but little to demonstrate the sufficiency of the Court of Appeals’ review. . . . Had the Court of Appeals engaged in a painstaking discussion in a league with Justice BREYER’s (compare his 14 pages with the Ninth Circuit’s 8), and had it confronted the comparability of these restrictions to bars on clearly verifiable advertising, its reasoning might have sufficed to justify its conclusion.”); *see also id.* at 777 at n.13 (criticizing the Court of Appeals because “absent further analysis of the kind Justice BREYER undertakes, it is not possible to conclude that the net effect of this particular restriction is anticompetitive.”).

416 F.3d 29 (D.C. Cir. 2005)), respectively. A proper reading of *Cal. Dental* requires no more fulsome an analysis in this case.

d. *Actavis* Does Not Preclude Inherently Suspect Analysis

1-800 Contacts misreads *FTC v. Actavis*, 133 S. Ct. 2223 (2013), as precluding the application of inherently suspect analysis to all litigation settlements. *Actavis* did not address a facially overbroad restraint on a fundamental dimension of competition, and thus does not apply to the Bidding Agreements.

Plainly, *Actavis* Court *did not* hold that all settlements of intellectual property disputes require a full-blown market analysis. To the contrary, the Court cited with approval a trio of decisions applying *per se* (truncated) analysis to facially overbroad or overly restrictive patent settlements. *See Actavis*, 133 S. Ct. at 2231-32 (citing *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963); *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952); *United States v. Line Material Co.*, 333 U.S. 287, 310-12 (1948)). *See also* Opinion and Order of the Commission Granting Complaint Counsel’s Motion For Partial Summary Decision, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017), at 3-4 (citing *Actavis*, 133 S. Ct. 2223; *Singer*, 374 U.S. 174). *Actavis* expressly reaffirms the Supreme Court’s holding in *Cal. Dental* that presumptive illegality “is appropriate ‘where an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect on customers and markets.’” *Actavis*, 133 S. Ct. at 2237 (quoting *Cal. Dental*, 526 U.S. at 770 (Breyer, J., concurring in part and dissenting in part)).

The core issue in *Actavis* was how to accommodate the interests of patent law and antitrust law in the face of significant uncertainty regarding the validity and infringement of the

patent at issue. *See Actavis*, 133 S. Ct. at 2231 (“The patent here may or may not be valid, and may or may not be infringed.”). In *Actavis*, a brand-name drug owner sued two generic drug manufacturers for patent infringement. In settlement of these claims, (i) the generic companies agreed to delay launching competing products, while allowing generic entry five years *before* the expiration of the patent, and (ii) the brand company agreed to pay the generic companies tens of millions of dollars. *Actavis*, 133 S. Ct. at 2227. Thus, the challenged settlement provided a compromise generic entry date *earlier* than such entry would have been allowed if the patent-holder had won its infringement suit. Still, the Commission argued that the agreement was presumptively unlawful. The Commission contended that the large cash payment from the patent holder to the alleged infringer (a “reverse payment”) demonstrated that the compromise entry date did not actually reflect the parties’ assessment of the strength of the patent claim. *Id.* at 2234. The Supreme Court rejected this analysis, holding that the existence of a reverse payment *by itself* was not sufficient to confidently conclude that the patent “arrangement[] in question would have an anticompetitive effect on customers and market.” *Id.* at 2237 (internal quotation omitted). Instead, the Court explained that additional factors must be taken into account: “[T]he likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor’s anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification.” *Actavis*, 133 S. Ct. at 2237.

The analytical complexities that have concerned antitrust courts in reverse payment patent cases are not present here. We may presume that the “1-800 Contacts” trademark is

valid.³⁰⁴ While a valid patent allows the owner to prohibit *all* uses of the invention, a valid trademark invests the owner with a limited right to bar only *confusing* uses of the trademark. On their face, the Bidding Agreements reach significantly beyond 1-800 Contacts' property right by (i) barring non-confusing uses of the trademark; (ii) broadly requiring negative keywords, even in instances where there has been no trademark "use"; and (iii) providing for reciprocal restraints on competition by 1-800 Contacts.³⁰⁵

The Bidding Agreements thus bear no resemblance to the patent settlements at issue in *Actavis*. This Court's analysis of the Bidding Agreements is controlled by cases applying truncated analysis to litigation settlements that on their face restrain lawful, non-infringing competition, such as *In re Cardizem Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003). In *Cardizem*, the Sixth Circuit Court of Appeals held a reverse payment settlement agreement *per se* illegal because its restrictions "extended to noninfringing and/or potentially noninfringing versions of generic Cardizem" and, thus, the agreement could "not be fairly characterized as merely an attempt to enforce patent rights." *Id.* at 907-09 & n.13. *See also F.T.C. v. Watson Pharm., Inc.*, 677 F.3d 1298, 1310 (11th Cir. 2012) (overbroad patent settlement subject to *per se* condemnation); *In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279 (S.D. Fla. 2005) (same). Properly understood, *Actavis* does not disturb this basic premise, and does not save 1-800 Contacts' Bidding Agreements from inherently suspect analysis.

³⁰⁴ Complaint Counsel has not analyzed whether 1-800 Contacts' trademark is valid and enforceable, and simply assumes it for purposes of this litigation.

³⁰⁵ *See supra* pp. 31-37.

e. ***Clorox Does Not Preclude Inherently Suspect Analysis***

1-800 Contacts also asserts that its Bidding Agreements cannot be inherently suspect because they constitute a “traditional” method of resolving a trademark dispute, akin to a settlement approved under the rule of reason in *Clorox Co. v. Sterling Winthrop*, 117 F.3d 50 (2d Cir. 1997). 1-800 Contacts misreads *Clorox*. *Clorox* teaches that a trademark settlement in which an alleged infringer agrees to cease *labeling* its product with a trademark that is confusingly similar to the plaintiff’s trademark is not presumptively anticompetitive.

In *Clorox*, the owner of the LYSOL mark initially claimed that Cyanamid’s PINE-SOL mark was confusingly similar to LYSOL. *Id.* at 53. The parties settled the dispute by agreeing that, in order to avoid consumer confusion, Cyanamid would not use the PINE-SOL mark to market its own disinfectant products (where the LYSOL brand was prominent). *Id.* In a later challenge to the (superseding) settlement by Cyanamid’s successor, Clorox, the Second Circuit, applying the rule of reason, concluded that the settlement was not anticompetitive. *Id.* at 61.

Clorox does not help 1-800 Contacts. In *Clorox*, the trademark owner barred its competitor from using a trademark that was confusingly similar to the LYSOL mark to market a competing disinfectant product. But nothing prevented Cyanamid from *displaying* or *offering* the competing merchandise, so long as it was not confusingly labeled. *Id.* at 57 (“The trademark agreement at issue here does no more than regulate how the name PINE-SOL may be used; *it does not in any way restrict Clorox from producing and selling products that compete directly with the LYSOL brand, so long as they are marketed under a brand name other than PINE-SOL.* Accordingly, at first blush it would not appear to restrict Clorox’s, much less any other competitor’s, ability to compete in the markets LYSOL products allegedly dominate.”)

(emphasis added). By contrast, the Bidding Agreements restrain sellers whose names and trademarks (*e.g.*, Coastal, Walgreens) are not remotely similar to “1-800 Contacts.” As there was no agreement that Sterling and Cyanamid would restrain the marketing of properly labeled competing products, *Clorox* offers no view on the legality of such a restraint or the propriety of truncated analysis.³⁰⁶

1-800 Contacts’ Bidding Agreements broadly, and on their face, preclude non-infringing activity. 1-800 Contacts is banning competitors from *displaying* and *offering* their properly (*i.e.*, non-confusingly) labeled products in competition with 1-800 Contacts in any auction resulting from 1-800 Contacts-related keywords.³⁰⁷ Further, the negative keyword provisions bar competitor advertising even where the competitor is only bidding on *generic* keywords, and is not “using” the 1-800 Contacts trademark at all.³⁰⁸ As such, 1-800 Contacts’ agreements, unlike the agreement at issue in *Clorox*, cannot be fairly characterized as merely a reasonable attempt to enforce trademark rights. Accordingly, truncated analysis is appropriate, and the burden should shift to 1-800 Contacts to prove a legitimate efficiency defense. *See Polygram I*, 136 F.T.C. at 345.

³⁰⁶ The *Clorox* court explicitly distinguished between the agreement at issue in the case and “trademark agreements that in reality serve to divide markets, and thus have been condemned as illegal *per se* under the antitrust laws.” *Clorox*, 117 F.3d at 55 (internal citation omitted). *See id.* at 55-56 (because the agreements at issue do not “effect any of the types of restraints that have historically been condemned as illegal *per se*, such as price fixing, market divisions, tying arrangements, or boycotts,” the court will review the agreement under the rule of reason); *id.* at 60 (“in the absence of any evidence that the provisions relating to trademark protection are auxiliary to an underlying illegal agreement between competitors – such as . . . territorial market division . . . we believe the parties’ determination of the scope of needed trademark protections is entitled to substantial weight”).

³⁰⁷ *See supra* pp. 32-33 (explaining that Bidding Agreements broadly prohibit rival advertising from appearing on a SERP in response to a search query including the term “1-800 Contacts” or a close variation thereof).

³⁰⁸ *See supra* pp. 33-37.

2. Direct Evidence of Actual Harm to Both Consumers and Search Engines Establishes a *Prima Facie* Case of Competitive Harm

As an alternative method of satisfying its *prima facie* case, Complaint Counsel has introduced direct evidence that 1-800 Contacts' Bidding Agreements caused *actual harm* to both search engines and consumers. Direct evidence sufficient to satisfy a *prima facie* case may consist of evidence of higher prices or lower output; *or* it may consist of evidence of a marketplace *distortion* that is *likely* to result in higher prices or lower output. For example, in *Indiana Federation*, the Supreme Court accepted as direct proof of anticompetitive effects evidence that in two localities, over a period of years, insurers were "actually unable to obtain compliance with their requests for submission of x-rays." 476 U.S. at 460. *See also Realcomp II*, 2007 WL 6936319, at *32 (direct evidence of harm consists of showing that "significantly fewer discount listings" were available to consumers after the advertising at issue was restrained).

Here, the direct evidence demonstrates that 1-800 Contacts' Bidding Agreements have had a significant distorting effect on "the proper functioning of the price-setting mechanism of the market," *Indiana Federation*, 476 U.S. at 461-62.

a. Direct Evidence of Harm to Consumers

1-800 Contacts' Bidding Agreements have significantly distorted the shopping experience and the shopping behavior of consumers. The likely consequence is that consumers pay higher prices for contact lenses.³⁰⁹

As described earlier, Professor Athey modeled changes to the SERP without the Bidding Agreements, and the likely consumer response. The model demonstrates that, for competitors of

³⁰⁹ *See supra* pp. 57-61.

1-800 Contacts, the Bidding Agreements result in substantially fewer advertising impressions, fewer clicks, and fewer sales.³¹⁰ Professor Evans' model works from a different data set and corroborates Professor Athey's results.³¹¹ Based on their models, both Professor Athey and Professor Evans conclude that, in the absence of the Bidding Agreements, consumers would have seen *millions* more ads for lower-price sellers; and that consumers would have paid lower prices for contact lenses as a result.³¹²

1-800 Contacts does not offer any alternative empirical analysis, just insubstantial criticisms of the models constructed by Professors Athey and Evans.³¹³ 1-800 Contacts' experts generally criticize the models for being "models," in that they necessarily rely on assumptions. Yet neither Dr. Ghose nor Dr. Murphy shows that the assumptions underlying the models are unreliable. Nor do they dispute Professors Evans' and Athey's conclusions that consumers were harmed by the Bidding Agreements. Instead, Drs. Ghose and Murphy merely take issue with the magnitude of such harm.³¹⁴

A second source of direct evidence of injury is the ordinary-course business documents and testimony of market participants. 1-800 Contacts' documents corroborate Professor Athey's and Professor Evans' conclusions that the Bidding Agreements have kept prices high by preventing consumers from seeing advertisements from lower-price rivals. Numerous

³¹⁰ See *supra* pp. 54-55.

³¹¹ See *supra* pp. 55-56.

³¹² See *supra* pp. 54-61.

³¹³ See, e.g., RX0739 at 0065-0073 (¶¶ 173-198) (Murphy Expert Report); RX0733 at 0064-0073 (¶¶ 149-171) (Ghose Expert Report).

³¹⁴ See RX0739 at 0065-0073 (¶¶ 173-198) (Murphy Expert Report); RX0733 at 0064-0073 (¶¶ 149-171) (Ghose Expert Report).

contemporaneous internal documents confirm that, when its lower-price competitors' advertisements appeared in response to searches for 1-800 Contacts, 1-800 Contacts lost sales and associated revenues.³¹⁵ In 2008, 1-800 Contacts estimated that *each month* it lost \$68,604 in sales due to rivals' search advertising against 1-800 Contacts trademarks.³¹⁶ Conversely, the "removal" of competitors from the SERP in response to queries relating to 1-800 Contacts had a material *positive* impact on 1-800 Contacts' sales.³¹⁷

The real-world experience of 1-800 Contacts' rivals bolsters 1-800 Contacts' own conclusions regarding what happens when 1-800 Contacts' rivals advertise in response to search queries for 1-800 Contacts: they receive impressions, clicks, and critically, *sales*.³¹⁸ Indeed, this

³¹⁵ See, e.g., CX0510 at 001 ("TM CTR [click-through rate] (24%) wasn't as strong as the five weeks prior, which is likely the result of additional competitor's [sic] ads (Vision Direct, Standard Optical, ShipMyContacts) showing up on our best terms such as 1800contacts and 1800 contacts."); CX0906 at 001 ("Google TM orders (and click through rates) were slightly softer than last week because of increased competition on our best branded terms. Google searches for our most profitable term, 1800-contacts, currently yields ads for six other advertisers."); CX0864 at 002 ("Our comps continue to be quite difficult. . . . We've seen particularly sharp declines in Trademark orders, which has dropped to less than 80% of our total orders for the past few weeks. This decline comes from a decreasing conversion rate on trademark – likely the result of competitive pressure and pricing."). See *supra* pp. 28-30, 58-59.

³¹⁶ See CX0213 _NATIVE_1-800F_00024851 (Oct. 17, 2008, 1-800 Contacts internal spreadsheet calculating cost of competitive bids).

³¹⁷ See, e.g., CX0564 at 001 ("Contributing to the TM success was the removal of a few competitors who had been showing up on our best TM terms. Walgreens was the most notable of these and dropped off on the 15th of June. Bing TM orders also jumped up drastically."); CX0855 at 001 ("Along with FSA season, we also had fewer organizations showing up on our [TM terms] this week, which always helps improve performance. The term 1800contacts improved NI [New Internet] orders by 44% over last week with 2-3 competing ads compared to 7-8 competing ads the week before."); See also, e.g., CX0927 at 001 ("Trademark orders (5,706) had another very solid week. . . . This was partially caused by the highest TM CTRs (27.2%) we've ever seen. The removal of ShipMyContacts from our trademarks . . . contributed to our excellent TM CTR this week."); CX0274 at 002 ("The TM order boost came despite lower TM searches, and was driven by a jump in TM CTR [click-through rate] and CR [conversion rate]. We saw fewer instances of ShipMyContacts on our TM searches which may have helped our CTR."). See *supra* pp. 28-30, 58-59.

³¹⁸ See *supra* pp. 42-47.

is the very analysis that impelled 1-800 Contacts to demand that its competitors cease advertising against the 1-800 Contacts trademark terms.³¹⁹

1-800 Contacts' Bidding Agreements also impede market entry by removing a low-cost means for new rivals to gain market awareness and acceptance.³²⁰ As described earlier, for an online seller of contact lenses, broad scale advertising is expensive, and inefficient.³²¹ For many online retailers, paid search advertising was the primary – or sole – means of breaking into a new market and establishing a customer base.³²² Many online retailers testified that they found it particularly useful to advertise against 1-800 Contacts' trademark because it put their ads in front of a large number of consumers who might not otherwise be familiar with their brands.³²³

³¹⁹ See, e.g., CX9004 (Coon, IHT at 152-154) (“When people type 1-800 Contacts into their browser they are trying to go there just like they are when they dial 1-800 Contacts. The phone system doesn’t like pick up and go oh, you called Domino’s Pizza and they pick up and go oh, hey, before we connect your call, you know, Pizza Hut has pizza half off. Would you like to be connected to Pizza Hut instead? That’s just not how the phone system works. It could have, I suppose. . . . Google’s a switchboard. Right? And I think it’s wrong for them to try to interrupt somebody who is just asking to be connected and try to profit off of ads and confusion and interfering with that effort to just connect with the party they’ve asked for.”); CX9001 (Bethers, IHT at 124) (“If an advertisement comes to me and I’m ready to go into a store, I’m not looking to have five other people run up to me at the entrance of the door and say, ‘By the way, I’m so and so, and I’m so and so, and I’m so and so.’”); CX0279 at 002 (2009 email exchange among marketing team, observing that, “it concerns me that customers may take the opportunity to order with our competitors, especially when their ad copy is so ‘savings’ driven”; and attaching screen shots of advertisements from competitors offering aggressive discounts); CX0549 at 055, *in camera* { [REDACTED] }.

³²⁰ See CX8006 at 041, 081-082, 085-087 (¶¶ 93, 181 n.188, 191) (Evans Expert Report), *in camera*.

³²¹ See *supra* pp. 40-41.

³²² See *supra* pp. 41-42.

³²³ See *supra* pp. 43-44. See, e.g., CX9039 (Clarkson, Dep. at 104) (“[W]e know from public data that there are an awful lot of people who search for 1-800-CONTACTS. We think that some portion of them would be interested in an offer that said, ‘We’re 20 percent cheaper.’ So it – we think it would be a compelling proposition to consumers.”); Holbrook, Tr. 1904-1905 (“[I]t put our brand in [consumers’] mind[s], and the next time they were looking for contact lenses they would be more likely to remember our name, our brand, and possibly look for us again.”); *id.* at 1909-1910; CX9024 (Holbrook, Dep. at 72-73); CX8003 at 002 (¶ 9) (Mitha, Decl.) (“[B]y bidding on 1-800 Contacts’ terms, we were able to generate a significant number of ad impressions, which meant that, even if consumers did not purchase from us in response to any particular search query, we were able to get the Lens

b. Direct Evidence of Harm to Search Engines

1-800 Contacts’ Bidding Agreements have also resulted in actual harm to search engines. The Bidding Agreements have distorted the search engines’ advertising auctions; they have diminishing revenues to the search engines; and they have diminished the quality of the search engines’ product.³²⁴

As described earlier, Professor Evans constructed a model showing that, as a result of the Bidding Agreements, 1-800 Contacts’ cost-per-click on its own trademark keywords was reduced by between { [REDACTED] }³²⁵ 1-800 Contacts’ “savings,” of course, represents a financial loss to the search engines – and a direct form of competitive injury.

Notably, 1-800 Contacts expressly acknowledges this point – as both the *purpose and the effect* of eliminating competition from the search advertising auctions – in its own documents. For example, 1-800 Contacts acknowledges that it “remove[d] competitors [from the auction,] which in turn drives down how much we pay per click.”³²⁶ Referring to the practice of “[k]eep[ing] competitors and affiliates off” its trademark terms, 1-800 Contacts stated that “[l]ow competition = low cost.”³²⁷ 1-800 Contacts’ CEO and president Brian Bethers acknowledged: “That’s the goal and objective that we have So on our trademark search I would like to spend

Discounters name in front of a large audience of potential customers. This gave consumers the choice and view of other cheaper options, similar to a brick-and-mortar shop have a competitor advertise next door.”).

³²⁴ See *supra* pp. 61-67.

³²⁵ See *supra* p. 61.

³²⁶ CX0935.

³²⁷ CX0051 at 004 (2010 “Search Overview”).

an appropriate amount, as little as we can.”³²⁸ 1-800 Contacts’ chief marketing officer Tim Roush agrees: “I wouldn’t want our competitors to bid on our terms [because] . . . they would drive up our search costs. . . . If more competitors were bidding on our term, then the costs would go up.”³²⁹

Former 1-800 Contacts search advertising manager Bryce Craven reported whether 1-800 Contacts was paying more or less for search advertising each week, depending on whether competitors were bidding on 1-800 Contacts’ keywords (1-800 Contacts’ advertising costs went up), or whether 1-800 Contacts had successfully “removed” its rivals from the auction (1-800 Contacts’ advertising costs went down).³³⁰ Mr. Craven confirmed this analysis at trial.³³¹ Indeed, 1-800 Contacts’ own 2008 analysis shows that it would pay search engines \$20,434 per month more in advertising costs if it had competition in auctions for its trademark terms.³³²

³²⁸ CX9001 (Bethers, IHT at 196-197) (discussing CX0051 at 004); CX9012 (L. Schmidt, IHT at 182) (“Q: And the second bullet says, Low competition equals low costs. What’s your understanding of that bullet? A: The harm that we – one of the harms from people bidding on our brand is that it increased our costs. Q: It increased your costs when they bid? A: Yes.”); *id.* at 211 (same).

³²⁹ CX9034 (Roush, Dep. at 60-62). *See also, e.g.*, CX9032 (L. Schmidt, Dep. at 188) (“There is less competitors showing up on our trademark keywords, and our spend – our costs for these terms went down.”).

³³⁰ *See, e.g.*, CX0915 at 001 (Jul. 28, 2008, email from Bryce Craven, 1-800 Contacts, to Brandon Dansie, 1-800 Contacts) (“TM CPCs . . . jumped up by 18% from last week and pushed us to our most costly week yet for trademarks. There were more advertisers on our marks this past week (both local and national retailers), which increased competition and CPCs for our top terms.”); CX8006 at 072 (¶ 161 n.169) (Evans Expert Report) (citing CX1080) (“We are still being outbid on keyword ‘800contacts’ but just by one competitor. I have increased the bid.”); CX0658 at 001 (“Compared with recent weeks, we saw fewer competitors showing on our TM keywords this week, which helped drop our spend for these terms.”); CX0657 at 001 (2011 email from Blackwood to Jonathan Coon, CEO of 1-800 Contacts, forwarding Search & Partner Dashboard) (“Competition on our TM [trademark] terms is lighter than recent history, which is likely a contributing factor in our lower TM CPO’s [costs per order] - \$1.26 this week.”). *See supra* p. 62.

³³¹ Craven, Tr. 547-551, 558-559.

³³² *See* CX0213_NATIVE_1-800F_00024851 (Oct. 17, 2008, 1-800 Contacts internal spreadsheet calculating cost of competitive bids).

1-800 Contacts' estimate is also consistent with the conclusions of both Google's Dr. Juda and Bing's Dr. Iyer that, all other things equal, a reduction in the number of auction participants reduces the price paid by the auction "winner," and reduces the revenues to the search engines.³³³

Finally, the Bidding Agreements entered into by 1-800 Contacts and its most significant online rivals resulted in a lower-quality product, both in the short-term and long-term, as the search engine results were artificially manipulated by the removal of relevant, valuable advertisements that would otherwise have been presented to consumers.³³⁴ Google's Dr. Juda testified that these Bidding Agreements resulted in a lower quality SERP, with a direct reduction of valuable information that would have been relevant to consumers.³³⁵ Bing's Dr. Iyer confirmed that the Bidding Agreements undermine the search engines' objective of assembling the best possible results.³³⁶ The harm to product quality is not limited to merely one specific auction; rather, it compounds over time, as the search engine's algorithms are unable to organically determine which advertisements are relevant, and which are not.³³⁷ The degrading of the SERP, of course, harms *both* the search engine and its users.

This substantial evidence that 1-800 Contacts' Bidding Agreements have "imped[ed] the ordinary give and take of the marketplace," *Professional Engineers*, 435 U.S. at 692-93, for both

³³³ See *supra* pp. 62-63.

³³⁴ See *supra* pp. 64-67.

³³⁵ See *supra* p. 65.

³³⁶ See *supra* pp. 65-66.

³³⁷ See *supra* pp. 66-67.

search engines *and* consumers is precisely the type of evidence that has been previously relied upon by both the Commission and the courts in condemning similar restraints.

3. Parties to the Bidding Agreements Collectively Have Market Power

A third, and alternative, way to prove the likelihood of harm is to show that the parties to the challenged agreements possess market power in a relevant market, and that the nature of the restraints makes them likely to result in anticompetitive effects. *Realcomp II*, 2007 WL 6936319, at *19, *21 (“if the tribunal finds that the defendants had market power and that their conduct tended to reduce competition, it is unnecessary to demonstrate directly that their practices had adverse effects on competition,” as market power serves as a proxy for determining “the potential for genuine adverse effects on competition”) (citing *Indiana Federation*, 476 U.S. at 460-61).³³⁸

An antitrust market is comprised of a relevant product market and a relevant geographic market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). A high market share in a relevant market supports a finding of market power, particularly when entry barriers limit the ability of new competitors to defeat a price increase. *E.g.*, *Microsoft*, 253 F.3d at 51-56; *FTC v. Staples*, 970 F. Supp. 1066, 1081-82, 1086 (D.D.C. 1997) (evidence of market share and entry barriers have commonly been central to market power analysis). In this case, the parties to the Bidding Agreements collectively have market power in a market for the online sales of contact lenses in the United States. 1-800 Contacts claims that a price increase by online sellers of contact lenses would not be profitable, for the reason that consumers would switch to ECPs and

³³⁸ As noted earlier, no demonstration of market power is necessary to support an inherently suspect analysis, or where direct proof of actual effects are shown. *Realcomp II*, 2007 WL 6936319, at *18-19.

other brick-and-mortar sellers.³³⁹ As described below, however, online sellers are sufficiently distinct (in price and along other dimensions) that an anticompetitive price increase would be profitable.

a. Relevant Product Market Consists of Online Sales of Contact Lenses

This case involves one antitrust product market: the online sale of contact lenses.³⁴⁰ While all retailers of contact lenses may compete for customers to some degree, market definition does not turn on identifying the retailers capable of satisfying a consumer's ultimate needs. *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 50 (D.D.C. 2011) (“All tax preparation methods provide taxpayers with a means to perform the task of completing a tax return, but . . . while providers of all tax preparation methods may compete at some level, this “does not necessarily require that [they] be included in the relevant product market for antitrust purposes.”) (quoting *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C.1997)). Instead, as the Supreme Court has instructed, courts define relevant product markets by evaluating the “cross-elasticity of demand between the product itself and substitutes for it.” *Brown Shoe*, 370 U.S. at 325. *See also* FTC AND U.S. DEP’T OF JUSTICE, HORIZONTAL MERGER GUIDELINES §4 (2010) (Market Definition) (hereinafter “2010 GUIDELINES”).

Assessing cross-elasticity of demand between products “guides antitrust courts in attempting to answer one ‘key question’: whether particular products ‘are sufficiently close substitutes’ such that substitution to one could ‘constrain any anticompetitive . . . pricing’ in the

³³⁹ *See* 1-800 Contacts Pretrial Brief at 68-70.

³⁴⁰ Evans, Tr. 1432 (“I concluded that the relevant antitrust market from a product perspective consisted of online sales of contact lenses.”).

other.” *United States v. Aetna Inc.*, 2017 U.S. Dist. LEXIS 8490 (D.D.C. Jan. 23, 2017) at *39 (quoting *H & R Block, Inc.*, 833 F. Supp. 2d at 54). This inquiry, termed the “hypothetical monopolist” (or “hypothetical cartel”) test, is a proper method of defining markets in all antitrust cases. *See, e.g., Realcomp II*, Dkt. No. 9320, 2007 WL 4465486 (Initial Decision, Dec. 10, 2007), *rev’d on other grounds*, 2007 WL 6936319 (F.T.C. Oct. 30, 2009), at *25 (“[a]pplying the standard economic framework for defining relevant markets, the net result is that a hypothetical monopolist of MLS listing services would be able to implement a ‘small but significant and non-transitory increase in price’ for access to the MLS.”); *Realcomp II*, 635 F.3d at 824 (approving market definition determination in which “the ALJ found that a broker monopolist could profitably increase commissions significantly above competitive levels”).

In assessing whether a proposed market satisfies the hypothetical monopolist test, “the Court has a number of analytical tools at its disposal.” *Aetna*, 2017 U.S. Dist. LEXIS 8490, at *11; *H & R Block*, 833 F. Supp. 2d at 52. As the D.C. District Court recently explained in *United States v. Aetna Inc.*, 2017 U.S. Dist. LEXIS 8490 (D.D.C. Jan. 23, 2017), “[t]he first [analytical tool] is provided by the Supreme Court’s decision in *Brown Shoe*”; the second tool is the firm or firms’ ordinary course documents; and the third is expert testimony and analysis. *Id.* at *11-12. In this case, each of these three analytic tools confirms that the online sale of contact lenses represent a relevant antitrust market. Specifically, contact lenses prices could be increased above the competitive level by a monopolist online seller, or a cartel of all online sellers, that faces no competition from any other online sellers of contact lenses. *See United States v. Am. Express Co.*, 838 F.3d 179, 198–99 (2d Cir. 2016) (“[u]nder the [hypothetical monopolist test], [a] market

is any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could profitably raise prices significantly above the competitive level.”) (internal quotations omitted).

i. “Practical Indicia” Prescribed by *Brown Shoe* Support Relevant Market for Online Sales

In assessing the boundaries of a product market, courts look to “such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” *Brown Shoe*, 370 U.S. at 325. In this case, all of the relevant “practical indicia” demonstrate that the online sale of contact lenses constitutes a relevant antitrust market.

First, the evidence shows widespread “industry or public recognition” of a distinct online market, *Brown Shoe*, 370 U.S. at 325, as online retailers uniformly identify other internet sellers as their closest competitors. For example, Vision Direct, Walgreens.com, and Lens Direct all testified that they view online competitors as the “primary competitors for contact lens sales.”³⁴¹ AC Lens, Memorial Eye, and other online firms also testified that their “main competitors” and “closest competitors” consist exclusively of online retailers.³⁴² 1-800 Contacts’ CEO and president Brian Bethers concurs, at least outside of the context of antitrust litigation. In October

³⁴¹ Hamilton, Tr. 391-393 (testifying regarding both Walgreens.com and VisionDirect.com); Aloviss, Tr. 988 (Lens Direct’s “primary competition” consists exclusively of online firms); CX9023 (Aloviss, Dep. at 108, 110) (Lens Direct’s “main competitors” are exclusively online firms, and none of its main competitors are “companies that sell contact lenses in brick-and-mortar stores.”).

³⁴² Clarkson, Tr. 187-188 (AC Lens’s “closest competitors” are exclusively online firms); CX9003 (Clarkson, IHT at 23-24) (AC Lens’s “primary competitors are the companies that are in the online space”); Holbrook, Tr. 1887-1888 (to set pricing, Memorial Eye would “look at our closest competitors,” which were exclusively online firms); CX9000 (Batushansky, IHT at 19-21), *in camera* { [REDACTED] }; CX8003 at 001 (¶ 4) (Mitha, Decl.) (“Lens Discounters’ closest competitors are other companies that sell contact lenses online”).

2016 he stated that the online rivals with which 1-800 Contacts reached agreements represented “all of our major competitors.”³⁴³ This “[i]ndustry or public recognition . . . matters because we assume that economic actors usually have accurate perceptions of economic realities.” *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1045 (D.C. Cir. 2008) (quoting *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 219 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, 479 U.S. 1033 (1987)). *Cf. F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1079-80 (D.D.C. 1997) (“While it is clear to the Court that Staples and Office Depot do not ignore sellers such as warehouse clubs, Best Buy, or Wal-Mart, the evidence clearly shows that Staples and Office Depot each consider the other superstores as the primary competition.”).

Second, the online market exhibits “distinct prices.” *Brown Shoe*, 370 U.S. at 325. Online retailers generally offer significantly lower prices – ranging roughly { [REDACTED] } percent less – than physical retailers,³⁴⁴ with the exception of membership warehouse club stores.³⁴⁵ The price difference is so significant that most online retailers focus exclusively on the online channel in setting their pricing. For example, during the period that Memorial Eye sold contacts both online and in physical stores, it charged significantly lower prices online. In setting its online prices, Memorial Eye considered only the prices of online rivals, while disregarding prices of ECPs and

³⁴³ Bethers, Tr. 3723-3725; CCXD0032 (Oct. 2016 Bethers radio interview) (“[W]e had to sue a couple of competitors and eventually we signed agreements with all of our major competitors.”). Likewise, while 1-800 Contacts is aware that Costco and other club stores offers at lower prices than 1-800 Contacts, 1-800 Contacts excludes club stores from that policy. CX9017 (Blackwood, Dep. at 288); CX9034 (Roush, Dep. at 151-152); *id.* at 155-157; CX9032 (L. Schmidt, Dep. at 140, 142).

³⁴⁴ *See supra* pp. 4-7 & n.9, 22, 24.

³⁴⁵ Clarkson, Tr. 189 (“[I]t’s also generally true that in most cases online pricing is significantly lower than for any of the brick-and-mortar channels, with the exception of the clubs.”); CX0526 at 030 (2012 Confidential Information Memorandum); CX0429 at 015 (2013 1-800 Contacts Management Presentation); CX9034 (Roush, Dep. at 151-152); CX9032 (L. Schmidt, Dep. at 142).

brick-and-mortar retailers because those prices were not “relevant” to its online business.³⁴⁶

Other online sellers similarly do not “look at eye doctor prices” when setting pricing, and typically factor neither brick-and-mortar stores nor clubs into their analysis of pricing.³⁴⁷ This pattern is consistent with similar cases in which separate relevant markets have been defined based on pricing considerations. *See, e.g., FTC v. Swedish Match*, 131 F. Supp. 2d 151, 165 (D.D.C. 2000) (product market for loose leaf tobacco did not include moist snuff where, among other factors, “loose leaf pricing is determined upon the basis of competition with other loose leaf products, not moist snuff.”); *Avnet, Inc. v. FTC*, 511 F.2d 70, 77 (7th Cir.), *cert. denied*, 423 U.S. 833 (1975) (Commission properly excluded reconditioned products from the product market based on “absence of any substantial interaction in price between” reconditioned products and new products).

And while club stores may offer lower prices than some online retailers, online retailers do not consider club stores to be close competitors because they require a membership, operate under a different pricing model, and appeal to an entirely “different category” of customers. As AC Lens CEO Peter Clarkson testified: “[E]ven though club stores have very competitive pricing, they’re not a big part of . . . analysis to figure out where to put prices because, for one thing, it’s a very different category of customer. They’ve paid a membership fee and in some

³⁴⁶ Holbrook, Tr. 1898-1900, 1887-1888 (Memorial Eye set prices for its online sales much lower than prices at its brick-and-mortar stores, because its online prices were based on the prices of other online retailers). *See id.* at 1889-1890 (Memorial Eye provided different service offerings to its online customers than to its brick-and-mortar customers).

³⁴⁷ Clarkson, Tr. 195-196; CX9039 (Clarkson, Dep. at 92-93); CX9003 (Clarkson, IHT at 23-24); CX9018 (Drumm, Dep. at 115-116); CX9000 (Batushansky, IHT at 18-21), *in camera* { [REDACTED] }; CX9014 (Batushansky, Dep. at 68), *in camera*.

cases, especially Costco, they're incredibly loyal to Costco."³⁴⁸ Tellingly, 1-800 Contacts' price-match policy explicitly *excludes* club stores.³⁴⁹

Third, online retailers are "specialized vendors" which, in order to obtain material business, must invest in "unique" assets that differ significantly from those of their brick-and-mortar counterparts. *See Brown Shoe*, 370 U.S. at 325. For example, online retailers must invest in, build out, and maintain sophisticated websites that allow customers to easily and efficiently navigate the websites, and order their products from home.³⁵⁰

Further, larger online retailers invest significantly in a wide variety and large quantity of contact lenses, in contrast to their brick-and-mortar counterparts. As Peter Clarkson of AC Lens, which supplies contact lenses and provides back-end services to several major brick-and-mortar

³⁴⁸ Clarkson, Tr. 196-197. *See also*, e.g., CX9000 (Batushansky, IHT at 18-21), *in camera* [REDACTED]; CX9017 (Blackwood, Dep. at 288) (warehouse clubs have a distinct pricing model that includes membership fees); CX9034 (Roush, Dep. at 156) (same).

³⁴⁹ CX8006 at 127-129 (¶¶ 276-77) (Evans Expert Report). *See, e.g.*, CX9017 (Blackwood, Dep. at 288); CX9034 (Roush, Dep. at 156) ("[O]ur price matching has typically excluded clubs as a policy. And the reason for that is pretty simple, and that is that there's a fee, a membership fee that's associated with clubs, and so you have to pay that fee."); *id.* at 151-152; *id.* at 155-157; CX9032 (L. Schmidt, Dep. at 140, 142). Chief marketing officer Tim Roush testified that customer service representatives have in the past price-matched against club stores, despite 1-800 Contacts' policy, but Mr. Roush has discouraged such price-matching. Indeed, in 2016 the 1-800 Contacts executive team expressly reaffirmed 1-800 Contacts' formal policy against price-matching club stores. CX9034 (Roush, Dep. at 157-158). *See supra* p. 5 & n.15. *Cf. F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1080 (D.D.C. 1997) ("it is clear from the evidence that Staples and Office Depot price check the other office superstores much more frequently and extensively than they price check other retailers such as BJ's or Best Buy, and that Staples and Office Depot are more concerned with keeping their prices in parity with the other office superstores in their geographic areas than in undercutting Best Buy or a warehouse club.").

³⁵⁰ *See, e.g.*, Holbrook, Tr. 1860-1862 (designing and building out website was investment). While ECPs and brick-and-mortar sellers may maintain websites (*see* 1-800 Contacts Pretrial Brief at 3-4) this is not their primary focus. By contrast, online sellers invest must considerable resources into designing and maintaining superior websites that encourage easy ordering. *See, e.g.*, CX0525 at 016 (2012 1-800 Contacts management presentation notes that 1-800 Contacts invests in having a "best-in-class website," with continuing "site optimization through constant user monitoring and surveys," "new customer tutorials to help enter order and prescription information," "simple and streamlined order process for new and repeat customers," and 24/7 "click-to-chat" services).

retailers,³⁵¹ testified: “I can speak specifically to Walmart and Sam’s [Club]. They would have a selection of maybe four different lenses, perhaps a total of 400 SKUs in the store. . . . I can’t speak for other online retailers, but [at AC Lens] we have 37,000 SKUs in stock.”³⁵² Other online retailers, including 1-800 Contacts, have made similarly large investments into significant inventories of contact lenses.³⁵³

In addition, online contact lens retailers must invest in increasingly sophisticated prescription verification systems.³⁵⁴ These and other online-specific investments, along with the regulatory requirements specific to selling contact lenses in the United States, is apparently burdensome enough that, even though Walgreens operates thousands of brick-and-mortar establishments, it sells contact lenses only online.³⁵⁵ The notion of online contact lens retailers as specialized vendors is further bolstered by the fact that so many well-known brick-and-mortar

³⁵¹ Clarkson, Tr. 175-177 (AC Lens supplies contact lenses wholesale to retail stores including Sam’s Club and National Vision, and provides “white label” back-end fulfillment for Walmart and Sam’s Club).

³⁵² Clarkson, Tr. 191-192; *see id.* at 191 (“A doctor usually would have even less [than Walmart and Sam’s Club], and many doctors don’t carry any inventory.”); Coon, Tr. 2876 (Costco could fill at most 30 percent of its prescriptions from inventory, which was higher than most eye doctors); CX9004 (Coon, IHT at 124-125) (“They have very little inventory in Costco . . . maybe 30 percent they could fill from in the store.”); CX9003 (Clarkson, IHT at 25-26) (“without a significant amount of capital to drive marketing and to provide significant inventory” an online participant would not be able to achieve scale.).

³⁵³ *E.g.*, Coon, Tr. 2881 (1-800 Contacts had an inventory of 65,000 SKUs worth millions of dollars); RX1228 at 0010, *in camera* (2015 1-800 Contacts Presentation: Staff Final Update notes that 1-800 Contacts { [REDACTED] }); Holbrook, Tr. 1868-1870 (in order to enter the online space, Memorial Eye made “a huge investment” in purchasing inventory, which was significantly larger than the inventory carried by its brick-and-mortar stores).

³⁵⁴ Clarkson, Tr. 180-181. *See also* CX9003 (Clarkson, IHT at 26) (“larger companies now would have an online database of all of the doctors in the United States” for prescription verification); Holbrook, Tr. 1868-1870 (in order to enter the online space, Memorial Eye set up prescription verification process, which was “a big deal” and a significant investment).

³⁵⁵ Hamilton, Tr. 388-389. Indeed, the largest online seller in the United States, Amazon, does not sell contact lenses, reportedly because of the difficulties specific to the industry. *See* CX1109 at 042 (AC Lens analysis reports that Amazon considered providing e-commerce platform for third-party contact lens sellers to sell directly to consumers, but that Amazon was not considering selling contact lenses itself); CX9014 (Batushansky, Dep. at 197-198), *in camera*.

retailers have elected to outsource their online operations completely. For example, Walmart relied on 1-800 Contacts for its online operations, including “prescription verification,” “distribution,” “customer service,” and “CRM and marketing” from January 2008 until December 31, 2012.³⁵⁶ After that “alliance” ended, rather than developing in-house capabilities to perform these specialized services, Walmart turned to AC Lens to operate WalmartContacts.com.³⁵⁷ Likewise, 1-800 Contacts performs “fulfillment” and e-commerce services for multiple companies, including brick-and-mortar retailers LensCrafters, Pearle, Sears, and Target Optical.³⁵⁸ These partnerships confirm the 2015 observations of 1-800 Contacts’ owner, AEA Investors, that while { [REDACTED]

[REDACTED] }.³⁵⁹ Indeed, 1-800 Contacts recognizes that its specialized assets have created a “{ [REDACTED] }” to provide “{ [REDACTED] }” to such brick-and-mortar retailers, which, despite their prominence, lack the

³⁵⁶ CX0526 at 039 (Confidential Information Memorandum, Feb. 2012); RX0428 at 0019, *in camera* (2015 1-800 Contacts Management Presentation { [REDACTED] }).

³⁵⁷ Clarkson, Tr. 175-177 (AC Lens provides “white label” e-commerce solutions for Walmart, Sam’s Club, and others).

³⁵⁸ Bethers, Tr. 3519-3520 (“We assist them in shipping product to their members, so when a member places an order on the website, we’ll package that up, put it in a box under their name, and we’ll send it to their member for them.”).

³⁵⁹ CX0439 at 014, *in camera* (2015 1-800 Contacts Staff Final Update); *see id.* (noting that { [REDACTED] } and 1-800 Contacts’ ability to provide such services { [REDACTED] }).

specialized “[REDACTED]” assets necessary to efficiently participate in the online market.³⁶⁰

Fourth, “peculiar characteristics” of the regulatory environment create “distinct customers” for online contact lens retailers compared to other sellers of contact lenses. *See Brown Shoe*, 370 U.S. at 325. For one thing, consumers with vision insurance are typically able to get in-network benefits at ECPs, but not from online vendors.³⁶¹ Another important “peculiar characteristic[]” of contact lens retailing is the fact that customers *must* periodically go to a brick-and-mortar ECP to get an eye exam and obtain a prescription for contact lenses.³⁶² Like consumers with vision insurance, consumers who make a trip to an ECP to get a prescription tend to make at least an initial purchase from that ECP while they are on-site.³⁶³ These consumers are situated different from consumers in the “refill” phase, *i.e.*, once the consumer has left the physical store. Online retailers typically compete only for that “refill” portion of the

³⁶⁰ RX0428 at 0045, *in camera* (2015 1-800 Contacts Management Presentation); *see id.* at 0034 ([REDACTED]).

³⁶¹ RX0428 at 0040, *in camera* (2015 1-800 Contacts Management Presentation noting: [REDACTED]); Evans, Tr. 1440-1441 (“for consumers who have eyecare/vision insurance, it is – it is typically more convenient to purchase from an ECP than to purchase online. It is more of a hassle to use vision insurance online than it is at ECPs. The online players are typically out of – typically out of network, and it turns out to be more inconvenient for that group of consumers that have vision insurance.”); CX8006 at 114-115 (¶ 252) (Evans Expert Report).

³⁶² Evans, Tr. 1434-1435 (“this is unlike other markets . . . consumers can go to physical book stores to buy books, they can buy books online, but the bookstore market doesn’t have the feature where every six months, you absolutely, positively have to go to a bookstore . . . nor is that true for most other markets.”); CX8006 at 020 (¶¶ 47-48) (Evans Expert Report),

³⁶³ Immediacy is often important because “contact lens wearers are notorious. They wear their last pair before they reorder, so they need contact lenses right away.” Bethers, Tr. 3613. Note that, while ECPs carry relatively limited inventories of contact lenses, an ECP who wishes to fill a high proportion of the prescriptions she writes from does not need to carry a wide variety of contact lenses; she just needs to prescribe the same brand every time.

market.³⁶⁴ Consumers who tend to shop online place a high premium on the convenience of online shopping, home delivery, low prices, and fast (and often free) shipping.³⁶⁵ But even those consumers must ultimately return to an ECP for a new prescription (and likely, an initial set of contact lenses). Thus, the consumer's changing behavior (purchasing from an ECP, then purchasing online, and then purchasing from an ECP again) simply reflects that consumers "are choosing the different types of stores under different circumstances."³⁶⁶ As discussed above, the fact that different suppliers can meet consumers' needs in different circumstances does not demonstrate that the suppliers compete in the same relevant antitrust market.

Finally, as described earlier, other than 1-800 Contacts, online retailers typically rely almost exclusively on search advertising to reach potential new customers.³⁶⁷ By contrast, brick-and-mortar retailers, including club stores, tend not to engage in substantial online advertising, including search advertising.³⁶⁸ The fact that online stores promote themselves to potential customers in a different manner than brick-and-mortar stores further supports the notion that customers of each channel tend to be distinct. *See Brown Shoe*, 370 U.S. at 325.

³⁶⁴ CX0547 at 036, *in camera* { [REDACTED] }

³⁶⁵ *See, e.g.*, CX9003 (Clarkson, IHT at 17-18) (characterizing the category of online contacts retailers as having a combination of the best service, convenience, and relatively low pricing compared to ECPs and most other retail channels); Holbrook, Tr. 1889 ("online customers are looking primarily for low price and quick delivery"). *See also* CX8006 at 113-114 (¶¶ 249-251) (Evans Expert Report).

³⁶⁶ CX8006 at 114 (¶ 251) (Evans Expert Report).

³⁶⁷ *See supra* pp. 14, 40-42.

³⁶⁸ *See, e.g.*, CX8004 at 002 (¶ 8) (Salas, Decl.) (Costco does not use search advertising to promote sales of contact lenses); CX9024 (Holbrook, Dep. at 26-28) (for its brick-and-mortar stores, Memorial Eye relies mostly on direct mailing; but for its online stores it relied primarily on internet search advertising).

ii. Ordinary Course Documents Support Relevant Market for Online Sales

In applying the *Brown Shoe* factors, courts also pay “close attention to the defendants’ ordinary course of business documents.” *Aetna Inc.*, 2017 U.S. Dist. LEXIS 8490, at *42 (quoting *H & R Block*, 833 F. Supp. 2d at 52). Here, 1-800 Contacts’ business documents confirm the existence of a separate relevant market for online sales. *See Brown Shoe*, 370 U.S. at 325. For example, recent high-level management presentations reference the “[REDACTED] [REDACTED]”,³⁶⁹ and focus on 1-800 Contacts’ competitive position compared to its online rivals,³⁷⁰ as do other sophisticated market analysts, noting that “[REDACTED] [REDACTED] [REDACTED]”.³⁷¹ Such ordinary-course analyses provide compelling evidence confirming the testimony of 1-800 Contacts’ rivals in this matter that, as a business reality, online sellers “who strive for profit” in the online market view it as distinct. *See FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C.1986) (“Analysis of the market is a matter of business reality—a matter of how the market is perceived by those who strive for profit in it”), *vacated as moot*, 829 F.2d 191 (D.C.Cir.1987).

The fact that 1-800 Contacts’ ordinary course documents also express a desire to draw customers from ECPs into the online channel does nothing to undermine this assessment.³⁷²

“[A]n innovative product can create a new product market for antitrust purposes by satisfying a

³⁶⁹ RX0428 at 0005 (2015 1-800 Contacts Management Presentation), *in camera* ([REDACTED] [REDACTED]).

³⁷⁰ RX0428 at 0005 (2015 1-800 Contacts Management Presentation), *in camera* ([REDACTED] [REDACTED]), 0008 ([REDACTED] [REDACTED]), 0010 ([REDACTED] [REDACTED]).

³⁷¹ CX0439 at 033 (AEA Investors Staff Final Update), *in camera*.

³⁷² *See supra* p. 16 (describing 1-800 Contacts’ strategy to draw consumers from brick-and-mortar stores online).

previously-unsatisfied consumer demand.” *Whole Foods*, 548 F.3d at 1048 (internal quotations and brackets omitted). Indeed, that is what commonly happens when a new business format (*e.g.*, online sales of contacts) attracts adherents at the expense of traditional formats (*e.g.*, ECPs and established brick-and-mortar retailers). As the Court of Appeals explained in *Whole Foods*:

[W]hen the automobile was first invented, competing auto manufacturers obviously took customers primarily from companies selling horses and buggies, not from other auto manufacturers, but that hardly shows that cars and horse-drawn carriages should be treated as the same product market. That *Whole Foods* and *Wild Oats* have attracted many customers away from conventional grocery stores by offering extensive selections of natural and organic products thus tells us nothing about whether *Whole Foods* and *Wild Oats* should be treated as operating in the same market as conventional grocery stores. Indeed, courts have often found that sufficiently innovative retailers can constitute a distinct product market even when they take customers from existing retailers.

Whole Foods, 548 F.3d at 1048 (citing, *inter alia*, *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 712–14 (7th Cir.1979) (finding a distinct market of drive-up photo-processing companies even though such companies took photo-processing customers from drugstores, camera stores, and supermarkets)).

Similarly, here, the fact that 1-800 Contacts’ documents indicate a desire to win business from ECPs by attracting new customers online “tells us nothing about whether” they “should be treated as operating in the same market.” *See Whole Foods*, 548 F.3d at 1048. In *H & R Block*, like in this case, ordinary-course documents indicated that participants in the proposed relevant market (DDIY tax services) had a “strategic goal to “Beat Tax Store[s],” which supplied products not included within the proposed relevant market. *H & R Block*, 833 F. Supp. 2d at 54. Such documents suggested that companies in the relevant market and companies outside the relevant market “all generally compete with each other for the same overall pool of potential customers,” and, in some instances, engaged in direct price competition. *Id.* at 54-56.

Nevertheless, the overall “lack of evidence of price competition” between the channels supported the conclusion that tax stores offering such assisted tax products were not within the relevant market because prices for DDIY tax products were “substantially below the average price of assisted tax products.” *Id.* at 55. Likewise, here, the dispositive factor is that online sellers do not react to the prices of ECP and brick-and-mortar retailers, because online prices are already substantially lower.³⁷³

iii. Professor Evans’ Critical Loss Analysis Supports an Online Market, as Respondent’s Expert Concedes

Professor Evans assessed the relevant market by conducting a “critical loss analysis,”³⁷⁴ which is a standard method of implementing the hypothetical monopolist test. *See H & R Block, Inc.*, 833 F. Supp. 2d at 63 (a critical loss analysis attempts to calculate “the largest amount of sales that a monopolist can lose before a price increase becomes unprofitable.”) (quoting *Swedish Match*, 131 F. Supp. 2d at 160). Professor Evans’ analysis demonstrates that a hypothetical monopolist of online contact lenses could profitably increase prices by a small but significant and non-transitory (SSNIP) amount.³⁷⁵

³⁷³ *See supra* pp. 4-7. *See also* CX9048 (Murphy, Dep. at 189-190) (expects that price-matching by 1-800 Contacts in response to ECPs is low because 1-800 Contacts’ prices are already below ECP prices). The one exception is brick-and-mortar club stores, which have similar or, in some cases, even lower prices than those of online sellers. Nevertheless, as described earlier, this fact alone does not mean there is price competition between club stores and online sellers. *See supra* pp. 5 & n.15, 103-110. Tellingly, 1-800 Contacts’ price-match policy explicitly *excludes* club stores. *See supra* p. 106 & n.349.

³⁷⁴ Evans, Tr. 1447-1449.

³⁷⁵ *Id.* at 1447-1449. CX8006 at 117-123 (¶¶ 257-268) (Evans Expert Report); *see id.* at 124 (¶ 269) (“a hypothetical monopolist of online contact lens retailers could profitably increase price by at least 5 percent over existing prices.”); *id.* at 120-123 (¶¶ 263-268), *in camera* (citing CX1162 { [REDACTED] }, *in camera*, and CX1449 { [REDACTED] }, *in camera*).

Based on survey evidence assembled in the ordinary course of business, Professor Evans calculated that 40 percent of the customers who would leave 1-800 Contacts in response to a price increase would shift to other online sellers. The movement of consumers from online sellers to 1-800 Contacts is also best approximated at 40 percent.³⁷⁶

Using this “diversion ratio,” combined with record evidence regarding 1-800 Contacts’ operating margins and conservative assumptions regarding the operating margins of other online retailers,³⁷⁷ Professor Evans demonstrated that a hypothetical monopolist would find it profitable to impose a SSNIP (price increase) of 12.1 percent,³⁷⁸ well in excess of the level (five percent) that the antitrust agencies typically use in identifying a relevant market. 2010 GUIDELINES § 4.1.2. As Professor Evans explained, this empirical analysis confirms, consistent with the “practical indicia” described above, that consumers would not switch to physical retailers in sufficient numbers to defeat a price increase by a hypothetical cartel of online sellers.³⁷⁹

Professor Evans’ empirical work is confirmed by 1-800 Contacts’ *own* economic expert. Dr. Kevin Murphy also concluded that online retailers of contact lenses could profitably impose a SSNIP, based on the diversion ratios and margins used by Professor Evans, and thus would

³⁷⁶ Evans, Tr. 1452-1454 (discussing CX1117 at 015 (1-800 Contacts 2014 Board Meeting Presentation); CCXD-005 at 035)). Notably, this diversion ratio was conservative because the survey on which it was based did not indicate that consumers who left 1-800 Contacts were leaving due to price differentials. At least some (if not most) of the switching between 1-800 Contacts and ECPs was likely due to the phenomenon described earlier, which is that consumers need to visit an ECP at least once a year (or every two years) to obtain a new prescription; and those consumers are likely to make at least an initial purchase from an ECP. *See supra* pp. 109-110. Thus, the reported “diversion” from 1-800 Contacts to ECPs is likely significantly inflated.

³⁷⁷ Evans, Tr. 1455; *see* CCXD0005 at 036.

³⁷⁸ Evans, Tr. 1455-1456; *see* CCXD0005 at 036.

³⁷⁹ Evans, Tr. 1456.

satisfy the hypothetical monopolist test.³⁸⁰ Indeed, Dr. Murphy established that a “candidate relevant market including 1-800 [Contacts] and the other online sellers” passes a SSNIP test even with diversion ratios far lower than the 40 percent diversion ratio employed by Professor Evans.³⁸¹ Dr. Murphy offered no criticism of Professor Evans’ model, analysis, or the profit margins used in Professor Evans’s empirical analysis.³⁸²

Instead, Dr. Murphy claimed that Professor Evans should have used a much lower diversion ratio – 17 percent. But Dr. Murphy’s suggested figure of 17 percent is highly inaccurate because it is calculated based on an entirely inapposite group of consumers. Diversion ratios are typically calculated based on actual lost sales, for example by analyzing lost sales reports.³⁸³ Consistent with this standard, Professor Evans used lost sales data in this case, focusing on 1-800 Contacts’ ordinary-course analysis of lost customers who were unlikely to return.³⁸⁴

By contrast, Dr. Murphy ignored this data, and instead relied on data relating to a large number of customers who recently purchased from an ECP but *intended* to make their next

³⁸⁰ Murphy, Tr. 4167-4168 (discussing RX0739 at 0109 (Ex. 22) (Murphy Expert Report)).

³⁸¹ According to Dr. Murphy, a relevant market for online contact lens sales satisfies the SSNIP test with any diversion ratio “above, say, in the mid-20s.” Murphy, Tr. 4167-4168 (discussing RX0739 at 0109 (Ex. 22) (Murphy Expert Report)).

³⁸² Evans, Tr. 1531.

³⁸³ *Id.* at 1835, *in camera* {

[REDACTED] }.

³⁸⁴ *Id.* at 1452-1454 (discussing CX1117 at 015 (1-800 Contacts 2014 Board Meeting Presentation)); CCXD0005 at 035).

purchase from 1-800 Contacts.³⁸⁵ Such customers do *not* represent lost sales from 1-800 Contacts’ perspective, because, as described earlier, it is typical for online consumers to make a purchase at an ECP when they visit to obtain or renew a prescription, and then to make their *refill* purchases online.³⁸⁶ Dr. Murphy’s analysis failed to employ data relating to 1-800 Contacts’ *actual* lost sales.³⁸⁷ His 17 percent figure is not reliable because it fails to “measure a proper diversion ratio from the standpoint of what antitrust economists would use in calculating a critical loss analysis.”³⁸⁸

iv. Professor Evans’ Critical Loss Analysis Is Not Undermined By Broader Candidate Markets That Also Pass a SSNIP Test

Dr. Murphy attempts to impeach Professor Evans’ analysis by pointing out that *broader* candidate markets could also pass a SSNIP test. For example, Dr. Murphy notes that a SSNIP test would also support a relevant market consisting of 1-800 Contacts and ECPs.³⁸⁹ That a

³⁸⁵ Evans, Tr. 1538-1539 (explaining that Dr. Murphy’s figure includes “individuals who didn’t purchase from 1-800 the last time but are going to the next time.”) (discussing CX1117 at 015-016 (1-800 Contacts 2014 Board Meeting Presentation); CCXD0005 at 082).

³⁸⁶ *See supra* pp. 109-110.

³⁸⁷ Dr. Murphy did not dispute that his figures failed to analyze lost sales, nor did he dispute that lost sales are a highly reliable source of evidence normally used in critical loss analysis. Instead, he defended his reliance on individuals who expected to come back to 1-800 Contacts based on speculation that some of them “wouldn’t have as much of an incentive to come back” in the event of a price increase. Murphy, Tr. 4161-4162. This explanation makes no sense. A diversion ratio is supposed to measure what *portion* of the individuals who would not come back in the event of a price increase would go to various channels. By counting all of those individuals as ECP customers, Dr. Murphy effectively assumed, contrary to substantial record evidence, that 100 percent of the individuals who recently purchased from ECP and intended to make their next purchase from 1-800 Contacts would make their next refill purchase from an ECP (as opposed to a lower-price online seller, or 1-800 Contacts itself).

³⁸⁸ Evans, Tr. 1539; *id.* at 1835, *in camera* { [REDACTED] }.

³⁸⁹ Murphy, Tr. 4168-4169 (“if I use the SSNIP test, I could say 1-800 and ECPs is a relevant market. If I use the SSNIP test, I could say 1-800 and online sellers is a relevant market.”); *id.* at 4164-4166 (discussing RX0739 at 0110 (Ex. 23) (Murphy Expert Report)).

hypothetical cartel of sellers in a *broader* market (consisting of online sellers and others) could raise prices above a competitive level is neither surprising nor material to assessing competitive effects in this case. The relevant question is: Does there exist *any* relevant market that is vulnerable to the exercise of market power by the alleged conspirators? As the *H & R Block* court explained, “courts correctly search for a ‘relevant market’ – that is a market relevant to the particular legal issue being litigated.” *H & R Block*, 833 F. Supp. 2d at 64 (quoting Phillip E. Areeda & Herbert Hovenkamp, *ANTITRUST LAW*, ¶ 533c, at 254 (3d ed. 2007)). *See id.* at 63-64 (“defendants suggested that the critical loss test is meaningless because it would seem to validate numerous different candidate markets consisting of various assortments of tax preparation businesses . . . [but] the fact that critical loss analysis would validate other groupings of businesses does not undermine [the expert’s] reliance on it to validate DDIY as the relevant market in this case.”).

Courts routinely evaluate mergers (or analyze competitive effects) within “the smallest” relevant market that satisfies the hypothetical monopolist test. *See, e.g., Aetna*, 2017 U.S. Dist. LEXIS 8490, at *40 (citing 2010 GUIDELINES § 4.1.1) (citing *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 26 (D.D.C. 2015) (referring to the “narrowest market” principle)); *FTC v. Advocate Health Care Network*, 841 F.3d 460, 473 (7th Cir. 2016) (reversing a district court’s determination that a candidate market was too narrow because “[t]he court did not explain why it thought that a narrow candidate market would produce incorrect results . . . The economic literature explains that if a candidate market is too narrow, the test will show as much, and further iterations will broaden the market until it is big enough.”).

As Professor Evans explained, this is the approach he adopted in this case: he assessed whether a restraint on online sellers of contact lenses led to anticompetitive effects, given the degree to which consumers will switch to offline purchases in response to anticompetitive conduct in the online sale of contact lenses.³⁹⁰ Dr. Murphy, on the other hand, did not attempt to assess the anticompetitive impact of the restraints within the narrowest cognizable relevant market – supported by Dr. Murphy’s own SSNIP test³⁹¹ – for the online sales of contact lenses.³⁹²

v. “Unilateral Pricing Policy” Natural Experiment Supports An Online Market

Professor Evans further supports his conclusion regarding the relevant market by analyzing data obtained from a real-world “natural experiment,” in which online retailers were forced to raise their prices as a result of several manufacturers’ implementation of unilateral pricing policies (“UPPs”).³⁹³ In 2014, contact lens manufacturer Johnson & Johnson implemented a UPP, which prohibited retailers from reselling certain products at prices below specified levels.³⁹⁴ Because the UPP set a price floor for covered products, discount retailers (online retailers and club stores) had to increase their prices substantially on many of these

³⁹⁰ Evans, Tr. 1431-1432 (“it’s important for the market definition analysis to start with the practice that’s being complained about, because that’s ultimately what we’re trying to understand when we talk about competitive constraints.”)

³⁹¹ Murphy, Tr. 4168-4169 (“If I use the SSNIP test, I could say 1-800 [Contacts] and online sellers is a relevant market.”).

³⁹² RX0739 at 0040-0041 (¶¶ 101-104) (Murphy Expert Report).

³⁹³ Evans, Tr. 1442-1444.

³⁹⁴ *Id.*

products.³⁹⁵ By contrast, most brick-and-mortar sellers were already pricing close to or above levels required by UPP, so their pricing did not change substantially. Professor Evans’ analysis of available data from the online sellers shows that the UPP-mandated price increases were *profitable* for those online sellers,³⁹⁶ suggesting that consumers did not substitute away from the group of sellers that increased prices (online retailers plus club stores) in sufficient numbers to defeat a price increase.³⁹⁷

As Dr. Evans explained, the candidate market tested by the UPP natural experiment included club stores; thus the results of the experiment, viewed alone, did not allow the exclusion of club stores from the relevant market.³⁹⁸ However, Dr. Evans concluded based on other factors – described above – that club stores, such as Costco, are “not . . . significant competitor[s] to the online contact lens retailers.”³⁹⁹

vi. Direct Evidence of Competitive Effects Supports Online Market

Direct evidence of competitive effects can also inform market definition. 2010 GUIDELINES, Section IV. *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000), is instructive. The Seventh Circuit observed that, regardless of how Toys “R” Us’ (“TRU”) market power was measured, TRU “was remarkably successful in causing the 10 major toy manufacturers to reduce

³⁹⁵ Evans, Tr. 1444-1447.

³⁹⁶ *Id.* at 1443-1444.

³⁹⁷ *Id.* at 1445 (“at least over this period of time, the physical retailers were not a sufficiently significant constraint to prevent the profits from going up as a result of the price increase.”).

³⁹⁸ *Id.* at 1446.

³⁹⁹ *Id.* See *supra* pp. 5 & n.15, 103-110, 106 & n.349 (online retailers testify that they do not price against club stores; 1-800 Contacts excludes club stores from pricing policy; and club stores do not typically engage in online advertising). Moreover, as Professor Evans explained, including club stores in the relevant market would not change his conclusions regarding the competitive effects of the restraints at issue. Evans, Tr. 1446-1447.

output of toys to the warehouse clubs, and that reduction in output protected TRU from having to lower its prices to meet the [discount] clubs' price levels." *Id.* at 937. The Seventh Circuit accepted this as clear evidence that price competition from conventional discounters (like Walmart) imposed no constraint on TRU. *See id.*

Here, like in *TRU*, instances of head-to-head competition between 1-800 Contacts and its online rivals support the conclusion that online retail sales of contact lenses is the relevant product market, and that ECPs and other brick-and-mortar retailers do not impose a constraint on 1-800 Contacts' behavior. Specifically, competitive search advertising placed by rival *online* sellers forced 1-800 Contacts to modify its own online advertising policy to highlight that it would beat rivals' prices by 2 percent.⁴⁰⁰ 1-800 Contacts determined that this change in its ad copy led to a doubling of the percentage of orders that were price-matched.⁴⁰¹

b. The United States Constitutes the Relevant Geographic Market

The geographic scope of the market is nationwide, extending to all contact lenses sold online in the United States. A relevant geographic market is the "area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (citing *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327). Contact lenses are regulated by the Food and Drug Administration, and no contact lens retailer may legally sell contact lenses in the United States

⁴⁰⁰ *See supra* pp. 59-60. CX8009 at 071-072 (¶ 127) (Evans Rebuttal Expert Report); CX0946 at 001-002, 011-012; CX9032 (L. Schmidt, Dep. at 132-133).

⁴⁰¹ CX8009 at 071-072 (¶ 127) (Evans Rebuttal Expert Report); CX1334 at 004, *in camera*; Evans, Tr. 1608-1617, *in camera*.

without proof of a valid prescription, or compliance with the federal prescription verification program.⁴⁰² This law applies to *any* entity wishing to sell contact lenses in the United States, *including* any non-U.S. seller that sells contact lenses within the United States.⁴⁰³

With a valid prescription, consumers can purchase contact lenses from any online seller operating anywhere in the United States.⁴⁰⁴ Based on these factors, the relevant geographic market is national in scope, encompassing all contact lens products sold online in the United States. *See* 2010 GUIDELINES § 4.2.2 (example 15, describing that, where “[c]ustomers in the United States must use products approved by U.S. regulators . . . [t]he relevant product market consists of products approved by U.S. regulators [and] [t]he geographic market is *defined around U.S. customers*”) (emphasis added).

c. Collectively, Parties to Bidding Agreements Have a Dominant Share of the Relevant Market

In a horizontal agreement case, courts look to the collective market share of the parties to the agreement or agreements. *E.g.*, *Realcomp II*, Dkt. No. 9320, 2007 WL 4465486. Here, the collective share of the parties to the written Bidding Agreements is overwhelming. 1-800 Contacts’ market share is approximately 54 percent, and the other parties to the written Bidding Agreements collectively represent an additional 25 percent of the market for the online sales of

⁴⁰² *See* 16 CFR § 315.5(a).

⁴⁰³ *See* 16 CFR § 315.5(a); 16 CFR § 315.5(e). There are only a handful of non-U.S. sellers that have a presence in the U.S. market. Coastal Contacts is the only major online seller that is based outside of the U.S. (Canada), but it has a large presence in the U.S. (including U.S. offices and distribution facilities), and it follows U.S. regulations regarding the distribution of contact lenses. Clarkson, Tr. 275-276, 280.

⁴⁰⁴ As noted above, Coastal Contacts, a Canadian firm, has set up a major U.S. presence and operates extensively within the United States. *See supra* n.403.

contact lenses in the United States.⁴⁰⁵ If the sellers that have unwritten agreements with 1-800 Contacts are considered,⁴⁰⁶ then the parties to the Bidding Agreements collectively represent some 91 percent of the market.⁴⁰⁷ These market share figures are not seriously disputed by Respondent’s experts.⁴⁰⁸

Given these market shares, a strong presumption of market power arises unless “entry into the market is so easy” that the parties, either unilaterally or collectively, “could not profitably raise price or otherwise reduce competition compared to” the but-for world. “Entry is easy if entry would be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern. . . .” 2010 GUIDELINES § 9. *See Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 663 F. Supp. 1360, 1435–36 (D. Kan. 1987) (“ease of entry fairly implies or assumes the ability of others to become meaningful competitors: not simply their ability to obtain a regulatory license, but their ability to enter the market itself and attempt to deliver a price-competitive product to . . . consumers”), *aff’d*, 899 F.2d 951 (10th Cir. 1990).

d. Substantial Barriers to Entry Exist

The presence of barriers to entry, in combination with high market share, supports a finding of market power. *See, e.g., United States v. Microsoft*, 253 F.3d 34, 51 (D.C. Cir. 2011)

⁴⁰⁵ Evans, Tr. 1416-1417. *See* CX8006 at 008, 022-023 (¶¶ 14, 54) (Evans Expert Report). *See also, e.g.,* CX1449 at 043, *in camera* { [REDACTED] }.

⁴⁰⁶ *See supra* pp. 21-22 & n.82-83 (including Lens Discounters and Lens.com).

⁴⁰⁷ CX8006 at 008 (¶ 14) (Evans Expert Report) (“The participants to the formal or informal bidding agreements account for 91 percent of online contact lens sales in 2015.”).

⁴⁰⁸ CX1446 at 005, *in camera* { [REDACTED] }. *See* Evans, Tr. 1417-1418; RX0739 at 0087 (Ex. 3) (Murphy Expert Report), *in camera*.

(citing *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995)). “Entry barriers’ are factors (such as regulatory requirements) that prevent new rivals from timely responding to an increase in price above the competitive level.” *Microsoft*, 253 F.3d at 51.

Here, as 1-800 Contacts itself has acknowledged, the barriers to selling contact lenses online are substantial.⁴⁰⁹ According to 1-800 Contacts’ business documents, these barriers include, among other things, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }⁴¹⁰ Likewise, the specific assets necessary to engage in online retailing represent a barrier to entry, such as the investments 1-800 Contacts has made to assemble a database of doctors, as well as the technology necessary to digitally record and store interactions with doctors’ offices.⁴¹¹ 1-800 Contacts has recognized that such { [REDACTED]

[REDACTED]

[REDACTED] }⁴¹²

⁴⁰⁹ Bethers, Tr. 3820-3832, *in camera* (testifying regarding substantial investments made by 1-800 Contacts). Indeed, when 1-800 Contacts internally analyzed entry barriers, it focused solely on barriers relating to online sales, further bolstering the notion of a separate online market with high entry barriers. *See* CX1343 at 014, *in camera* (2015 1-800 Contacts Staff Final Update).

⁴¹⁰ CX1343 at 014, *in camera* (2015 1-800 Contacts Staff Final Update).

⁴¹¹ CX0526 at 036 (describing 1-800 Contacts automated prescription verification system, including “Largest and most accurate database (51,738 verified doctors)” and ability to digitally record and store interactions with doctors).

⁴¹² CX1343 at 014, *in camera* (2015 1-800 Contacts Staff Final Update).

1-800 Contacts' Bidding Agreements themselves pose an additional (and substantial) barrier to entry: by systematically roping each (new) online competitor into a Bidding Agreement, 1-800 Contacts directly impeded new entrants' ability to introduce their own brands to consumers.⁴¹³ For example, Memorial Eye launched its online business a mere nine months before it started receiving "threatening" letters from 1-800 Contacts, demanding that Memorial Eye implement negative keywords against search queries relating to 1-800 Contacts.⁴¹⁴ The "critical" nature of the 1-800 Contacts search query volume to 1-800 Contacts' online rivals bolsters the notion that the Bidding Agreements themselves pose a substantial barrier to entry for any retailer that desires to use the most efficient advertising method to introduce its brand to a broad swath of contact lens consumers and/or to effectively develop a new customer base.⁴¹⁵

Finally, the actual history of entry into the online sales of contact lenses confirms that entry by new firms or expansion by smaller firms could not offset the anticompetitive harm from the Bidding Agreements.⁴¹⁶ Indeed, a recent analysis prepared by 1-800 Contacts' owner, AEA Investors, cites, { [REDACTED] }⁴¹⁷ 1-800 Contacts' economic expert, Dr. Kevin Murphy, claims that

⁴¹³ CX1343 at 014, *in camera* (2015 1-800 Contacts Staff Final Update, noting: { [REDACTED] } [REDACTED]). *See also supra* pp. 43-44 (describing how advertising against 1-800 Contacts' trademark terms can be effective in promoting a rival's brand name); CX8006 at 130-131 (¶¶ 280-283) (Evans Expert Report).

⁴¹⁴ *See supra* p. 49.

⁴¹⁵ *See supra* pp. 43-46.

⁴¹⁶ Evans, Tr. 1578, *in camera*.

⁴¹⁷ CX0439 at 014, *in camera*. *See* CX1449 at 149, *in camera* { [REDACTED] } [REDACTED] }.

recent entry by four firms (Web Eye Care, Contact Lens King, Walmart, and Costco⁴¹⁸) suggests the absence of barriers to entry.⁴¹⁹ However, a closer examination of the experience of these four firms contradicts this claim. Dr. Murphy contends that Web Eye Care, founded in 2009 and a party to one of the Bidding Agreements, has been able { [REDACTED] }⁴²⁰ But, at trial, Dr. Murphy conceded that Web Eye Care – which is restrained from advertising against 1-800 Contacts’ trademarks by a Bidding Agreement – { [REDACTED] }⁴²¹ Dr. Murphy also conceded that { [REDACTED] }⁴²²

IV. 1-800 CONTACTS’ PROFFERED DEFENSES DO NOT REBUT COMPLAINT COUNSEL’S *PRIMA FACIE* SHOWING OF HARM TO COMPETITION

Once Complaint Counsel establishes a *prima facie* case of competitive harm through any one of the three methods described above, the burden shifts to 1-800 Contacts to proffer legitimate procompetitive efficiencies. *Realcomp II*, 2007 WL 6936319, at *17, *27-31.

1-800 Contacts’ efficiency defense must satisfy three separate requirements. *First*, the efficiencies advanced must be cognizable *and* plausible. “Cognizable justifications ordinarily explain how specific restrictions enable the defendants to increase output or improve product

⁴¹⁸ Web Eye Care and Contact Lens King are subject to Bidding Agreements. CX0324 (Web Eye Care); CX0323 (Contact Lens King). Walmart and Costco are not, although 1-800 Contacts attempted (unsuccessfully) to bind Walmart to AC Lens’ Bidding Agreement. *See supra* p. 39.

⁴¹⁹ RX0739 at 0045 (¶ 115) (Murphy Expert Report), *in camera*.

⁴²⁰ *Id.*, *in camera*.

⁴²¹ Murphy, Tr. 4262-4263, *in camera*; RX0739 at 0087 (Ex. 3) (Murphy Expert Report).

⁴²² Murphy, Tr. 4263-4264, *in camera*.

quality, service, or innovation.” *Polygram I*, 136 F.T.C. at 346-46. “A justification is plausible if it cannot be rejected without extensive factual inquiry.” *Id.* at 347. *Second*, these efficiencies must be supported by actual record evidence. *Realcomp II*, 2007 WL 6936319, at *17. *Third*, 1-800 Contacts must demonstrate that the restraints are a “*reasonably necessary means* to achieve a legitimate, procompetitive end.” *Id.* (emphasis added). If there is a significantly less restrictive alternative, then a challenged restraint is not reasonably necessary. *See Polygram I*, 136 F.T.C. at 335 (citing *NCAA*, 468 U.S. at 118-19).

1-800 Contacts has plainly failed to meet its burden in this case.

A. 1-800 Contacts’ Free-Riding Defense Is Non-Cognizable

1-800 Contacts’ primary motivation for securing and enforcing the Bidding Agreements has been a self-serving judgment that rivals should not be permitted to benefit from its investments in promoting internet sales of contact lenses and its own brand name, a phenomenon that 1-800 Contacts describes as akin to “free-riding.” 1-800 Contacts asserts that it spends millions of dollars each year advertising on television and other media; and that such promotion drives consumers to the internet where they search for, *inter alia*, “1-800 Contacts.” According to 1-800 Contacts, any attempt by rivals to attract these consumers through search advertising constitutes an unfair form of competition, which, if permitted, would diminish 1-800 Contacts’ incentives to invest in its brand through advertising.⁴²³

⁴²³ *See* Bethers, Tr. 3729-3731; CCXD0032 (“if we advertise and build a brand, someone overseas shouldn’t come in and free ride on our trademark and get business.”); CX9001 (Bethers, IHT at 149) (“So I go out and try to advertise, but my advertising goes to 13 percent of the U.S. population. But now I have a free-rider that can come on to my search terms and my trademark and put an offer and divert some traffic”); *id.* at 124, 299. *See also* CX1396 at 001-002 (expressing concern to Google that while 1-800 Contacts spent “millions of dollars in advertising on television, internet, radio,” advertising triggered by searches for 1-800 Contacts benefited competitors who were “spending a few dollars per click and in exchange . . . receiving the benefits of the millions of dollars we devote to

Competition invariably involves efforts to build upon and benefit from the investments of rivals. Except insofar as a firm trespasses another's property right, there is no basis for complaint or condemnation. For example, "[s]uppose a firm enters a new product market that another firm has pioneered. Although the new entrant obviously benefits from the pioneer's efforts to cultivate consumer demand and to build general goodwill for the new product, we do not think that the new entrant is doing something morally blameworthy."⁴²⁴ Certainly, an incumbent firm that arranges to exclude a would-be entrant may not defend against an antitrust claim by asserting that the entrant would be guilty of "free-riding." *See Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 47-50 (1990) (licensing agreement whereby incumbent firm excludes new entrant condemned as *per se* unlawful).

1-800 Contacts' free-riding claim therefore is not a cognizable defense. What 1-800 Contacts derides as "free-riding" is what antitrust law calls "the lifeblood of competition."⁴²⁵

branding. People see our commercials, search on '1800contacts' on the web, and see Coastal contacts."); CX0621 at 121 (expressing concern at Lens.com's growing market share as a result of advertising against 1-800 Contacts' trademark).

⁴²⁴ Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 Va. L. Rev. 2099, 2111-12 (Dec. 2004).

⁴²⁵ CX8014 at 004-005 (¶ 8) (Tushnet Rebuttal Expert Report). While the elimination of free-riding may be a legitimate defense for a vertical restraint that is *ancillary* to a distribution arrangement (e.g., *Leegin*, 551 U.S. at 880-99; *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 757, 761-63 (1984)) or for a horizontal restraint that is *ancillary* to a substantial business integration (i.e., a joint venture) (e.g., *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986); *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-91 (7th Cir. 1985)), it is decidedly *not* a defense to a naked horizontal restraint between unaffiliated competitors. *See, e.g., Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 370 (7th Cir. 1987) ("So in price-fixing cases 'free riding' is the way the cartel unravels. A group of firms trying to extract a supra-competitive price therefore hardly can turn around and try to squelch lower prices – as the Association may have done – by branding the lower prices 'free riding'!"); *United States v. Capitol Serv., Inc.*, 756 F.2d 502, 506 (7th Cir. 1985) (holding a horizontal market allocation among movie exhibitors to be *per se* unlawful as a ban on competitive bidding despite claim that the allocation would reduce free riding). The restraints at issue in this investigation are *not* ancillary to a joint venture or other collaboration; 1-800 Contacts and the other contact lens sellers are wholly independent competitors. Where an antitrust court is evaluating a naked horizontal restriction, free-riding is not a cognizable defense.

Indeed, in *Polygram*, the Commission considered and rejected a free-riding argument indistinguishable from the argument that 1-800 Contacts advances here:

The sort of behavior that Respondents disparage as “free-riding” – i.e., taking advantage of the interest in competing products that promotional efforts for one product may induce – is an essential part of the process of competition that occurs daily throughout our economy. For example, when General Motors (“GM”) creates a new sport utility vehicle (“SUV”) and promotes it, through price discounts, advertising, or both, other SUVs can “free ride” on the fact that GM’s promotion inevitably stimulates consumer interest, not just in GM’s SUV, but in the SUV category itself. Our antitrust laws exist to protect this response, because it is in reality the competition that drives a market economy to benefit consumers. There is no doubt that GM’s SUV will likely be more profitable if its competitors do not respond. Promoting profitability, however, is not now, nor has it ever been, recognized as a basis to restrain interbrand competition under the antitrust laws.

Polygram I, 136 F.T.C. at 361-62 (2003).

The Supreme Court has rejected a similar free-riding defense. In *Fashion Originators’ Guild of America v. FTC*, 312 U.S. 457 (1941) (“FOGA”), a group of garment and textile manufacturers formed a guild to address an asserted free rider problem: competing garment manufacturers were copying the FOGA members’ “distinctive” garment designs and selling them for a lower price. *Id.* at 461. FOGA members agreed not to sell to retailers that sold garments made with pirated designs. *Id.* The Supreme Court condemned the horizontal group boycott, notwithstanding FOGA’s concerns about piracy. *Id.* at 463-68; *see also, e.g., Premier Elec. Constr. Co. v. Nat’l Elec. Contractors Ass’n*, 814 F.2d 358, 368-69 (7th Cir. 1987) (holding a horizontal price fixing agreement among contractors unlawful *per se* despite a claim that the restraint would reduce free-riding; noting that, “despite the incentive for firms to take free rides on the activities” of their competitors, and “despite the potential gains” from reducing free-riding “this is not the sort of justification that a court may accept.”).

The presence of trademarks here does not change the analysis. Rivals may seek to benefit from consumers’ “use” of the 1-800 Contacts trademark in search queries so long as these rivals do not infringe the trademark. As Professors Areeda and Hovenkamp have observed, “the following defenses to a horizontal restraint affecting price or output are unacceptable: . . . that collusion or market division is necessary to prevent firms from violating one another’s intellectual property rights, or to discipline others who are violating them.” AREEDA & HOVENKAMP, ANTITRUST LAW ¶1907b. Any other result would sanction collusion between horizontal competitors to expand their trademark rights beyond the limits prescribed by Congress. *Cf. FOGA*, 312 U.S. at 468 (explaining that “even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law”); *Professional Engineers*, 435 U.S. at 689-90 (rejecting an argument that, “because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition” as the “kind of argument [that] is properly addressed to Congress . . . but it is not permitted by the Rule of Reason”).

B. 1-800 Contacts’ Trademark Rights Do Not Justify The Restraints

1-800 Contacts also asserts that its Bidding Agreements broadly “protect” its trademark rights⁴²⁶ by preventing potentially infringing advertising by rival online sellers of contact lenses.⁴²⁷ This defense fails because trademark law allows 1-800 Contacts to prevent only certain

⁴²⁶ A trademark is a word, symbol, or phrase, used to identify a particular seller’s products and to distinguish them from the products of another seller. 15 U.S.C. § 1127.

⁴²⁷ *See generally* 1-800 Contacts Pretrial Brief at 1, 16-18. Trademark law also protects against uses of a trademark that result in certain forms of dilution, but these are not at issue here, as discussed *infra* at pp. 150-151.

confusing uses of its trademark.⁴²⁸ Specifically, trademark law seeks to prevent consumer confusion “*as to the source, affiliation, or sponsorship* of [a company’s] products or services.” *Scott Fetzer Co. v. House of Vacuums, Inc.*, 381 F.3d 477, 483 (5th Cir. 2004) (citing 15 U.S.C.A. § 1114(1); *id.* § 1125(a)). If an advertisement does not confuse consumers as to the *source, affiliation, or sponsorship* of the goods in question, there can be no trademark infringement, and prohibiting the non-infringing advertisement cannot represent a cognizable and plausible consumer benefit that might justify a horizontal restraint.

There is no record evidence that *any* of the particular search advertisements that prompted the 1-800 Contacts lawsuits and Bidding Agreements were actually confusing to consumers. But even assuming that such evidence existed, the Bidding Agreements still must be condemned because they impermissibly suppress even non-confusing advertising. As discussed below, the Commission has repeatedly condemned similar overbroad prohibitions because they are not reasonably necessary to address confusing advertisements.

This result is not impacted by the particular species of trademark confusion 1-800 Contacts invokes: initial interest confusion.⁴²⁹ Initial interest confusion arises where a defendant uses the plaintiff’s trademark in a confusing manner calculated to capture initial consumer attention and direct the now-confused consumer to the defendant’s store (or website), “even

⁴²⁸ In that regard, a trademark is fundamentally different from a patent, which confers upon the patentee the exclusive right to use the patented invention.

⁴²⁹ The doctrine is recognized in some, but not all, circuits. For example, the Fourth Circuit has explicitly rejected the doctrine. *See Lamparello v. Falwell*, 420 F.3d 309, 316 (4th Cir. 2005) (“[W]e have never adopted the initial interest confusion theory; rather, we have followed a very different mode of analysis, requiring courts to determine whether a likelihood of confusion exists by ‘examining the allegedly infringing use in the context in which it is seen by the ordinary consumer’” (quoting *Anheuser-Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316, 319 (4th Cir.1992)). The doctrine’s status is not clear in several other circuits.

though no actual sale is finally completed as a result of the confusion.” *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011) (quoting *Nissan Motor Co. v. Nissan Computer Co.*, 378 F.3d 1002, 1018 (9th Cir. 2004)). In other words, the difference between initial interest confusion and a traditional trademark infringement claim is one of timing: in a traditional trademark claim, the consumer is allegedly confused as to the source, sponsorship, or affiliation of the product or service at the time the purchase is made, whereas in an initial interest confusion claim, the consumer is allegedly confused at the point she is directed to the defendant’s store (or website), but the confusion dissipates prior to the point of sale. In either case, however, no trademark infringement occurs unless at some point a consumer is confused as to *source, sponsorship, or affiliation*.

1. The Bidding Agreements Suppress All Trademark Search Advertising, Not Just Confusing Advertising, and, Thus, Are Overbroad As A Matter of Law

The Bidding Agreements are significantly broader than reasonably necessary to achieve any legitimate objective. By banning advertising without regard to the likelihood that any particular ad will cause confusion, the Bidding Agreements eliminate a broad range of truthful, non-deceptive advertising. The Agreements thus should be condemned.

The Commission has repeatedly held that, while competitors may agree to prohibit deceptive advertising, a restraint that fails to distinguish between deceptive advertising and truthful advertising is overbroad and unlawful. *Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549, *45 (“Prohibiting truthful statements . . . cannot be justified on the ground that some advertising may seek to deceive the public.”); *Am. Med. Ass’n*, 94 F.T.C. 701, *234-35 (1979) (“We accept the contention that an ethical precept narrowly directed toward false or deceptive

advertising and unfair solicitation may enhance competition by insuring the communication of accurate information in a manner that allows it to be processed unburdened by unscrupulous practices. Respondent’s restrictions are of a different kind, however, reflecting a belief that the best way to interdict false and deceptive advertising and overreaching by physicians is to proscribe practically the full spectrum of advertising and solicitation activities.”). In such cases the Commission has enjoined interference with truthful and non-deceptive advertising, while permitting defendants to adopt reasonable restraints targeted at false advertising.⁴³⁰

Likewise, the Commission’s Policy Statement in Regard to Comparative Advertising rejects the contention that an agreement barring a firm from using a rival’s trademark in advertising is a reasonable (and not overbroad) means of avoiding consumer confusion. 16 C.F.R. § 14.15. The Commission expressly “encourages” truthful and non-deceptive comparative advertising, including “the naming of, or reference to competitors.” *Id.* at § 14.15(b). The Commission cautions that advertising referencing competitors “requires clarity, and, if necessary, disclosure to avoid deception of the consumer.” *Id.* In other words, if firms are legitimately concerned about confusion, then requiring clarity of expression together with appropriate disclosure is the acceptable and less restrictive remedy.⁴³¹

⁴³⁰ *E.g., Mass. Bd. of Registration in Optometry*, 110 FTC at *38 (“Nothing in this order shall prevent the Board from adopting...reasonable rules...to prevent advertising that [is] fraudulent, false, deceptive, or misleading within the meaning of [state law]...”); *Am. Med. Ass’n*, 94 FTC at *251 (“Nothing... shall prohibit respondent from...adopting...reasonable ethical guidelines governing the conduct of its members with respect to representations...that would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act...”).

⁴³¹ 1-800 Contacts’ trademark expert, Howard Hogan, agrees that Commission policy explicitly encourages comparative advertising, and relies on “disclosure” – not bans on advertising – to address deception. RX0734 at 120 (¶ 163) (Hogan Expert Report).

The Commission has enforced these principles regarding comparative advertising in litigated cases and in a series of consent orders:

On many occasions, the Commission has prohibited groups of horizontal competitors from agreeing to refrain from making truthful, non-deceptive claims, including comparisons, criticisms, or disparaging statements in advertising. The Commission has recognized that one of the benefits of competition is that competitors may be driven to provide consumers with information that makes for better educated, effective consumers.

Sensormatic Elecs., FTC Docket No. 951-0083, 60 FR 5428 (1998) (Analysis of Proposed Consent Orders to Aid Public Comment).⁴³²

Because the Bidding Agreements here eliminate *all* trademark search advertising, rather than only confusing advertising, they are overbroad as a matter of law.⁴³³ For example, in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the Supreme Court concluded that competing engineers may not remedy deceptive business practices by agreeing to a total ban on competitive bidding. *Id.* at 696. Likewise, in *Catalano Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), the Court concluded that beer wholesalers may not promote price visibility (a cognizable goal) by

⁴³² These orders include (i) an agreement between two manufacturers of electronic surveillance systems restricting comparative advertising about their systems' performance and effectiveness, *Sensormatic Elecs.*, 125 F.T.C. 595 (1998) (Commission Order); (ii) an agreement among manufacturers of protective body armor restraining truthful comparative advertising, *Personal Protective Armor Ass'n*, 117 F.T.C. 104 (1994); and (iii) an agreement among automobile dealers prohibiting advertising that disparages a rival, *Arizona Automobile Dealers Ass'n*, 117 F.T.C. 781 (1994).

⁴³³ The Bidding Agreements are also impermissibly overbroad because they reach advertisements that do not involve any *use* of a trademark. *See supra* pp. 32-27 (explaining that negative keyword provisions require advertiser to affirmatively remove them from auctions for *generic* keywords where bidding on those keywords will cause the advertiser's ad to appear in response to a search query containing 1-800 Contacts-related keywords). Indeed, some parties to the Bidding Agreements (*e.g.*, Walgreens, Memorial Eye) *never actually bid* on 1-800 Contacts' trademarks; in other words, they had not been legally "using" the trademark, and as such, could not possibly be liable for trademark infringement. *See supra* p. 37. Moreover, the agreements require *reciprocal* commitments from 1-800 Contacts, even where no infringement claim against 1-800 Contacts was asserted by the settling party. *See supra* p. 32.

agreeing to forgo all discounting. *Id.* at 649-50. *See also Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466, 478 (1988) (“Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.”) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646 (1985)); *Blackburn v. Sweeney*, 53 F.3d 825, 828-29 (7th Cir. 1995) (attorneys may not facilitate the orderly dissolution of a law partnership by agreeing to advertise only in non-overlapping geographic territories).

2. Any Cognizable Efficiencies Could Have Been Accomplished Through Significantly Less Restrictive Alternatives

A restraint may be justified by a cognizable and plausible procompetitive efficiency only if the restraint is reasonably necessary to achieve this objective. *Realcomp II*, 2007 WL 6936319, at *17 (restraint must be a “reasonably necessary means” to achieve a legitimate procompetitive objective); *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1416 (7th Cir. 1995), *as amended on denial of reh’g* (Oct. 13, 1995) (territorial division unlawful unless essential to the provision of a lawful service); *Brown University*, 5 F.3d 658, 679 (3d Cir. 1993) (restraint must be “reasonably necessary to achieve the legitimate objectives proffered by the defendant”); *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1018-19 (10th Cir. 1998) (same). “To be reasonably necessary, the restraint must not only promote the legitimate objective but must also do so significantly better than the available less restrictive alternatives.” PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1505. In other words, the restraint “must be reasonably ‘tailored’ to serve the asserted procompetitive interests.” *Polygram I*, 136 F.T.C. at

335 (citing *NCAA*, 468 U.S. at 118-19); *see* FTC AND U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), § 3.36(b) (“[I]f the participants could have achieved or could achieve similar efficiencies by practical, significantly less restrictive alternative means, then the Agencies conclude that the relevant agreement is not reasonably necessary to their achievement.”).

Here, the Bidding Agreements are not reasonably necessary to eliminate any purportedly confusing trademark search advertising because 1-800 Contacts could have achieved the claimed efficiency by practical, significantly less restrictive means. For example, 1-800 Contacts could have adopted any one or more of the following less restrictive alternatives:

- Requiring clear and conspicuous disclosure in each ad of the identity of the seller (for example, in the text or the URL of the ad, specify *coastalcontacts.com*, or *walgreens.com*).⁴³⁴
- Prohibiting rival sellers from using the term “1-800 Contacts” (or any confusingly similar variation thereof) in the *text* of their ads, absent appropriate disclosures;⁴³⁵
- Prohibiting rival sellers from using *names* that were confusingly similar to 1-800 Contacts (as in *Clorox*);⁴³⁶
- Requiring clear and conspicuous comparative language, such as “We are better [or different or cheaper or newer] than 1-800 Contacts”;⁴³⁷

⁴³⁴ *Amazon* specifically instructs that disclosure of the seller’s name is sufficient to prevent confusion and avoid initial interest confusion liability. *Amazon*, 804 F.3d at 93. Some courts have suggested that clear labeling as to source might even go *beyond* what is required to dispel confusion. *See Toyota*, 610 F.3d. at 1177 (protecting “truthful use of a mark, even if the speaker fails to expressly disavow association with the trademark holder, so long as it’s unlikely to cause confusion as to sponsorship or endorsement.”). Accordingly, the identification of the source of the seller provides, perhaps, the clearest example of appropriate fencing-in relief.

⁴³⁵ *See, e.g., GEICO v. Google, Inc.*, 2005 U.S. Dist. LEXIS 18642, at *25-26 (E.D. Va. Aug. 8, 2005) (no likelihood of confusion for ads that “do not reference GEICO’s marks *in their headings or text*”) (emphasis added).

⁴³⁶ *See, e.g., Happy Feet USA, Inc. v. Serenity “2000” Corp.*, No. 09-cv-1832 (M.D. Fla. Mar. 16, 2010) (foot insole manufacturer called its product “Happy Feet” while competing with the plaintiff, another foot insole manufacturer with a trademarked product called “Happy Feet”).

- Requiring rival sellers to change any confusing or deceptive claims made in the *text* of their ads.

In short, there were numerous ways 1-800 Contacts could have addressed purportedly confusing advertising without completely banning search advertising triggered by search queries relating to 1-800 Contacts.⁴³⁸ The proposition that the *only reasonable way* to ensure that a competitor will eschew confusing advertising is to bar *all* trademark keyword advertising⁴³⁹ is unsupported by any record evidence in this case. In addition, this claim is contrary to Commission and judicial experience.

Since at least the Ninth Circuit’s decision in *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 354 F.3d 1020 (9th Cir. 2004) (“*Netscape*”), courts have repeatedly affirmed the principle that “clear labeling” as to the identity of the advertiser eliminates the risk that search advertising will lead to consumer confusion regarding the source or affiliation of internet advertising. *See id.* at 1025 n.16 (“Note that if a banner advertisement *clearly identified its source*, or even better, overtly compared [plaintiff’s] products to the sponsor’s own, *no confusion would occur* under [plaintiff’s] theory.”) (emphasis added); *id.* at 1023; *id.* at 1030 n.43; *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930 (9th Cir. 2015) (affirming that

⁴³⁷ *See, e.g., Netscape*, 354 F.3d at 1025 n.16 (“Not that if a banner advertisement clearly identified its source, or even better, *overtly compared [plaintiff’s] products to the sponsor’s own*, no confusion would occur under [plaintiff’s] theory”) (emphasis added). One of the ads challenged by 1-800 Contacts was an advertisement displayed by Lens Discounters, which expressly stated: “*We will beat all 1800 and Direct mail order prices. Try us today!*” CX1238 at 003-005 (emphasis added).

⁴³⁸ To be clear, 1-800 Contacts *could* have structured its settlement agreements in any one of a number of ways to remedy infringing conduct, and even to “fence in” potentially infringing conduct. However, given 1-800 Contacts’ lengthy history of anticompetitive conduct, Complaint Counsel requests that the remedy be limited to a narrower universe of permissible agreements. *See infra* Section V (remedy discussion), Section VII (proposed Order).

⁴³⁹ *See, e.g., RX0734* at 0025-0027 (¶¶ 43, 46) (Hogan Expert Report).

disclosure of the seller’s name in the text of advertisements triggered by search queries including plaintiff’s trademark was sufficient to prevent confusion “[b]ecause Amazon’s search results page *clearly labels the name and manufacturer of each product* offered for sale”) (emphasis added); *Network Automation, Inc. v. Advanced Systems Concept, Inc.*, 638 F.3d 1137, 1153-54 (9th Cir. 2011) (“clear labeling might eliminate the likelihood of initial interest confusion that exists in this case”) (quoting *Netscape*, 354 F.3d at 1030 n.43).

In 2013, the Tenth Circuit applied this principle and upheld a district court’s rejection of 1-800 Contacts’ *own* trademark infringement claim against a rival. *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151, 1173-74 (D. Utah 2010) (holding that use of trademark keywords, divorced from the text of the resulting ads, could not result in a likelihood of confusion), *aff’d*, 722 F.3d 1229 (10th Cir. 2013). The Tenth Circuit in *1-800 Contacts v. Lens.com* concluded:

[T]he substantial dissimilarity between [the parties’ marks] can be expected to greatly reduce the chance that the consumers will think that the parties are related enterprises; the similarity of the search term and 1–800’s mark is of minor relevance.... [An] inference [that a trademark owner is the source of another webpage] is an unnatural one when the entry is clearly labeled as an advertisement and *clearly identifies the source, which has a name quite different from the business being searched for.*

1-800 Contacts, 722 F.3d. at 1245 (emphasis added) (following *Network Automation*, 638 F.3d at 1154).⁴⁴⁰

⁴⁴⁰ *See supra* n.99 (collecting cases following the central holding of *Lens.com*, 722 F.3d 1229). *See also* CX8014 at 040 (¶ 85) (Tushnet Rebuttal Expert Report) (“Courts have made clear that proper labeling satisfies a seller’s obligations; reasonable consumers can use labeling to distinguish the source of ads.”). Some courts have suggested that clear labeling as to source might even go *beyond* what is required to dispel confusion. *See Toyota*, 610 F.3d. at 1177 (protecting “truthful use of a mark, even if the speaker fails to expressly disavow association with the trademark holder, so long as it’s unlikely to cause confusion as to sponsorship or endorsement.”).

“Clear labeling” as to the identity of the seller in the advertisement (or any of the other remedies described above) would have been sufficient to remedy any purported confusion in the underlying disputes here.⁴⁴¹

3. 1-800 Contacts’ Various Contentions Regarding Consumer Understanding Are Not Cognizable Defenses

1-800 Contacts appears to contend that consumers who enter a search query for “1-800 Contacts” have a single, immutable intent to go to 1-800 Contacts’ website. (1-800 Contacts employs the term “navigational intent.”)⁴⁴² Even if true – and the evidence is to the contrary⁴⁴³ –

⁴⁴¹ Trademark courts have consistently emphasized that “remedies must be carefully tailored.” CX8014 at 038-040 (¶ 84) (Tushnet Rebuttal Expert Report) (collecting cases).

⁴⁴² 1-800 Contacts Pretrial Brief at 37, 47-48.

⁴⁴³ The assertion that consumers have a single, monolithic intent is unsupported by actual record evidence, including the studies that 1-800 Contacts purports to rely on. *See* David J. Franklin & David A. Hyman, *Trademarks as Search Engine Keywords: Much Ado About Something?* 26 HARV. J.L. & TECH. 481 (2013), at 532 (when asked, in the abstract, what consumers wished to see in response to a brand search, almost *half* responded that they wanted to see information relating to other brands, suggesting that consumers want and “intend” different things); Simonov, *supra* p. 82; Bechtold, *supra* p. 82. *See also* Eric Goldman, *Brand Spillovers*, 22 HARV. J.L. & TECH. 381 (2009), at 411-12 (the assumption that advertising against a trademark owner’s mark is “stealing” the trademark owner’s customer because of “the consumer’s apparently expressed interest in the trademark owner” is “unquestionably incorrect; many consumers entering a trademarked search term may not be looking for the trademark owner’s goods or services”); Indeed, 1-800 Contacts’ expert, Dr. Ghose, published an entire book explaining why targeting consumers of rival sellers with trademark advertising is a *successful* marketing strategy because consumer intent is flexible. *See* Anindya Ghose, *Tap: Unlocking the Mobile Economy* (2017). In his book, Dr. Ghose describes the benefit of targeting consumers in the store of one trademark owner with mobile ads featuring discount offers or coupons for a nearby rival seller. *Id.* at 69-73. *See* Ghose, Tr. 3960-3966.

In any event, regardless of a consumer’s initial “intent,” truthful non-deceptive advertising is generally helpful and valuable to consumers. *See* Franklin & Hyman (concluding that “many consumers find sponsored ads for competitors to be useful”); Simonov, *supra* p. 82; Bechtold, *supra* p. 82; CX8014 at 024-025 (¶¶ 48-50) (Tushnet Rebuttal Expert Report) (describing Bechtold study); *id.* at 026-027 (¶ 57) (citing Franklin & Hyman at 484 (“most consumers are open to purchasing competing products”). Indeed, Google’s entire mission revolves around determining what consumers find to be useful in response to their search queries, millions (or billions) of times each day. As described earlier, Google’s algorithms are continuously updating the SERP based on what other users *have found* to be relevant and useful. Thus, when ads for rival brands appear in response to a search for a trademark owner, it is because other consumers have previously found those ads to be relevant and useful. *See supra* pp. 10-11. Google’s determinations are entirely consistent with the experience of 1-800 Contacts’ competitors. As several online sellers have testified, a significant enough volume of consumers who have typed in the search query “1-800 Contacts” have clicked on, shopped for, and *purchased* contact lenses from these firms that it made financial sense for them to continue to seek to display ads to consumers who had typed in the query “1-800 Contacts.” In

the vindication of this intent is not a cognizable efficiency that justifies the Bidding Agreements. As described above, the legal standard for establishing trademark infringement in advertising is not what a consumer “wants” or “expects” to see;⁴⁴⁴ it is *likelihood of confusion*.⁴⁴⁵

1-800 Contacts also asserts that the SERP layout of Google and other search engines is generally “confusing,” in that “large numbers” of consumers cannot distinguish between organic search results and advertisements.⁴⁴⁶ Again, even if this were true,⁴⁴⁷ it is entirely irrelevant. The gravamen of trademark “confusion” is not whether a consumer recognizes that a link for a rival advertiser, like Walgreens, is an *ad* or an *organic* search result; instead, the question is whether a consumer recognizes the link for Walgreens as a link for *Walgreens*.⁴⁴⁸

short, consumers’ *actual behavior* when faced with these ads clearly supports the conclusion that consumers find these ads to be relevant and useful, regardless of initial “intent” or “expectation.” *See supra* pp. 42-46.

⁴⁴⁴ Presumably, many consumers would *prefer* to see less advertising across the board. Of course, if there were no advertising, consumers would not have “free” access to search engines or significant swaths of other online content, television, or radio.

⁴⁴⁵ *See supra* pp. 129-130. *See also* RX0734 at 018 (¶¶ 33-34) (Hogan Expert Report); CX8014 at 004-005 (¶¶ 8-9) (Tushnet Rebuttal Expert Report) (“Conflating different kinds of confusion obscures the proper role of trademark law in the larger system of competition law.”); *id.* at 009-010, 028, 033-034 (¶¶ 19, 60, 72) (“Ultimately, to answer a question about actionable confusion, it is important to ask questions that reliably map onto the protections provided by trademark law: primarily, protection against consumer confusion about source or sponsorship. . . .”).

⁴⁴⁶ Indeed, 1-800 Contacts relies on prior letters issued by the Commission itself in discussing the issue. *See, e.g.*, RX0734 at 0054-0056 (¶¶ 89-91) (Hogan Expert Report) (citing Letter from M. Engle, Bureau of Consumer Protection (June 24, 2013)); RX0736 at 0025-0026 (¶ 56) (Goodstein Expert Report) (citing Letter from M. Engle, Bureau of Consumer Protection (June 24, 2013); Letter from H. Hipsley, Bureau of Consumer Protection (June 27, 2002)). None of those letters related to trademark infringement, or “confusion” in any trademark sense. *See* Hogan, Tr. 3355-3360; CX8014 at 005, 009-010 (¶¶ 9, 19) (Tushnet Rebuttal Expert Report).

⁴⁴⁷ Neither 1-800 Contacts nor Complaint Counsel have conducted discovery on this issue.

⁴⁴⁸ *See* CX8014 at 009-010, 033-034 (¶¶ 19, 72) (Tushnet Rebuttal Expert Report). *See also* *Simon Property Grp. L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1044 (S.D. Ind. 2000) (“Any Internet user is familiar with the confusion one confronts with such a welter of search results, but *that confusion is the uncertainty about where to go next, not necessarily the confusion that is relevant for purposes of trademark law.*”) (emphasis added).

For the same reason, 1-800 Contacts cannot justify its restraints as reasonably necessary to remove so-called “clutter” or “low-value” advertising from SERPs.⁴⁴⁹ Even assuming that Google’s SERP is “cluttered” with “low-value” ads (a proposition that the record evidence in this case suggests is false),⁴⁵⁰ this is simply not a cognizable antitrust defense. 1-800 Contacts may not conspire with its horizontal competitors to “correct” what it perceives to be a problem with a third party’s offering (either by boycotting the supplier, or by rigging the auction). *See, e.g., Professional Engineers*, 435 U.S. at 693-96 (engineers’ defense that competition poses a threat to public safety “is nothing less than a frontal assault on the basic policy of the Sherman Act”); *FOGA*, 312 U.S. at 467-68 (that boycott was designed to protect guild from tortious “pirating” of designs is not cognizable defense); *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 421-24 (1990) (that boycott was intended to improve quality of legal advocacy is not cognizable defense); *United States v. Topco Assocs.*, 405 U.S. 596, 610-11 (1972) (that market allocation was designed to “foster[] competition between members and other large supermarket chains” is not a defense to *per se* unlawful horizontal agreement). If dissatisfied with the quality of the SERP, 1-800 Contacts’ lawful options would include taking its business elsewhere, or changing the way that 1-800 Contacts advertises on Google (or other search engines).

4. There Is No Evidence of Confusion Based on Keyword Bidding Alone In Any Case, Including This One

Critically, no court has *ever* found trademark liability based on keyword bidding, absent a demonstration that the *content* of the triggered ad confuses a consumer as to its source,

⁴⁴⁹ *See generally* 1-800 Contacts Pretrial Brief at 50-51.

⁴⁵⁰ *See supra* n.443.

sponsorship, or affiliation. *See USA Nutraceuticals Group, Inc. v. BPI Sports, LLC*, No. 15-CIV-80352, 2016 WL 695596, at *5 (S.D. Fla. Feb. 22, 2016) (“[Plaintiff] points to no case indicating that the simple purchase of advertising keywords, *without more*, may constitute initial interest confusion. . . .”); *see also Acad. of Motion Picture Arts & Sciences v. GoDaddy.com, Inc.*, 2015 U.S. Dist. LEXIS 120871, *150 (C.D. Cal. Sept. 10, 2015) (“There is a growing consensus in the case authorities that keyword advertising does not violate the Lanham Act.”); CX8014 at 021 (¶ 43) (Tushnet Rebuttal Expert Report) (noting that the “preeminent expert on internet advertising law . . . has been unable to identify any case in which a defendant lost a trial on likely confusion based on purchases of a plaintiff’s trademark as a search engine keyword – despite the filing of over a hundred such cases”); Hogan, Tr. 3459-3461 (1-800 Contacts’ expert acknowledging that no court has ever found liability based on keyword bidding alone). In other words, *no plaintiff* – including 1-800 Contacts – has *ever succeeded* on a trademark infringement claim by showing that keyword bidding, *on its own*, is confusing. Instead, courts have rejected such claims on numerous occasions. *See* CX8014 at 012-014 (¶¶ 25-28) (Tushnet Rebuttal Expert Report) (collecting cases).⁴⁵¹

Courts have uniformly reached the same conclusion: consumers not only understand that searches will bring ads from multiple companies, but have come to expect this variety, and are not “confused” by it. *See, e.g., Toyota Motor Sales U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1179 (9th Cir. 2010) (“When a domain name making nominative use of a mark does not actively suggest sponsorship or endorsement, the worst that can happen is that some consumers may arrive at the site uncertain as to what they will find. But in the age of FIOS, cable modems, DSL

⁴⁵¹ *See also supra* n.99 (collecting cases following *Lens.com*, 722 F.3d 1229, rejecting keyword bidding claims).

and T1 lines, reasonable, prudent, and experienced internet consumers are accustomed to such exploration by trial and error. They skip from site to site, ready to hit the back button whenever they're not satisfied with a site's contents. They fully expect to find some sites that aren't what they imagine based on a glance at the domain name or search engine summary.”⁴⁵²

The most recent appellate decision to address keyword bidding, *Amazon*, clearly instructs (like the cases before it), that, in assessing the likelihood that search advertising results in confusion, a court must consider both the use of the keyword *and* the actual content of the resulting ad. *Amazon*, 804 F.3d. at 937-39 (granting summary judgment for defendant based on the *content* of the ad, which was “clearly labeled” as to the source of the product, and citing *Davis v. HSBC Bank*, 691 F.3d 1152, 1162 (9th Cir. 2012) and *Freeman v. Time, Inc.*, 68 F.3d 285, 289-90 (9th Cir. 1995), for the same proposition); *id.* at 939 (“[W]here a court can conclude that the consumer confusion alleged by the trademark holder is highly unlikely *by simply reviewing the product listing/advertisement at issue*, summary judgment is appropriate.”) (emphasis added). *See also Netscape*, 354 F.3d. 1020, 1030 & 1025 n.16 (holding that Netscape could be held liable for selling the trademark term “Playboy” to rival internet advertisers where the ads that Netscape displayed were not labeled with the name of the rival advertiser, but excluding from its holding any advertisement that “clearly identified its source” in the text of the ad); *CollegeSource, Inc. v. AcademyOne, Inc.*, 597 F. App’x 116, 130 (3d Cir. 2015) (unreported decision affirming grant of summary judgment for defendant AcademyOne because purchase of rival CollegeSource’s trademarks did not confuse users); *USA Nutraceuticals Group*, 2016 WL

⁴⁵² Cf. *Simon Property Grp. L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1044 (S.D. Ind. 2000) (“Any Internet user is familiar with the confusion one confronts with such a welter of search results, but that confusion is the uncertainty about where to go next, not necessarily the confusion that is relevant for purposes of trademark law.”).

695596, at *5 (“[T]he use of a keyword encompassing a competitor’s terms does not necessarily produce an infringing advertisement; it is the *content* of the advertisement and/or the manner in which the mark is used that creates initial interest confusion.”) (emphasis added).⁴⁵³

1-800 Contacts has proffered no evidence in this litigation (or in any other case) showing that any of the ads that it challenged were confusing. 1-800 Contacts’ executives admit that they have no evidence that consumers are confused when they see rival ads after entering a search query containing a 1-800 Contacts trademark,⁴⁵⁴ and that they have never *investigated* the issue except during litigation.⁴⁵⁵ Indeed, 1-800 Contacts has conducted only two studies on this issue over the past 13 years, both prepared in connection with litigation: one study prepared for the *Lens.com* case, which was rejected by the District Court of Utah court as unreliable,⁴⁵⁶ and in

⁴⁵³ See also, e.g., *Infogroup, Inc. v. Database, LLC*, 95 F. Supp. 3d 1170, 1190-91 (D. Neb. 2015) (“The advertisements at issue here . . . do not use Infogroup’s marks in the advertisement itself, and each is either separated from the search results or *plainly labeled* as a sponsored advertisement. . . .”) (following *Lens.com*, 722 F.3d at 1245) (emphasis added); *EarthCam, Inc. v. OxBlue Corp.*, 49 F. Supp. 3d 1210, 1241 (N.D. Ga. 2014) (no initial interest confusion where the *content* of the ad is not confusing) (following *Lens.com*, 722 F.3d at 1245); *3form, Inc. v. Lumicor, Inc.*, 2012 U.S. Dist. LEXIS 27504, at *26 (D. Utah Mar. 1, 2012) (“As this Court previously concluded in *1-800 Contacts*, the fact that a competitor’s search results appear as one of many options when conducting a web search will not confuse consumers, as they will have *different appearances*.”) (following *Lens.com*, 755 F. Supp. 2d 1151 (emphasis added); *J.G. Wentworth, S.S.C. Ltd. P’ship v. Settlement Funding LLC*, 2007 U.S. Dist. LEXIS 288, at *23-24 (E.D. Pa. Jan. 4, 2007) (“Due to the *separate and distinct nature* of the links created on any of the search results pages in question, potential consumers have no opportunity to confuse defendant’s goods, services, advertisements, links or websites for those of plaintiff.”) (emphasis added).

⁴⁵⁴ See, e.g., CX9017 (Blackwood, Dep. at 276); CX9032 (L. Schmidt, Dep. at 101-102); CX9034 (Roush, Dep. at 69-70). 1-800 Contacts’ own trademark expert conceded that he was provided with no evidence of confusion by 1-800 Contacts. See Hogan, Tr. 3345-3346; CX9047 (Hogan, Dep. at 68-69) (testifying that he was only provided with screen shots attached to various complaints filed by 1-800 Contacts). The settling parties are similarly unaware of any evidence that users were confused by their ads. See, e.g., Holbrook, Tr. 1957-1958; CX9003 (Clarkson, IHT at 105-106); CX9000 (Batushansky, IHT at 92), *in camera*; CX8001 at 04 (¶ 10) (Hamilton (Walgreens), Decl.); CX8002 at 003 (¶ 10) (Hamilton (Vision Direct), Decl.).

⁴⁵⁵ CX9021 (Pratt, Dep. at 111).

⁴⁵⁶ See *Lens.com, Inc.*, 722 F.3d. at 1246-47.

any event is not admitted as evidence in this matter; and a highly flawed survey by Dr. Kent Van Liere in this case.

For the purposes of this litigation, 1-800 Contacts commissioned a survey, conducted by Dr. Kent Van Liere, that claims to show relevant confusion. But it does nothing of the sort. Dr. Van Liere's survey purports to assess whether a user entering a search query for "1-800 Contacts" *expects* to see *only* ads for 1-800 Contacts, and will therefore be confused by ads for firms *other than* 1-800 Contacts. To answer that question, Dr. Van Liere should have isolated the (hypothesized) causal factor. That is, Dr. Van Liere should have tested whether users who were *not* confused by ads displayed in response to a generic search query, like "contact lenses," *were* confused by the same ads when they were displayed in response to a search query for "1-800 Contacts."⁴⁵⁷ But he did not do that.

Instead, Dr. Van Liere had *all* respondents search for "1-800 Contacts," and then presented test respondents with one of two different SERPs: one with between six and eight ads, and one without any ads.⁴⁵⁸ According to Dr. Van Liere, a significant number of respondents

⁴⁵⁷ This theory has been explicitly spelled out by 1-800 Contacts, not just in complaints against rivals (*see, e.g.*, CX1619 at 006-007 (Complaint, *1-800 Contacts, Inc. v. Memorial Eye, PA*, No. 2:08-cv-00983-DN (Dec. 23, 2008) ¶ 20 ("The {www.shipmycontacts.com} website advertisements are triggered *upon a search for 1800CONTACTS* and thus, use of the 1800 CONTACTS trademark as a triggering keyword to display and promote Memorial Eye's directly competitive goods and services. In essence, Memorial Eye is using the 1-800 CONTACTS Marks to trick consumers into visiting the Memorial Eye Website.") (emphasis added)), but also by its employees in their deposition and investigational hearing testimony (*see, e.g.*, CX9017 (Blackwood, Dep. at 284-285) (testifying that the identical ads could be confusing when returned in response to a search to "1-800 Contacts," but not confusing when returned in response for a search for "contact lenses"); and by 1-800 Contacts' own experts. *See, e.g.*, CX9047 (Hogan Dep. at 132-133) ("Well, I think the very premise of these cases is that by inducing a search engine to serve up a sponsored link at the top of a page *in response to a search for 1-800 Contacts*, these advertisers were in effect *communicating to consumers that they were 1-800 Contacts* or were affiliated or endorsed or sponsored by 1-800 Contacts. . . .") (emphasis added)).

⁴⁵⁸ RX0735 at 006 (¶ 12) (Van Liere Expert Report). The Google test page used six ads; the Yahoo! test page used eight ads.

were confused by the SERP with between six and eight ads. This reported confusion may have been attributable to the specific ads selected by Dr. Van Liere; the quantity of ads or other links presented; the test conditions; or to any of a myriad of other factors, individually or collectively. By not isolating the search term as the relevant variable, Dr. Van Liere's survey could not possibly show whether users who type in the search term "1-800 Contacts" *expect* to see only ads for 1-800 Contacts, and are therefore *confused* by ads displayed for firms that are *not* 1-800 Contacts.⁴⁵⁹

By not controlling for the only factor relevant to this litigation, Dr. Van Liere failed to answer the question central to each of 1-800 Contacts' trademark infringement claims, or any question at all.⁴⁶⁰ Thus, even if the Court acknowledges Dr. Van Liere's findings regarding confusion,⁴⁶¹ his study provides no support for 1-800 Contacts' proposition that the Bidding Agreements were reasonably necessary to reduce confusion.

⁴⁵⁹ See CX8011 at 002-006, 007-009 (¶¶ 3-8, 11-15) (Jacoby Rebuttal Expert Report) (describing the proper variable to be isolated as the search term).

⁴⁶⁰ See CX8011 at 006-007, 009-010, 016 (¶¶ 9, 16-19, 30) (Jacoby Rebuttal Expert Report) (observing that Dr. Van Liere's "control" and "test" conditions had numerous differences). Dr. Van Liere's survey contained multiple additional problems, including his failure to include a 1-800 Contacts ad in the test SERP; his use of numerous additional links in the test SERP as compared to the control; his use of a search engine with minimal real-world market share, and his failure to appropriately populate or weight the results of that use; his failure to properly define his universe of respondents; his use of inappropriate survey questions; and many data and methodological problems, among other issues. See *generally id.* at 010-023 (¶¶ 20-34) (Jacoby Rebuttal Expert Report) (describing multiple problems with Dr. Van Liere's survey, controls, and data collection). In addition, Dr. Van Liere claimed that he relied upon various search results pages where no ad for "1-800 Contacts" appeared in response to a search for "1-800 Contacts," but he failed to produce any of those purported search results pages. See Complaint Counsel's Motion to Disregard and Strike Certain Portions of the Report and Testimony of Dr. Kent Van Liere (May 16, 2017), at 3-4. The Court denied the Motion to Strike, ordering instead that the issue be noted in Complaint Counsel's briefing. Order Denying Complaint Counsel's Motion to Disregard and Strike Certain Expert Opinions (May 31, 2017), at 2.

⁴⁶¹ The Court should disregard Dr. Van Liere's conclusions regarding consumer confusion entirely because Dr. Van Liere violated the Court's Scheduling Order, as discussed *infra* at pp 152-154.

Instead, the Court should credit the testimony provided by Professor Jacob Jacoby. Based on the properly constructed survey that Professor Jacoby conducted,⁴⁶² Professor Jacoby testified that confusion resulting from the mere appearance of a rival ad in response to a search for the trademark term “1-800 Contacts” is *de minimis*.⁴⁶³ Professor Jacoby’s conclusions are entirely consistent with Google’s prior studies on this issue,⁴⁶⁴ and with the Tenth Circuit’s *Lens.com* decision, which found that confusion was *not* caused by the mere presence of a non-1800 Contacts advertisement in response to a search for the trademark “1-800 Contacts.”⁴⁶⁵

5. 1-800 Contacts’ Assertion that Its Bidding Agreements Are “Commonplace” Is Erroneous, and a Non-Cognizable Defense

1-800 Contacts asserts that its Bidding Agreements are “commonplace,” and should thus be upheld under the novel legal theory that “commonplace” agreements are necessarily lawful.⁴⁶⁶ This argument fails. Even if the terms of 1-800 Contacts’ Bidding Agreements were

⁴⁶² In contrast to Dr. Van Liere, Professor Jacoby used the proper control, testing whether consumers who typed in a search query for “1800contacts” were confused by ads for firms other than 1-800 Contacts, against consumers who typed in a search query for “contact lenses” and saw those same ads. Thus, in Professor Jacoby’s survey, only one variable was changed between the test and control, and it was – as proper survey protocol requires – the “key variable” that was central to each of 1-800 Contacts’ trademark infringement claims. *See* CX8008 at 014-015 (Jacoby Expert Report) (describing test and control).

⁴⁶³ Jacoby, Tr. 2130; CX8008 at 008-010 (Jacoby Expert Report). Dr. Jacoby tested three different types of confusion: source, sponsorship, and business affiliation. *Id.* By contrast, Dr. Van Liere tested only source and affiliation confusion. *See* RX0735 at 003 (¶ 1) (Van Liere Expert Report).

⁴⁶⁴ CX0582, *in camera* [REDACTED].

⁴⁶⁵ *See Lens.com, Inc.*, 755 F. Supp. 2d at 1173-74 (D. Utah 2010) (holding that use of trademark keywords, divorced from the text of the resulting ads, could not result in a likelihood of confusion), *aff’d*, 722 F.3d 1229.

⁴⁶⁶ *See generally* 1-800 Contacts Pretrial Brief at 55; RX0734 at 0092-0124 (Section X) (Hogan Expert Report). This is an extension of 1-800 Contacts’ wholly invented legal argument – rejected by the Commission – that “commonplace” agreements should be exempt from antitrust scrutiny altogether. *See* Opinion and Order of the Commission Granting Complaint Counsel’s Motion For Partial Summary Decision, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017), at 4-5.

“commonplace” (which they are not), such a finding would not justify manifestly anticompetitive agreements.

1-800 Contacts argues that, if a court has ordered a particular remedy, 1-800 Contacts is within its rights to demand similar “fencing in” relief by means of a private agreement with a competitor.⁴⁶⁷ 1-800 Contacts cites no authority for this proposition. Court-ordered relief is beyond the reach of the antitrust laws, while agreements between private parties are decidedly not. *See* Opinion and Order of the Commission Granting Complaint Counsel’s Motion For Partial Summary Decision, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017), at 3-4. In addition, the Bidding Agreements restrained competition well beyond what *any court has* ordered,⁴⁶⁸ or *would* order, in similar circumstances.⁴⁶⁹ In its pretrial brief, 1-800 Contacts twice asserts that

⁴⁶⁷ *See* 1-800 Contacts Pretrial Brief at 38-39.

⁴⁶⁸ For example, no court has ordered reciprocity among parties. CX9047 (Hogan Dep., at 197-198). No court has found liability, or ordered relief, against parties that were *not bidding* on trademarks as keywords in the first place. Hogan, Tr. 3476, 3485; CX9047 (Hogan, Dep. at 125-126, 166, 168-170) (discussing the only two cases that have addressed the issue of whether bidding on generic terms can result in liability; and noting that both cases find that bidding on generic keywords is *not* “use” of a trademark, and *cannot* result in liability). And no defendant – outside of three consent judgments (*Happy Feet USA, Inc. v. Serenity “2000” Corp.*, No. 09-cv-1832 (M.D. Fla. Mar. 16, 2010); *Probar, LLC v. Onebody*, No. 14-cv-166 (Dkt. 18) (M.D. Fla. Oct. 29, 2014), *Orion Bancorp, Inc. v. Orion Residential Fin., LLC*, No. 807CV1753T26MAP, 2008 WL 816794 (M.D. Fla. Mar. 25, 2008)) and one default judgment (*Transamerica Corp. v. Moniker Online Servs., LLC*, No. 09-60973-CIV, 2010 WL 1416979 (S.D. Fla. Apr. 7, 2010)) – has *ever* been ordered to implement negative keywords in *any* circumstances, let alone *similar* circumstances. Hogan, Tr. 3486. *See infra* pp. 162-163 & n.523 (noting that *three* of those four cases – *Probar*, *Orion Bancorp*, and *Transamerica Corp.*, did not involve a *single allegation* relating to keyword bidding). Indeed, in the only context in which a court expressly considered whether a defendant should be ordered to implement negative keywords, such relief was expressly *rejected* by the court. *See Rhino Sports, Inc. v. Sport Court, Inc.*, 2007 WL 1302745 (D. Ariz. May 2, 2007), at *18 (rejecting claim that a sports equipment company’s purchase of generic keywords “courts” and “basketball court” violated permanent injunction against use of plaintiff’s SPORT COURT trademark, concluding that “a contrary interpretation of the permanent injunction would not be reasonable because it would preclude [defendant] from using these generic terms as keywords”). *See also Lens.com*, 755 F. Supp. 2d at 1174 (“It is beyond dispute that a competitor cannot be held liable for purchasing a *generic keyword* to trigger an advertisement that does not incorporate a holder’s mark in any way, even if that competitor’s advertisement appeared when a *consumer* entered a trademarked *search term*.”) (emphasis in original).

⁴⁶⁹ *See infra* p. 160-163 (distinguishing cases cited by Mr. Hogan); *see* CX8014 at 034-041 (¶¶ 73-86) (Tushnet Rebuttal Expert Report).

Complaint Counsel has “admitted” that “the obligations of 1-800 Contacts’ counterparties to the Challenged Settlement Agreements under those Agreements was comparable to relief that a court of competent and appropriate jurisdiction would have had the legal authority to order if merited in an appropriate case.”⁴⁷⁰ 1-800 Contacts fails to relay the remaining portion of this answer, which expressly states: “For avoidance of doubt, Complaint Counsel *specifically denies that such relief would have been appropriate or supported under either trademark or antitrust law, would have been supported by relevant precedent in analogous cases, or could reasonably have been expected to be ordered in the cases that Respondent filed.*”⁴⁷¹

Relatedly, 1-800 Contacts asserts (again, without any legal support) that, even if a court has not ordered the specific relief agreed to by 1-800 Contacts and its competitors, if it is “common” for *private settlement agreements* to take similar forms, then 1-800 Contacts’

⁴⁷⁰ 1-800 Contacts Pretrial Brief at 36 (citing Complaint Counsel’s Second Amended Response to Request for Admission 19 at 4-5).

⁴⁷¹ Complaint Counsel’s Second Amended Response to Request for Admission 19 at 4-5 (emphasis added). 1-800 Contacts also asserts that Complaint Counsel has “admitted” that its trademark claims were not “sham.” 1-800 Contacts Pretrial Brief at 36. To the contrary, Complaint Counsel has expressly rejected this assertion as wholly irrelevant to this case, and no discovery has been conducted on the issue. *See* Opinion and Order of the Commission Granting Complaint Counsel’s Motion For Partial Summary Decision, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017), at 4-5 (rejecting 1-800 Contacts’ affirmative defense that Complaint Counsel’s Section 5 claim is “barred . . . because the lawsuits that gave rise to the trademark settlement agreements . . . have not been alleged to be and have not been shown to be objectively and subjectively unreasonable”; and expressly holding that Complaint Counsel “*need not show that the underlying lawsuits . . . are sham*”) (emphasis added). Complaint Counsel is clearly not required to take, *nor has it taken*, any position on this issue. *See* Complaint Counsel’s Amended Responses to Requests for Admission 9-10 at 7-8 (“Complaint Counsel specifically objects to this Request for Admission 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 . . . because Complaint Counsel is not in a position to determine whether [1-800 Contacts’ lawsuits were] objectively baseless or subjectively brought in bad faith. . . . [T]he information known to or readily obtainable by Complaint Counsel is insufficient to enable it to admit or deny this Request for Admission. Complaint Counsel does not contend that the lawsuit [*1-800 Contacts, Inc. v. Memorial Eye* or *1-800 Contacts, Inc. v. Lens.com*] was sham litigation.”). For 1-800 Contacts to assert that Complaint Counsel’s failure to “*contend*” a *wholly irrelevant proposition* is an *affirmative* “admission” of that proposition, as it does *three times* in its pretrial brief (1-800 Contacts Pretrial Brief at 1, 23, 36) is dishonest.

agreements should be presumed lawful.⁴⁷² On its face, this argument is nonsensical. Does this mean that if *many* parties enter into price-fixing or market allocation agreements, then such agreements cease to violate the antitrust laws? Obviously, that cannot be the law. And numerous agreements entered in settlement of litigation have been condemned by courts, without regard to whether the terms are “commonplace” or not. *See Actavis*, 133 S. Ct. at 2231-32 (citing *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963); *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952); *United States v. Line Material Co.*, 333 U.S. 287, 310-12 (1948)). *See also* Opinion and Order of the Commission Granting Complaint Counsel’s Motion For Partial Summary Decision, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017), at 3-4 (citing *Actavis*, 133 S. Ct. 2223; *Singer*, 374 U.S. 174).

In any event, 1-800 Contacts and its trademark expert have not reviewed the vast majority of trademark settlement agreements (and cannot even estimate how many exist). Thus, they have no way of knowing what terms are “commonplace” and what terms are not.⁴⁷³ Tellingly, the cases that 1-800 Contacts relies upon for this proposition are *not* keyword bidding cases, and, thus, can tell this Court nothing about the terms of relief awarded in keyword bidding disputes, or upon which those disputes “commonly” settle.⁴⁷⁴ Indeed, 1-800 Contacts can point to “*no case* indicating that the simple purchase of advertising keywords, *without more*, may

⁴⁷² *See* RX0734 at 0092-0124 (Section X) (Hogan Expert Report); 1-800 Contacts Pretrial Brief at 38-39.

⁴⁷³ Hogan, Tr. 3247-3248; CX9047 (Hogan, Dep. at 45).

⁴⁷⁴ *See infra* p. 160-163 (distinguishing cases cited by Mr. Hogan); *see* CX8014 at 034-041 (¶¶ 73-86) (Tushnet Rebuttal Expert Report).

constitute initial interest confusion.”⁴⁷⁵ It stands to reason that, if there are no similar cases in which any court has ever ordered such relief, 1-800 Contacts’ Bidding Agreements cannot possibly be “commonplace.”⁴⁷⁶

**6. Assorted State Law and Trademark Dilution Claims
1-800 Contacts Brought Against Some of its Rivals
Do Not Justify the Bidding Agreements**

In addition to its claims for trademark infringement, in some cases 1-800 Contacts asserted against rivals an additional claim of trademark dilution, or claims based on assorted state trademark, unfair competition law, and false advertising laws.⁴⁷⁷ None of the state law claims justifies 1-800 Contacts’ Bidding Agreements, as 1-800 Contacts made no allegations under those claims that are independent of its trademark infringement claims.⁴⁷⁸ Thus, they fail to justify the Bidding Agreements for the same reasons that reliance on the 1-800 Contacts trademark infringement claims fail.

⁴⁷⁵ *Nutraceuticals*, 2016 WL 695596, at *5 (emphasis added). See Hogan, Tr. 3459-3461 (testifying that no court has ever found liability based on keyword bidding alone). See also *GoDaddy.com*, 2015 U.S. Dist. LEXIS at *150 (“There is a growing consensus in the case authorities that keyword advertising does not violate the Lanham Act.”); CX8014 at 021 (¶ 43) (Tushnet Rebuttal Expert Report) (noting that the “preeminent expert on internet advertising law . . . has been unable to identify *any case* in which a defendant lost a trial on likely confusion based on purchases of a plaintiff’s trademark as a search engine keyword – despite the filing of over a hundred such cases”) (emphasis added). On the other hand, during this time frame, dozens of courts have rejected keyword bidding claims. See CX8014 at 012-014 ¶¶ 25-28) (Tushnet Rebuttal Expert Report) (collecting cases).

⁴⁷⁶ Tushnet, Tr. 4453-4454; See also CX8014 at 035 (¶ 75) (Tushnet Rebuttal Expert Report) (“There is no evidence that the remedies Mr. Hogan defends are ‘common’ for *any* group of defendants.”).

⁴⁷⁷ See generally RX0734 at 0083-0092 (¶¶ 127-135) (Hogan Expert Report).

⁴⁷⁸ See generally, e.g., CX0808 (Empire Vision complaint); CX0965 (Standard Optical complaint). Indeed, confirming how closely the state law claims are related to infringement claims, 1-800 Contacts’ trademark expert testified that he was unaware of *any* court that had ever *rejected* liability for a trademark infringement claim, while simultaneously *granting* liability on an unfair competition claim. CX9047 (Hogan Dep. at 297); Hogan, Tr. 3489-3490. Unsurprisingly, in the only state trademark and unfair competition claim that 1-800 Contacts litigated against a rival, 1-800 Contacts lost the case. See *Lens.com*, 722 F.3d 1229 (10th Cir. 2013).

Nor does trademark dilution have relevance to any of 1-800 Contacts' claims against its rival, which may explain why 1-800 Contacts *itself* declined to allege this claim in the vast majority of complaints it filed against rivals.⁴⁷⁹ Trademark dilution comes in two flavors: “blurring” and “tarnishment.”⁴⁸⁰ In both types of dilution claims, the key is whether the defendant has adopted a name that is *identical* or *substantially similar* to the plaintiff's trademark. *See, e.g., Dallas Cowboys Football Club v. Am.'s Team Properties*, 616 F. Supp. 2d 622, 643 (N.D. Tex. 2009) (finding dilution where the defendant adopted plaintiff's “America's Team” trademark to identify its own goods).⁴⁸¹

Further, dilution claims typically apply to sellers of *unrelated* goods. *See, e.g., Scooter Store, Inc. v. SpinLife.com, LLC*, No. 2:10-cv-18, 2012 U.S. Dist. LEXIS 140003, at *40-41 (S.D. Ohio Sept. 28, 2012) (citing *Scott Fetzer Co. v. House of Vacuums, Inc.*, 381 F.3d 477, 489 (5th Cir. 2004) (“There is no allegation by TSS that SpinLife has used its marks on any unrelated goods – only that SpinLife used the phrase ‘the scooter store’ in *hidden* places within websites and search engines to attract customers. As customers cannot ‘see the plaintiff's mark’ at all

⁴⁷⁹ Notably, of the 13 complaints filed in connection with Bidding Agreements, only two complaints make *any* reference to federal trademark dilution. CX1615 at 012 (complaint against Coastal); CX1614 at 015 (complaint against Vision Direct). One additional complaint makes reference to common law dilution, but not federal trademark dilution. CX1622 at 012 (complaint against Lensworld). *See* Hogan, Tr. 3487 (testifying that he is not aware of any complaints that alleged trademark dilution against 1-800 Contacts' competitors). To defend its agreements *today* in a lawsuit brought by the Commission on grounds that it was protecting itself against conduct it never alleged *at the time* suggests that the defense is clearly pretextual, and should be rejected. *See Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 484 (1992) (rejecting pretextual justification for exclusivity restrictions).

⁴⁸⁰ *See generally* RX0734 at 0036 (¶ 64) (Hogan Expert Report); CX8014 at 041-042 (¶ 87) (Tushnet Rebuttal Expert Report). Dilution by blurring has been defined as “use by the defendant of a [trade]mark for its own goods and services that is so similar to the plaintiff's as to diminish the distinctiveness of . . . the plaintiff's mark.” CX8014 at 041-042 (¶ 87) (Tushnet Rebuttal Expert Report). Professor Tushnet cites the “classic” example of Kodak soap. *Id.* Dilution by tarnishment “involves a use of a too-similar mark on a disreputable product,” *id.* at 044 (¶ 97), such as Pillsbury sex toys. *Id.* at 039 (¶ 87).

⁴⁸¹ Mr. Hogan cites this decision in his discussion of trademark dilution. RX0734 at 0036 (¶ 66 & n.128) (Hogan Expert Report).

from SpinLife’s challenged uses of the phrase . . . ‘blurring’ is not an available theory of recovery to TSS for dilution.”) (emphasis in original).⁴⁸²

Finally, comparative advertising is expressly exempted from the federal dilution statute. *See* 15 U.S.C. §1125 (3)(A)(i) (“Exclusions: The following shall not be actionable as dilution by blurring or dilution by tarnishment. . . . (A) Any fair use . . . including use in connection with (i) advertising or promotion that permits consumers to compare goods or services. . . .”).⁴⁸³

In short, we are aware of no court that has found trademark dilution in the circumstances presented here: *comparative* advertising by rival sellers of the *same* product with entirely *distinct* names.⁴⁸⁴ Nor has 1-800 Contacts cited any such case in support of its purported dilution claims.⁴⁸⁵ And, in any event, the Bidding Agreements are not reasonably necessary to prevent trademark dilution for the same reasons they are not reasonably necessary to prevent trademark infringement – less restrictive alternatives are clearly available.

C. 1-800 Contacts’ Expert Testimony Does Not Defeat Complaint Counsel’s *Prima Facie* Case or Establish A Viable Defense

1. Kent Van Liere

The testimony and expert report of Kent Van Liere, 1-800 Contacts’ survey expert, should be rejected. On May 16, 2017, Complaint Counsel filed a motion to strike Dr. Van Liere’s

⁴⁸² *See also* CX8014 at 041-042 (¶ 87) (Tushnet Rebuttal Expert Report) (“The classic examples are products such as Kodak soap or Pillsbury sex toys: uses on non-competing goods.”) (citing RX0734 at 0031-0032 (¶ 54) (Hogan Expert Report)).

⁴⁸³ CX8014 at 042 (¶ 88) (Tushnet Rebuttal Expert Report) (citing 15 U.S.C. § 1125 (3)(A)(i)).

⁴⁸⁴ CX8014 at 043 (¶ 91) (Tushnet Rebuttal Expert Report). *See generally id.* at 041-045 (¶¶ 87-96) (collecting cases rejecting dilution claims based on keyword advertising).

⁴⁸⁵ *See generally* RX0734 at 0030-0040, 072-075 (¶¶ 51-71, 112-115) (Hogan Expert Report).

report, based on 1-800 Contacts' clear violation of Section 19(g) of the Scheduling Order in this matter, in which the Court instructed that "the producing party shall provide to the other party all documents and written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of 19(g)." On May 31, the Court denied Complaint Counsel's motion, directing Complaint Counsel to address the issue in post-trial briefing. *See* Order Denying Complaint Counsel's Motion to Disregard and Strike Certain Expert Opinions (May 31, 2017). Complaint Counsel hereby renews its request.

As described in Complaint Counsel's previous motion, in direct contravention of this Court's Scheduling Order, Dr. Van Liere (and 1-800 Contacts) failed to disclose and produce the SERPs that Dr. Van Liere expressly "relied upon" in creating the "test" and "control" conditions for his survey. *See* Complaint Counsel's Motion to Disregard and Strike Certain Portions of the Report and Testimony of Dr. Kent Van Liere (May 16, 2017).

At trial, Dr. Van Liere testified that he had run a large number of internet searches on both Google and Yahoo! for the search term "1-800 Contacts," and that the resultant SERPs had, in some undefined number of instances, *not* included sponsored ads for 1-800 Contacts. Dr. Van Liere's "experience" directly contradicts 1-800 Contacts' corporate policy of *always* bidding to appear in the *top advertising spot* in response to *any* search for its trademark.⁴⁸⁶ Dr. Van Liere

⁴⁸⁶ CX9028 (Roundy, Dep. at 86-88) (former 1-800 Contacts marketing executive testified that 1-800 Contacts allocates as much of its budget to bidding on its trademarks as necessary to ensure that 1-800 Contacts' advertisement is the first advertisement displayed in response to searches for its trademarks); CX9031 (C. Schmidt, Dep. at 125-127 (same)); Bethers, Tr. 3787-3788 (1-800 Contacts' CEO and president Brian Bethers testified that 1-800 Contacts wanted to "show up as the first" advertisement for its own trademarks); CX9032 (L. Schmidt, Dep. at 91) (1-800 Contacts' "goal" was always to have its advertisement appear in the first position in response to any search for its trademarks); CX0296 at 035, *in camera* { [REDACTED] }; CX0935 at 001 (internal marketing email described 1-800 Contacts' trademark keyword management process: "Ensure top placement by giving each TM [trademark] keyword a high CPC [cost per click]. . . . All

testified that *he relied on those SERPs – none of which purportedly contained an ad for 1-800 Contacts – to create the test and control conditions for his survey.*⁴⁸⁷ Yet Dr. Van Liere failed to turn over *a single one* of these SERPs to Complaint Counsel to support his claim that he designed his survey to replicate “real-world” search conditions.⁴⁸⁸ This egregious omission on the part of Dr. Van Liere and 1-800 Contacts clearly prejudices Complaint Counsel’s ability to fully test Dr. Van Liere’s suspect conclusions. Beyond any methodological or design flaw, this omission independently requires the exclusion of Dr. Van Liere’s survey.⁴⁸⁹

Even aside from this threshold issue of prejudice, Dr. Van Liere’s survey contains multiple fundamental flaws in both its design and implementation that render Dr. Van Liere’s conclusions unreliable. Of particular note, Dr. Van Liere himself concedes that, if the “real world” is one in which 1-800 Contacts’ own ad appears at the top of the SERP in response to a

trademark keywords are given a relatively high CPC bid, in order to ensure we will stay in the first position despite competitors.”); CX9020 (Craven, Dep. at 123-125) (discussing CX0935: “I meant that we wanted to always be in the first position for our trademarked keywords, and so we would bid higher than what we actually would have to pay in the event that another competitor or affiliate bid on those trademarked keywords, so that we could stay in number one – in the number one position for those terms”); Craven, Tr. 670-672. *See also* Hogan, Tr. 3348-3349 (testifying that “trademark owners [are] effectively required to pay the search engine to make sure that they did not lose the top spot when Internet users searched for the trademark,” and that he is unaware of any instance in which 1-800 Contacts’ ad did not appear in the top advertising spot in response to a search for a 1-800 Contacts trademark, which is “indicative of a successful counterstrategy by 1-800 Contacts”).

⁴⁸⁷ *See* Complaint Counsel’s Motion to Disregard and Strike Certain Portions of the Report and Testimony of Dr. Kent Van Liere (May 16, 2017), at 3-5 (citing Van Liere, Tr. 3002, 3010, 3013, 3099-3100). On this point, Dr. Van Liere’s trial testimony appears to be in conflict with his deposition testimony, in which he testified that he excluded an ad for 1-800 Contacts based on the instructions of 1-800 Contacts’ outside counsel. *See* CX9049 (Van Liere, Dep. at 189-190) (“I was asked to test a future world where these [other competitors’] ads could appear and 1-800 did not spend money to purchase its way to the top of the list or somewhere on that list.”).

⁴⁸⁸ Complaint Counsel’s Motion to Disregard and Strike Certain Portions of the Report and Testimony of Dr. Kent Van Liere at 5 & n.7-9 (citing Van Liere, Tr. 3133).

⁴⁸⁹ Specifically, Complaint Counsel asks the Court to disregard RX0735 at 0006, 0013-0021, 0030 ¶¶ 12-13, 27-40, 63 (Van Liere Expert Report); RX0730 (Ex. C) (Van Liere Expert Report), RX0731 (Ex. D) (Van Liere Expert Report), as well as Dr. Van Liere’s trial testimony, Van Liere, Tr. 2975:15-3074:25, 3228:21-3238:15.

query for “1-800 Contacts,” (as is the *acknowledged strategy* of 1-800 Contacts⁴⁹⁰), then Dr. Van Liere’s conclusion regarding confusion is not reliable.⁴⁹¹ Notably, in excluding an ad for 1-800 Contacts from his test, Dr. Van Liere not only disregarded the “real world,” he also failed to remove an *obvious* alternative explanation for any resulting consumer “confusion” in his test condition. 1-800 Contacts’ trademark expert Howard Hogan testified regarding a Bing study that demonstrated that, { [REDACTED]

[REDACTED] } This study suggests that { [REDACTED]

[REDACTED] }⁴⁹² Dr. Van Liere concedes that, in a world in which 1-800 Contacts’ ad appears on the SERP (*i.e.*, the real world), his survey is worthless, because it failed to test whether consumers would be confused in the presence of a 1-800 Contacts ad.⁴⁹³ For this reason alone, the Court should not credit Dr. Van Liere’s testimony or report.

Even if considered on its merits, Dr. Van Liere’s conclusion regarding consumer confusion fails scrutiny at the threshold. As described earlier, Dr. Van Liere’s survey purports to determine whether a consumer entering a search query for “1-800 Contacts” expects to see ads

⁴⁹⁰ See *supra* n.486 (citing 1-800 Contacts documents and testimony for proposition that 1-800 Contacts always bids enough to ensure that its advertisement appears at the top of the SERP for any search for “1-800 Contacts” or a variation thereof).

⁴⁹¹ See Van Liere Tr. 3222 (“I would have no way to know for sure if it would or would not change my results because I didn’t test that.”).

⁴⁹² Hogan, Tr. 3342-3344, *in camera*; RX0734 at 0089 (¶ 132) (Hogan Expert Report), *in camera*.

⁴⁹³ Van Liere Tr. 3222 (“I would have no way to know for sure if it would or would not change my results because I didn’t test that.”).

only for 1-800 Contacts, and will therefore be confused by ads for firms *other than* 1-800 Contacts. But Dr. Van Liere fails to answer that question because he failed to isolate the correct variable (the search term).⁴⁹⁴ Indeed, he failed to isolate *any* variable at all.⁴⁹⁵ By not controlling for the only factor relevant to this litigation, Dr. Van Liere failed to answer the question central to each of 1-800 Contacts’ trademark infringement claims: Has a rival used 1-800 Contacts’ trademark in a manner that causes confusion as to source, sponsorship, or affiliation?

Not only does Dr. Van Liere fail to identify the cause of any confusion, in designing his survey, Dr. Van Liere clearly “stacked the deck” in favor of finding confusion by including a greater number of links in the test condition than in his control condition. Having a “test” group that contained between six and eight *more* links than the control group necessarily (and obviously) increases the opportunity for error in the test group.⁴⁹⁶ As Professor Jacoby testified:

It’s analogous to a basketball player going up to the line and shooting baskets, and if he shoots 20 baskets, you count the misses, and then he goes and shoots ten minutes later 14 baskets, and you count the misses, and you’re comparing these two. That’s ridiculous. You[’ve] got to compare 20 to 20. You can’t say, oh, he made fewer misses when he was only shooting 14 baskets. Yes . . . he was . . . making fewer because he only shot 14 baskets. I mean, this is so fundamental.⁴⁹⁷

⁴⁹⁴ See CX8011 at 002-006, 007-009 (¶¶ 3-8, 11-15) (Jacoby Rebuttal Expert Report) (describing the proper variable to be isolated as the search term).

⁴⁹⁵ See CX8011 at 006-007, 009-010, 016 (¶¶ 9, 16-19, 30) (Jacoby Rebuttal Expert Report) (observing that Dr. Van Liere changed multiple elements between his “test” and “control” pages).

⁴⁹⁶ Dr. Van Liere’s Google “test” page contained six more links than the Google “control” page; the Yahoo! “test” page contained eight more links than the Yahoo! “control” page. See CX8011 at 006-007, 009-010, 016 (¶¶ 9, 16-19, 30) (Jacoby Rebuttal Expert Report) (observing that Dr. Van Liere’s “control” and “test” conditions had numerous differences); See also Van Liere, Tr. at 3225 (six less opportunities for confusion in Google control condition than Google test condition); *id.* at 3226 (eight less opportunities for confusion in Yahoo! control condition than Yahoo! test condition).

⁴⁹⁷ Jacoby, Tr. 2225-2226; CX8011 at 021 (¶ 33(b)) (Jacoby Rebuttal Expert Report). See also Tushnet Tr. 4445-4446 (“When you ask your test group 18 questions and your control group 12, it’s as if you gave them math problems and you find out that, in the test group, some of the test group got some of the extra six wrong and you

For all of these reasons – along with multiple additional problems with both the design and the sloppy implementation of Dr. Van Liere’s survey – described in Professor Jacoby’s Expert Report⁴⁹⁸ – Dr. Van Liere’s survey should be disregarded by this Court.

2. Howard Hogan

The testimony and expert report of Howard Hogan, 1-800 Contacts’ trademark expert, should be rejected. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court made clear that one of Rule 702’s core requirements for expert testimony is that it actually “assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* at 591 (quoting FED. R. EVID. 702). Stated differently, “[e]xpert testimony which does not relate to any issue in the case is not relevant, and ergo, non-helpful.” *Id.* (quoting 3 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE ¶ 7202[02], at 702-18).

Mr. Hogan’s primary contribution was to assert, without any basis, that 1-800 Contacts’ Bidding Agreements are “commonplace.”⁴⁹⁹ Mr. Hogan cites approximately 46 cases for the assertion that courts have routinely found liability in keyword bidding disputes, and that courts routinely enter the sort of injunctive relief agreed to by 1-800 Contacts and its competitors to

conclude, well, they’re worse at math than the control group. That just – that conclusion just isn’t supported by your evidence.”).

⁴⁹⁸ Dr. Van Liere’s survey contained multiple additional problems, including his use of a Yahoo!, a search engine with minimal real-world market share while ignoring the second-largest search engine, Bing, and his failure to appropriately populate or weight the results of that use; his failure to properly define his universe of respondents, thereby excluding an entire class of potential respondents; his use of inappropriate and ambiguous survey questions; his use of incomplete, vague, and contradictory survey instructions; his dismissal of verbatim responses that clearly demonstrated confusion on the part of purportedly confused respondents, as well as other examples of flawed design and careless implementation of the survey. *See generally* CX8011 at 010-027 (¶¶ 20-34) (Jacoby Rebuttal Expert Report) (describing multiple problems with Dr. Van Liere’s survey, controls, and data collection).

⁴⁹⁹ *See generally* RX0734 at 0092-0124 (Section X) (Hogan Expert Report) (“1-800 Contacts’ Settlement Terms With Advertisers Were Supportable and Commonplace Means to Resolve Trademark Disputes”).

resolve those keyword bidding disputes.⁵⁰⁰ Based on this analysis of purportedly analogous disputes,⁵⁰¹ Mr. Hogan concludes that 1-800 Contacts' Bidding Agreements are "commonplace,"⁵⁰² and thus (according to 1-800 Contacts), are presumptively lawful.⁵⁰³

But Mr. Hogan's (erroneous) assertion that the Bidding Agreements are "commonplace" is not relevant to any issue in this case. As noted earlier, court-ordered relief is beyond the reach of the antitrust laws, while agreements between private parties are not, regardless of whether or not they are "commonplace." *See* Opinion and Order of the Commission Granting Complaint Counsel's Motion For Partial Summary Decision, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017), at 3-4.

⁵⁰⁰ *See* RX0734 at 0063-0070, 0099-0114, 0118-0119 (¶¶ 104-108, 149-153, 159) (Hogan Expert Report).

⁵⁰¹ RX0734 at 0063-0064 (¶ 104) (Hogan Expert Report) ("The following are several examples of cases where courts have affirmatively found that the *use of others' trademarks as search engine keywords* constitutes infringement," and listing cases) (emphasis added); *id.* at 0064-0066 (¶ 105) ("Many courts have also held that the irreparable harm prerequisite to injunctive relief is *satisfied by use of trademarks as keywords*," and listing cases) (emphasis added); *id.* at 0066-0068 (¶ 107) ("[M]ost [courts] have still allowed infringement claims *based on the use of trademarks of others as keywords* to proceed beyond the pleadings," and listing cases) (emphasis added); *id.* at 0068-0070 (¶ 108) ("courts have allowed such infringement claims *based on the use of trademarks as keywords* to proceed beyond summary judgment," and listing cases) (emphasis added); *id.* at 0099-0100 (¶ 149) ("Consistent with the *keyword advertising cases* discussed above, courts in contested *keyword advertising cases* have entered injunctions," and listing cases) (emphasis added); *id.* at 0100-0102 (¶ 150) ("In line with the injunctions issued by courts in contested *keyword advertising cases*, courts in default judgment cases have issued similar injunctions," and listing cases) (emphasis added); *id.* at 0102-0107 (¶ 151) ("Courts have also been confident in their ability to issue similar injunctions in consent judgments in *keyword advertising cases*," and listing cases) (emphasis added); *id.* at 0109-0114 (¶ 153) (citing cases as examples of courts implementing injunctive relief with regard to "trademark disputes related to *search engine advertising*") (emphasis added); Hogan, Tr. 3266 (on direct examination, discussing "the types of cases that [Mr. Hogan] has been talking about [as] involving *keyword or paid search advertising*") (emphasis added); *id.* at 3270-3271 (on direct examination, testifying that courts encourage settlement of "*these types* of trademark disputes," referring to keyword bidding disputes) (emphasis added); *id.* at 3271-3272 (on direct examination, testifying to a "common form" that settlement agreements take "*in this particular context*," referring to keyword bidding disputes) (emphasis added); *id.* at 3277 (on direct examination, testifying that he reviewed court orders and settlement agreements to form his opinion); *id.* at 3287-3291, *in camera* 3297-3300 (on direct examination, discussing purportedly analogous cases); CX9047 (Hogan, Dep. at 58) (Hogan selected "analogous cases" based on "cases where claims were brought based on the use of trademarks as keywords").

⁵⁰² RX0734 at 0092-0124 (Section X) (Hogan Expert Report) ("1-800 Contacts' Settlement Terms With Advertisers Were Supportable and Commonplace Means to Resolve Trademark Disputes").

⁵⁰³ *See generally id.* *See also* 1-800 Contacts Pretrial Brief at 33-39.

Even if Mr. Hogan’s opinion were relevant, the purported evidence proffered by Mr. Hogan in support of his assertion that the Bidding Agreements are “commonplace” undermines that very assertion. As Mr. Hogan conceded at trial, he has no idea how many trademark cases are filed every year, or how many settlement agreements are entered into every year, and what the terms of those agreements are.⁵⁰⁴ Therefore, he has no way of knowing how “commonplace” any terms are to trademark settlements in general or keyword bidding settlements in particular.⁵⁰⁵

Moreover, with few exceptions, the cases Mr. Hogan cites were never litigated. Rather, many of the cases he relies upon were consent judgments (14 cases),⁵⁰⁶ default judgments (nine cases),⁵⁰⁷ or private settlement agreements (four cases).⁵⁰⁸ The majority of the other cases were

⁵⁰⁴ Hogan, Tr. 3321-3322. 3325; *see also* CX9047 (Hogan, Dep. at 26-28, 31-36). Indeed, of the publicly available settlement agreements Mr. Hogan cited, several were available (and reviewed by Mr. Hogan) only in redacted form. Hogan, Tr. 3325.

⁵⁰⁵ CX8014 at 035 (¶ 75) (Tushnet Rebuttal Expert Report) (“There is no evidence that the remedies Mr. Hogan defends are ‘common’ for *any* group of defendants.”).

⁵⁰⁶ *Joshua David Mellberg, LLC v. Advanced Retirement Income Solutions, LLC*, No. 12-cv-854 (Dkt. 89) (D. Ariz. Oct. 27, 2016); *Eclipse Aesthetics v. Regenlab USA, LLC*, No. 15-cv-03748 (Dkt. 25) (N.D. Tex. Jan. 11, 2016); *Probar, LLC v. Onebody*, No. 14-cv-166 (Dkt. 18) (M.D. Fla. Oct. 29, 2014); *Select Management Resources, LLC v. D and D Marketing, Inc.*, No. CV10-10008 (Dkt. 39) (C.D. Cal. Jul. 15, 2011); *Gonzalez & Gonzalez Bonds and Ins. Agency, Inc. v. Action Immigration Bonds and Ins. Servs., Inc.*, No. CV 10-01162 (Dkt. 15) (C.D. Cal. Apr. 7, 2010); *Mastercard Int’l Inc. v. Trehan*, 629 F. Supp. 2d 824, 833 (N.D. Ill. 2009); *J-Rich Clinic, Inc. v. Cosmedic Concepts, Inc.*, No. 02-CV-74324 (Dkt. 359) (E.D. Mich. May 16, 2006); *Weight Watchers, Inc. v. Diet Patch, Inc.*, No. 04 Civ. 4053 (LAP) (Dkt. 45) (S.D.N.Y. Sep. 28, 2004); *Happy Feet USA, Inc. v. Serenity “2000” Corp.*, No. 09-cv-1832 (Dkt. 22) (M.D. Fla. Mar. 16, 2010); *Orion Bancorp, Inc. v. Orion Residential Fin., LLC*, No. 807CV1753T26MAP, 2008 WL 816794 (M.D. Fla. Mar. 25, 2008); *Rhino Sports, Inc. v. Sport Court, Inc.*, 2007 WL 1302745 (D. Ariz. May 2, 2007); *Fragrancenet.com, Inc. v. Les Parfums, Inc.*, No. 09 Civ. 2626 (Dkt. 23) (E.D.N.Y. Mar. 8, 2010); *True & Dorin Medical Group, P.C. v. Leavitt Medical Associates, P.A.*, No. 06-CV-00092 (PKC) (Dkt. 78) (S.D.N.Y. Apr. 20, 2007); *Guardian Pool Fence Systems, Inc. v. Sentry Safety Systems, LLC*, No. CV07-1213 JFW (Ex) (Dkt. 25) (C.D. Cal. Sep. 14, 2007).

⁵⁰⁷ *Global Tel-Link Corp. v. Jail Call Servs., LLC*, 2015 WL 1936502 (E.D. Va. Apr. 28, 2015); *Chloe Sas v. Sawabeh Information Servs. Co.*, No. 11-cv-04147 (Dkt. 728) (C.D. Cal. Jul. 8, 2014); *World Entertainment v. Brown*, 2011 WL 2036686 (E.D. Pa. May 20, 2011); *Quidgeon v. Olsen*, 2011 WL 1480537 (C.D. Ill. Apr. 19, 2011); *Young Again Products, Inc. v. Acord*, No. RWT 03 CV2441 (Dkt. 264) (D. Md. Mar. 25, 2009), *aff’d*, No. 09-1481 (4th Cir. Dec. 23, 2011); *Partners for Health & Home, L.P. v. Yang*, No. CV-09-07849 (CMB) (RZx) (Dkt. 46) (C.D. Cal. Sep. 13, 2010); *Louis Vuitton Malletier, S.A. v. Abags.co.UK*, 2015 WL 11197741 (S.D. Fla. Feb. 27,

preliminary injunctions only,⁵⁰⁹ decisions on motions to dismiss,⁵¹⁰ reversals of summary judgment,⁵¹¹ and denials of summary judgment to defendant.⁵¹²

Further, as Mr. Hogan concedes, of the cases that Mr. Hogan *relied upon* for the proposition that the terms of the 1-800 Contacts Bidding Agreements are “commonplace,” *not a single case found liability* on the basis of keyword bidding alone.⁵¹³ The cases relied upon by Mr. Hogan involve egregious infringing conduct such as the *counterfeit sale* of products (*e.g.*, the sale of fake Louis Vuitton bags, advertised as Louis Vuitton bags);⁵¹⁴ defendants adopting plaintiffs’ trademark names as the *brand names of their own goods* (*e.g.*, a foot insole manufacturer calling its product “Happy Feet” while competing with the plaintiff, another foot

2015); *Rolex Watch U.S.A., Inc. v. Jesus Eloy Hernandez*, No. 13-20653-CIV (Dkt. 14) (S.D. Fla. Aug. 20, 2013); *Transamerica Corp. v. Moniker Online Servs., LLC*, 2010 WL 1416979 (S.D. Fla. Apr. 7, 2010).

⁵⁰⁸ *Greenberg Smoked Turkeys, Inc. v. Tsavo Media, Inc.*, No. 11-cv-00037 (Dkt. 29) (E.D. Tex. Jan. 23, 2012); *Pine Tree Legal Assistance v. LegalMatch.com*, No. 06-cv-00045 (D. Me. Mar. 2006); *American Airlines, Inc. v. Yahoo!, Inc. et al.*, No. 08-CV-626-A (Nov. 27, 2009); *GEICO v. Google, Inc. et al.*, No. 04-CV-507 LMB/TCB (E.D. Va. Nov. 24, 2004).

⁵⁰⁹ *CJ Products LLC v. Snuggly Plushez LLC*, 809 F. Supp. 2d 127 (E.D.N.Y. 2011).

⁵¹⁰ *Lbf Travel v. Fareportal, Inc.*, 2014 WL 5671853 (S.D.N.Y. Nov. 5, 2014); *Hearts on Fire Co., LLC v. Blue Nile, Inc.*, 603 F. Supp. 2d 274 (D. Mass. 2009); *Rescuecom Corp. v. Computer Troubleshooters USA, Inc.*, 464 F. Supp. 2d 1263 (N.D. Ga. 2006); *Google Inc. v. American Blind & Wallpaper Factory, Inc.*, 2005 WL 832398 (N.D. Cal. Mar. 30, 2005).

⁵¹¹ *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144 (4th Cir. 2012); *Netscape*, 354 F.3d 1020 (9th Cir. 2004) (reversing summary judgment for defendant *only* as to ads that did not identify *source* of ad).

⁵¹² *Edible Arrangements, LLC v. Provide Commerce, Inc.*, 2016 WL 4074121 (D. Conn. Jul. 29, 2016); *Gravity Defyer Corp. v. Under Armour, Inc.*, 2014 WL 3766724 (C.D. Cal. Jul. 7, 2014); *Soaring Helmet Corp. v. Nanal, Inc.*, 2011 WL 39058 (W.D. Wash. Jan. 3, 2011); *Pensacola Motor Sales, Inc. v. Eastern Shore Toyota LLC*, 2010 WL 3781552 (N.D. Fla. Sep. 23, 2010).

⁵¹³ *See* Hogan, Tr. 3459-3461. *See, e.g.*, CX9047 (Hogan, Dep. at 130-131; 135; 140; 143-144; 148-149). *See also* CX8014 at 017-018 (¶¶ 35-36) (Tushnet Rebuttal Expert Report) (describing cases). This is consistent with trademark expert Professor Tushnet’s review of the case law, which suggests that *no court* has ever found liability based on keyword bidding alone. *See* CX8014 at 021 (¶ 43) (Tushnet Rebuttal Expert Report).

⁵¹⁴ *Louis Vuitton Mallatier, S.A. v. Abags.co.UK*, 2015 WL 11197741 (S.D. Fla. Feb. 27, 2015). *See also* CX8014 at 035 (¶ 76) (Tushnet Rebuttal Expert Report) (describing counterfeiting cases cited by Mr. Hogan).

insole manufacturer with a trademarked product called “Happy Feet”);⁵¹⁵ the *unauthorized sale* of plaintiffs’ trademarked goods, along with advertisements that *explicitly refer* to such goods (e.g., plaintiff’s Australian Gold suntan lotion being unlawfully sold by a retailer who advertises “Australian Gold” suntan lotion on its websites);⁵¹⁶ or the use of plaintiffs’ trademarks in the *bolded, underlined headings of advertisements* in response to searches for the plaintiffs’ trademarks (e.g., in response to a search for the law firm “Binder & Binder,” defendant’s ad is displayed, with the bolded, underlined headline “**Binder & Binder**”).⁵¹⁷ Mr. Hogan acknowledges that *none* of this conduct was present in any of the underlying cases brought by 1-800 Contacts.⁵¹⁸

In short, Mr. Hogan can point to “*no case* indicating that the simple purchase of advertising keywords, *without more*, may constitute initial interest confusion.”⁵¹⁹ And it stands to

⁵¹⁵ *Happy Feet USA, Inc. v. Serenity “2000” Corp.*, No. 09-cv-1832 (M.D. Fla. Mar. 16, 2010). *See also* CX8014 at 036 (¶ 78) (Tushnet Rebuttal Expert Report) (describing cases cited by Mr. Hogan, including *Happy Feet*, in which defendants use plaintiffs’ marks to name their own products).

⁵¹⁶ *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228 (10th Cir. 2006). *See also* CX8014 (Tushnet Report) at 018-019, 020-21 (¶¶ 38, 42) (Tushnet Rebuttal Expert Report) (describing cases cited by Mr. Hogan, including *Australian Gold*, in which defendants are unauthorized distributors of plaintiffs’ trademarked products).

⁵¹⁷ *Binder v. Disability Group, Inc.*, 772 F. Supp. 2d 1172 (C.D. Cal. 2011). *See also* CX8014 at 019 (¶ 39) (Tushnet Rebuttal Expert Report) (describing cases cited by Mr. Hogan, including *Binder*, stemming from confusing uses of trademarks in text).

⁵¹⁸ *See, e.g.*, CX9047 (Hogan Dep., at 61, 130) (not aware of any claims brought by 1-800 Contacts regarding a rival distributing counterfeit 1-800 Contacts products); *id.* at 63, 140 (not aware of any claims brought by 1-800 Contacts in which a defendant “called itself 1-800 Contacts”); *id.* 135 (not aware of any claims brought by 1-800 Contacts that involved firms identifying themselves to customers by phone or email as 1-800 Contacts); *id.* 66 (not aware of any claims brought by 1-800 Contacts in which a rival was advertising the trademark “1-800 Contacts” on its own website); *id.* at 149 (not aware of claims brought by 1-800 Contacts involving rivals falsely stating that they were distributing products on behalf of 1-800 Contacts); *id.* at 65, 141 (“I do not recall seeing 1-800 Contacts’ in the text of any of the ads at issue. . . .”); *id.* at 144 (not aware of “any instances where . . . 1-800 Contacts’ trademarks [were used by another firm] in a domain name” or URL); *id.* at 131 (not aware of any claims brought by 1-800 Contacts alleging that 1-800 Contacts’ photographs were being reproduced or used on another company’s website).

⁵¹⁹ *Nutraceuticals*, 2016 WL 695596, at *5 (emphasis added). *See* Hogan, Tr. 3459-3461 (testifying that no court has ever found liability based on keyword bidding alone). *See also* *GoDaddy.com*, 2015 U.S. Dist. LEXIS at *150

reason that, if there are no actual cases similar to the lawsuits filed by 1-800 Contacts in which any court has ever ordered such relief, 1-800 Contacts' Bidding Agreements cannot possibly be "commonplace."⁵²⁰

At least 15 of the cases cited by Mr. Hogan contain *no claims* relating to keyword bidding.⁵²¹ *Thirteen* of those cases do not contain *a single allegation* relating to keyword bidding.⁵²² To be clear, this is inarguably true notwithstanding the fact that Mr. Hogan expressly

("There is a growing consensus in the case authorities that keyword advertising does not violate the Lanham Act."); CX8014 at 021 (¶ 43) (Tushnet Rebuttal Expert Report) (noting that the "preeminent expert on internet advertising law . . . has been unable to identify *any case* in which a defendant lost a trial on likely confusion based on purchases of a plaintiff's trademark as a search engine keyword – despite the filing of over a hundred such cases") (emphasis added). On the other hand, during this time frame, dozens of courts have rejected keyword bidding claims. *See id.* at 012-014 (¶¶ 25-28) (collecting cases).

⁵²⁰ Tushnet, Tr. 4460-4463; *See also* CX8014 at 035 (¶ 75) (Tushnet Rebuttal Expert Report) ("There is no evidence that the remedies Mr. Hogan defends are 'common' for *any* group of defendants.").

⁵²¹ *PODS Enters., LLC v. U-Haul Int'l, Inc.*, 126 F. Supp. 3d 1263 (M.D. Fla. 2015); *see PODS Enters., LLC v. U-Haul Int'l, Inc.*, Case 8:12-cv-01479-T-27MAP, Doc. 289 (Aug. 19, 2014) (court order explicitly disclaiming any claims of unlawful keyword bidding, noting that no allegations relating to purchase of keywords appear in complaint; "[r]ather, the crux of this case is U-Haul's use of the [trademark] terms *pod* and *pods* [in the text of] its website"); *Rolex Watch U.S.A., Inc. v. Jesus Eloy Hernandez*, No. 13-20653-CIV (Dkt. 14) (S.D. Fla. Aug. 20, 2013); *Transamerica Corp. v. Moniker Online Servs., LLC*, 2010 WL 1416979 (S.D. Fla. Apr. 7, 2010); *Probar, LLC v. Onebody*, No. 14-cv-166 (Dkt. 18) (M.D. Fla. Oct. 29, 2014); *Weight Watchers, Inc. v. Diet Patch, Inc.*, No. 04 Civ. 4053 (LAP) (Dkt. 45) (S.D.N.Y. Sep. 28, 2004); *Zerorez Franchising Sys., Inc. v. Distinctive Cleaning, Inc.*, 103 F. Supp. 3d 1032 (D. Minn. 2015); *Gravity Defyer Corp. v. Under Armour, Inc.*, 2014 WL 3766724 (C.D. Cal. Jul. 7, 2014); *Chloe Sas v. Sawabeh Information Servs. Co.*, No. 11-cv-04147 (Dkt. 728) (C.D. Cal. Jul. 8, 2014); *World Entertainment v. Brown*, 2011 WL 2036686 (E.D. Pa. May 20, 2011); *Quidgeon v. Olsen*, 2011 WL 1480537 (C.D. Ill. Apr. 19, 2011); *Louis Vuitton Mallatier, S.A. v. Abags.co.UK*, 2015 WL 11197741 (S.D. Fla. Feb. 27, 2015); *Eclipse Aesthetics v. Regenlab USA, LLC*, No. 15-cv-03748 (Dkt. 25) (N.D. Tex. Jan. 11, 2016); *Mastercard Int'l Inc. v. Trehan*, 629 F. Supp. 2d 824 (N.D. Ill. 2009); *Orion Bancorp, Inc. v. Orion Residential Fin., LLC*, 2008 WL 816794 (M.D. Fla. Mar. 25, 2008); *Skydive Arizona, Inc. v. Quattrocchi*, 2010 WL 1743189 (D. Ariz. Apr. 29, 2010).

⁵²² *Weight Watchers*, No. 04 Civ. 4053; *Gravity Defyer*, 2014 WL 3766724; *Chloe Sas*, No. 11-cv-04147; *World Entertainment*, 2011 WL 2036686; *Quidgeon*, 2011 WL 1480537; *Louis Vuitton*, 2015 WL 11197741; *Rolex Watch*, No. 13-20653-CIV; *Transamerica Corp.*, 2010 WL 1416979; *Probar*, No. 14-cv-166; *Mastercard*, 629 F. Supp. 2d 824; *Orion Bancorp*, 2008 WL 816794; *Skydive Arizona*, 2010 WL 1743189; *PODS Enters.*, 126 F. Supp. 3d 1263. When provided by Complaint Counsel with a list of cases, and offered the opportunity to review various complaints and decisions in order to find any such claims or analysis, Mr. Hogan was unable to do so. *See, e.g.*, Hogan, Tr. 3367-3421, 3430-3458 (discussing cases). Indeed, although Mr. Hogan *expressly discussed* the *PODS* decision in his report as a "trademark dispute[] related to *search engine advertising*," RX0734 at 0109-0110 (¶ 153) (Hogan Expert Report) (emphasis added), there was *not a single allegation* relating to search engine advertising, as expressly noted by the court. *See PODS Enters., LLC v. U-Haul Int'l, Inc.*, Case 8:12-cv-01479-T-27MAP, Doc. 289

asserted – in his expert report, at his deposition, and at trial⁵²³ – that the cases he was relying on were “analogous” *because* they were *keyword bidding disputes*. Mr. Hogan was apparently unaware of the fact that many of the cases he relied upon did not involve *any* keyword bidding, as he did not review the majority of complaints in the very cases that formed the basis of his expert report.⁵²⁴

Instead, according to Mr. Hogan, he relied on the court decisions in those cases,⁵²⁵ largely recitations accompanying consent and default judgments.⁵²⁶ These documents perfunctorily

(Aug. 19, 2014) (court order explicitly disclaims any allegation of unlawful keyword bidding, noting that *not a single allegation* relating to purchase of keywords appears in complaint; “[r]ather, the crux of this case is U-Haul’s use of the [trademark] terms *pod* and *pods* [in the text of] its website”). *See also* Hogan, Tr. 3405-3421, 3430-3445 (discussing *PODS*).

⁵²³ *See supra* n.501.

⁵²⁴ During his deposition, Mr. Hogan acknowledged that he did not review, or did not recall reviewing, at least the complaints in the following 22 cases: *Australian Gold*, 436 F.3d 1228 (CX9047 (Hogan, Dep. at 129)); *Zerorez Franchising Sys.*, 103 F. Supp. 3d 1032 (CX9047 (Hogan, Dep. at 131)); *FenF, LLC v. Smarthingz*, No. 12-cv-14770, 2014 WL 1304779 (E.D. Mich. Mar. 28, 2014) (CX9047 (Hogan, Dep. at 138)); *Binder*, 772 F. Supp. 2d 1172 (CX9047 (Hogan, Dep. at 141)); *Storus Corp. v. Aroa Marketing, Inc.*, No. C-06-2454, 2008 WL 449835 (N.D. Cal. Feb. 15, 2008) (CX9047 (Hogan, Dep. at 141)); *Global Tel-Link Corp.*, 2015 WL 1936502 (CX9047 (Hogan, Dep. at 143)); *World Entertainment*, 2011 WL 2036686 (CX9047 (Hogan, Dep. at 145)); *Young Again Products*, No. RWT 03 CV2441 (CX9047 (Hogan, Dep. at 147)); *Gravity Defyer*, 2014 WL 3766724 (CX9047 (Hogan, Dep. at 157)); *Pensacola Motor Sales*, 2010 WL 3781552 (CX9047 (Hogan, Dep. at 159)); *PODS Enters.*, 126 F. Supp. 3d 1263 (CX9047 (Hogan, Dep. at 233)); *Louis Vuitton*, 2015 WL 11197741 (CX9047 (Hogan, Dep. at 237)); *Rolex Watch*, No. 13-20653-CIV (CX9047 (Hogan, Dep. at 237)); *Transamerica*, 2010 WL 1416979 (CX9047 (Hogan, Dep. at 238)); *Joshua David Mellberg*, No. 12-cv-854 (CX9047 (Hogan, Dep. at 240)); *Eclipse Aesthetics*, No. 15-cv-03748 (CX9047 (Hogan, Dep. at 242)); *Probar*, No. 14-cv-166 (CX9047 (Hogan, Dep. at 242)); *Select Management Resources*, No. CV10-10008 (CX9047 (Hogan, Dep. at 243)); *Mastercard*, 629 F. Supp. 2d 824 (CX9047 (Hogan, Dep. at 245)); *J-Rich Clinic*, No. 02-CV-74324 (CX9047 (Hogan, Dep. at 247)); *Happy Feet*, No. 09-cv-1832 (CX9047 (Hogan, Dep. at 248)); *Greenberg Smoked Turkeys*, No. 11-cv-00037 (CX9047 (Hogan, Dep. at 252)).

⁵²⁵ Hogan, Tr. 3447.

⁵²⁶ *See supra* p. 159.

confirm whatever relief the parties had privately agreed to. The majority of these “decisions” lack *any* analysis of the claims at issue.⁵²⁷

Mr. Hogan testified that, even if the cases he cited in his report were *not* keyword bidding disputes (contrary to the statements he made in his report, at his deposition, and at trial),⁵²⁸ they broadly related to the “online use of trademarks.”⁵²⁹ According to Mr. Hogan, the subject of the dispute made *no difference* to his opinion regarding the “commonplace” nature of 1-800 Contacts’ Bidding Agreements.⁵³⁰ In other words, it appears that the opinion of 1-800 Contacts’ trademark expert – and the position of 1-800 Contacts by extension – is that 1-800 Contacts may privately agree to *whatever it wants* with its rivals, so long as it can find a court *somewhere* that has allowed another party to do something vaguely similar under *completely different circumstances*.⁵³¹ Again, this contention is completely unsupported by any case law, and should be rejected.

For all of these reasons, Mr. Hogan’s expert report and related testimony should be disregarded by the Court.

⁵²⁷ *E.g.*, RX0732 at 0060-0066 (Ex. F) (Hogan Expert Report Exhibit) (attaching *Rolex* order, a 6-page order summarily granting relief, not discussing the claims at issue); *id.* at 0067-0071 (Ex. G) (attaching *Partners for Health and Home* order, a 4-page order summarily granting relief, not discussing the claims at issue).

⁵²⁸ *See supra* n.501.

⁵²⁹ Hogan, Tr. 3447-3448. *See id.* at 3409-3410.

⁵³⁰ Hogan, Tr. 3449-3451.

⁵³¹ *See* Hogan, Tr. 3456-3458. At trial, Complaint Counsel used the analogy of a prosecutor seeking the death penalty for a shoplifting charge, and citing the “common” use of the death penalty in murder cases as support for her request. *Id.* at 3373-3374.

3. Ronald Goodstein

The testimony and expert report of Ronald Goodstein, 1-800 Contacts' second trademark expert, should be rejected. As noted above, "[e]xpert testimony which does not relate to any issue in the case is not relevant, and ergo, non-helpful." *Daubert*, 509 U.S. at 591 (quoting FED. R. EVID. 702). Professor Goodstein's opinions regarding purported consumer confusion relating to the layout and elements of a SERP and the purported harm to 1-800 Contact's brand equity are not relevant to any factual issues cognizable under trademark law.

First, Professor Goodstein opines that consumer confusion is to be reasonably expected from advertisements for other online retailers of contact lenses that are displayed on a SERP in response to a consumer query for "1-800 Contacts."⁵³² He bases his opinion not on any survey of consumer confusion that he has conducted, but on third-party research suggesting that (1) many consumers believe that the top search results will be most relevant to their query; (2) many consumers do not recognize the difference between organic search results and sponsored advertisements; and (3) many consumers expect that the top search result will take them to the website of the company they are searching for if their query is navigational in nature.⁵³³

Even assuming that Professor Goodstein's reliance on select third-party research meets *Daubert's* requirement of reliability, his analysis offers nothing relevant to the central question in a trademark infringement case, which is whether consumers are confused as to the source, sponsorship, or affiliation of a rival retailer's advertisement.⁵³⁴ Summarizing someone else's

⁵³² RX0736 at 0018 (¶ 40) (Goodstein Expert Report).

⁵³³ *Id.* at 0018-0031 (¶¶ 41-71).

⁵³⁴ *See supra* p. 129-130.

research on what consumers may *assume*, in the abstract, about the organic or paid nature of search results, or consumers' expectations of what the "top" search results will contain, tells this Court nothing about whether consumers who see sponsored advertisements for rivals of 1-800 Contacts are confused as to the *source, sponsorship, or affiliation* those advertisements. Of course, the overwhelming evidence, discussed above, indicates that consumers are *not at all* confused by the appearance of ads for competitors of 1-800 Contacts in response to search queries relating to 1-800 Contacts.⁵³⁵

Additionally, Professor Goodstein bases his opinion regarding consumer confusion on surveys that Dr. Kent Van Liere conducted in this case and in the *American Airlines* case.⁵³⁶ For the reasons set forth above, Dr. Van Liere's survey in this case is fundamentally flawed, and should be disregarded by this Court.⁵³⁷ Dr. Van Liere's survey in *American Airlines* – which was never accepted by the court in that case – contains many of the same flaws as does Dr. Van Liere's survey in this matter.⁵³⁸ Thus, Professor Goodstein's opinions that rely upon Dr. Van Liere's surveys should be disregarded.

Second, Professor Goodstein proffers an opinion regarding the harm (or "dilution") to 1-800 Contact's so-called "brand equity" if advertisements for rival online retailers of contact

⁵³⁵ See *supra* pp. 140-145.

⁵³⁶ RX0736 at 0031-0033 (¶¶ 72-76) (Goodstein Expert Report).

⁵³⁷ See *supra* pp. 152-157 (discussing multiple problems with Van Liere survey). See generally CX8011 at 002-028 (¶¶ 3-9 & Section II) (Jacoby Rebuttal Expert Report) (criticizing Van Liere survey); CX8014 at 028-032 (¶¶ 60-68) (Tushnet Rebuttal Expert Report) (criticizing Van Liere surveys).

⁵³⁸ See CX8014 at 028-032 (¶¶ 60-68) (Tushnet Rebuttal Expert Report) (discussing multiple problems with Van Liere's *American Airlines* survey).

lenses appear among the results for a consumer query of “1-800 Contacts.”⁵³⁹ Professor Goodstein’s opinion on 1-800 Contacts’ “brand equity” should be disregarded because it is entirely untethered to *any* trademark right recognized by *any* court. As explained earlier, trademark dilution comes in two flavors: “blurring” and “tarnishment.” In both types of claims, the key is whether the defendant, a seller of *unrelated goods*, has adopted a name that is *identical* or *substantially similar* to the plaintiff’s trademark. Comparative advertisements are expressly exempted from federal dilution claims.⁵⁴⁰

In this case, Professor Goodstein asserts that comparative advertisements by distinctly named rivals can somehow damage 1-800 Contacts’ “brand equity” by building an “association” between a competing retailer and 1-800 Contacts’ trademark.⁵⁴¹ To put it in layman’s terms, if the distinctly named Pepsi displays an advertisement to a consumer who has typed in a search query for the very different brand “Coke,” that consumer may very well understand that the Pepsi ad is *for* Pepsi, *sponsored* by Pepsi, and *affiliated* with Pepsi. Nevertheless, the mere *appearance* of that ad “harms” Coke’s brand equity in some nebulous, nonsensical fashion.⁵⁴² In short, Professor Goodstein’s theory is wholly invented, and has no analogue in the law, trademark or otherwise.⁵⁴³

⁵³⁹ RX0736 at 0036-0041 (¶¶ 86-100) (Goodstein Expert Report).

⁵⁴⁰ *See supra* pp. 150-152.

⁵⁴¹ RX0736 at 0039 (¶ 95) (Goodstein Expert Report).

⁵⁴² *See generally* CX8014 at 045 (¶ 95) (Tushnet Rebuttal Expert Report).

⁵⁴³ *See generally id.* at 041-046 (¶¶ 87-97) (Tushnet Rebuttal Expert Report).

For all of these reasons, Dr. Goodstein's expert report and related testimony should be disregarded by the Court.

4. William Landes

The expert report of William Landes, 1-800 Contacts' third trademark expert, should not be relied on by the Court. 1-800 Contacts submitted the expert report of Professor William Landes,⁵⁴⁴ and listed Professor Landes on its final witness list, but did not call him to testify at trial. Therefore, Complaint Counsel had no opportunity to cross-examine Professor Landes.⁵⁴⁵ On that basis alone, Professor Landes' report should be disregarded by the Court.

In any event, Professor Landes' report is of no value to the Court because it offers only general high-level observations about trademarks that are repeated in the testimony provided by 1-800 Contacts' other experts. Specifically, Professor Landes opines that: (1) trademarks reduce consumer search costs and give firms an incentive to invest in brand quality; (2) trademark protection preserves these benefits; and (3) Complaint Counsel's experts failed to properly consider the importance of trademarks.⁵⁴⁶ Professor Murphy makes identical arguments in his report,⁵⁴⁷ and Professor Landes' report is therefore cumulative.

In addition to being cumulative, Professor Landes' report has no connection to the facts of this case, as it does little more than rehash the themes of an article he co-wrote 30 years

⁵⁴⁴ RX0737 (Landes Expert Report).

⁵⁴⁵ Complaint Counsel took the deposition of Professor Landes on March 7, 2017. CX9050 (Landes, Dep.).

⁵⁴⁶ RX0737 at 0004-0005 (¶8) (Landes Expert Report).

⁵⁴⁷ RX0739 at 0032-0035 (¶¶ 78-86) (Murphy Expert Report).

ago.⁵⁴⁸ The main point of the article was that trademarks provide informational benefits to consumers and reduce search costs.⁵⁴⁹ This uncontroversial observation does not provide any justification for the Bidding Agreements, which increase search costs by suppressing advertising regarding competitors' prices and offerings. Professor Landes agrees that advertising can reduce search costs,⁵⁵⁰ and his report approvingly cites literature confirming this point.⁵⁵¹ He agrees that advertising can help buyers learn which sellers are competing in the market⁵⁵² and what prices prevail in the market,⁵⁵³ and that making it harder for consumers to ascertain the price differentials among sellers represents an increase in search costs.⁵⁵⁴

Indeed, to the extent that Professor Landes' report and deposition testimony have any bearing on this matter, they support a finding of liability, as Professor Landes concedes that he is unaware of any theory of trademark infringement that suggests infringement cannot be avoided by clarifying language in advertising.⁵⁵⁵ This concession demonstrates that the Bidding Agreements are overbroad, as they prohibit trademark search advertising even if the text of the ad contains clarifying language that renders it non-infringing. Professor Landes does not offer a

⁵⁴⁸ See RX0737 at 0005 (n.3) (Landes Expert Report) (citing Landes and Posner, "Trademark Law: An Economic Perspective," 30 J. L. & ECON. 265 (October 1987)).

⁵⁴⁹ See RX0737 at 0005 (¶10) (Landes Expert Report).

⁵⁵⁰ CX9050 (Landes, Dep. at 191-192).

⁵⁵¹ RX0737 at 0005 (n.4) (Landes Expert Report) (citing George Stigler, "The Economics of Information," 69 J. POL. ECON. 213 (June 1961)).

⁵⁵² CX9050 (Landes, Dep. at 67).

⁵⁵³ *Id.* at 197.

⁵⁵⁴ *Id.* at 206, 210. "Price dispersion" refers to the spread of prices in a market. *Id.* at 187.

⁵⁵⁵ *Id.* at 158-159.

contrary view, as he admits that he has not evaluated or opined on whether bidding on a competitor's trademark as a keyword is likely to create confusion.⁵⁵⁶

For all of these reasons, Professor Landes' expert report should be disregarded by the Court.⁵⁵⁷

5. Anindya Ghose

The testimony and expert report of Anindya Ghose, 1-800 Contacts' economic expert, should be rejected.

a. At trial, Dr. Ghose attempted to offer two opinions that must be disregarded because they are not contained in his report.

Dr. Ghose stated at trial that, when “consumers search for 1-800 Contacts,”⁵⁵⁸ ads for rivals are “not very relevant” to their interests.⁵⁵⁹ 1-800 Contacts' counsel asserted that this opinion was contained in Paragraphs 57 and 58 of Dr. Ghose's report.⁵⁶⁰ Those paragraphs do not express or support any opinion regarding the relevance of competitors' paid search advertisements, instead they refer to how Google positions *organic links* to competitors'

⁵⁵⁶ *Id.* at 152-153, 216.

⁵⁵⁷ Professor Landes' deposition testimony, CX9050, should also be disregarded by the Court.

⁵⁵⁸ Ghose, Tr. 3904.

⁵⁵⁹ *Id.* at 3954 (“It is my opinion that the ads are not very relevant.”); *id.* at 3960 (referring to “ads that are not very relevant”); Ghose, Tr. 3996 (referring to “these additional ads that may not be very relevant . . .”). *See id.* at 3904-3908. At times, Dr. Ghose attempted to phrase his conclusion in a more limited fashion. *E.g.*, Ghose, Tr. 3908 (“The ad that belongs to the retailer itself is very relevant, whereas the other ads are less relevant.”). The precise contours of Dr. Ghose's opinion regarding the relevance of competitors' ads is somewhat difficult to discern, as it was not disclosed in his report and thus could not be explored at deposition, which confirms the necessity for excluding it entirely.

⁵⁶⁰ *See* Ghose, Tr. 3905-3906.

websites.⁵⁶¹ The position assigned by a search engine algorithm to competitors' *organic links* provides no support for a conclusion about the relevance of competitors' *advertisements*. Indeed, Dr. Ghose himself testified that the way that search engines determine the relevance of ads and organic links is "very different,"⁵⁶² and that "the relevance factors used for ranking organic [results] is different from the relevant [sic] factors used for ranking the paid [search advertising results]."⁵⁶³ Dr. Ghose's view that competitors' ads are "not very relevant" to "consumers search for 1-800 Contacts" must be disregarded because it is unsupported by and not disclosed in his report. Disregarding this opinion, in turn, should cause the Court to discount the principal opinions Dr. Ghose expressed at trial, as described in detail below.

In addition, Dr. Ghose stated at trial that, if "a user puts in a search query, and he or she gets to see several different offers and listings . . . then the user may completely abandon the search process."⁵⁶⁴ This opinion is not expressed anywhere in Dr. Ghose's report. 1-800 Contacts' counsel asserted that this opinion is expressed in a footnote to Paragraph 73 of Dr. Ghose's report.⁵⁶⁵ That footnote does not express any opinion that a user may "abandon the search process" if exposed to too many different offers and listings. It simply quotes a blog hypothesizing that long lines at theaters might cause some people to conclude they won't get in to see a movie. *See* RX0733 at 0031 (¶ 73 n.153) (Ghose Expert Report) ("It is like looking at a line of people outside a theater and leaving because you feel like you'll just never get inside; too

⁵⁶¹ RX0733 at 0025 (¶¶ 57-58) (Ghose Expert Report).

⁵⁶² Ghose, Tr. 3909.

⁵⁶³ *Id.* at 4003.

⁵⁶⁴ *Id.* at 3915.

⁵⁶⁵ *See id.* at 3916.

much choice can cause us to abandon the things that we truly want.”). A footnote quoting a blog does not advise Complaint Counsel of an opinion Dr. Ghose formed. And a blog post commenting on long theater lines certainly does not express an opinion regarding the effect on consumers of “several different offers and listings” on a SERP, because a single theater line is not remotely analogous to several different search advertisements. A theater line does not cause consumers to make *choices*; it forces them to stand and wait, which most people find unpleasant.⁵⁶⁶ An analogy to theater lines does not in any way relate to Dr. Ghose’s testimony regarding “several different offers and listings” on a SERP.

In any event, the opinion that consumers abandon the search process if exposed to different online offers is unsupported by evidence in the record or analysis in Dr. Ghose’s report. No evidence suggests that search engines display an inappropriate number of listings. Dr. Ghose explicitly disclaimed offering any opinion as to “whether search engines provide too many or too few” advertisements,⁵⁶⁷ and likewise does not contend that search engines provide users with a poor experience.⁵⁶⁸

b. None of the three principal opinions Dr. Ghose offered at trial rebuts Complaint Counsel’s *prima facie* case.

Dr. Ghose offered three principal opinions at trial: (1) when consumers enter the query “1-800 Contacts,” they typically intend to navigate to 1-800 Contacts’ website; (2) consumer search costs are impacted by the number of ads the see on the screen; and (3) “the settlement

⁵⁶⁶ Also, conceivably, a long enough line would suggest that all of the seats in the theater will be taken by those in line. This is also inapposite to search advertising.

⁵⁶⁷ Ghose, Tr. 3980-3981.

⁵⁶⁸ *Id.* at 3978-3979 (Dr. Ghose does not contend that Google provides consumers with a poor user experience).

agreements had limited effects, at most, on consumers and advertisers.”⁵⁶⁹ These opinions do not rebut Complaint Counsel’s prima facie case or meaningfully support Respondent’s arguments.

Dr. Ghose’s opinion that many consumers have a “navigational intent” when they initially enter a query containing “1-800 Contacts” is entirely consistent with a finding that the Bidding Agreements harm competition and consumers.⁵⁷⁰ Dr. Ghose himself concedes that “advertising has the capacity to change the consumer’s commercial intent.”⁵⁷¹ He agrees that it is often effective for advertisers to target “a customer at the moment when that customer’s intent is to engage with a rival of the advertiser.”⁵⁷² He recommends in his book that advertisers target their rivals’ customers, particularly if (like 1-800 Contacts’ online rivals) they are able to provide lower-price offers.⁵⁷³ In substance, Dr. Ghose *endorses* Complaint Counsel’s theory of liability, as he agrees that advertisements directed to a rival’s customers can stimulate price competition and thus benefit consumers, *including those consumers who have an intent to engage with a rival*.⁵⁷⁴

⁵⁶⁹ *Id.* at 3867-3868.

⁵⁷⁰ As explained *supra*, at pp. 138-139, consumers’ supposed “navigational intent” is not relevant to this Court’s analysis of 1-800 Contacts’ purported efficiencies.

⁵⁷¹ Ghose, Tr. 3962; *see also id.* at 3963.

⁵⁷² Ghose, Tr. 3962-3964. Likewise, Dr. Ghose agrees that, in the context of mobile digital advertising, “one effective strategy for finding consumers for a company is to identify consumers who at that point in time intend to engage with a rival of the advertiser.” *Id.* at 3970-3971. Dr. Ghose’s half-hearted attempt to limit this proposition to the “offline world” was entirely ineffective, as he concedes that the commercial intent of online consumers can be changed by advertising, just like the commercial intent of consumers in “the offline world.” *Id.* at 3970-3971.

⁵⁷³ Ghose, Tr. 3963-3966. In addition, Dr. Ghose concedes that for an online seller of contact lenses, bidding on the keyword “1-800 Contacts” may be the lowest cost and most efficient way to capture new customers. *Id.* at 3976-3977.

⁵⁷⁴ *Id.* at 3967-3969.

Dr. Ghose’s second opinion, that exposure to too many ads may harm consumers, is of no value to the Court because it is an abstract proposition that has no connection to the facts of this case. Dr. Ghose did not analyze and has no opinion regarding whether, without the Bidding Agreements, the number of search ads routinely presented on a search engine results page is sub-optimal for consumers.⁵⁷⁵ Indeed, Dr. Ghose does not offer a conclusion that *any* consumers who entered a query including a 1-800 Contacts trademark suffered (or would suffer) harm. While Dr. Ghose testified to his opinion that, in the abstract, “search costs can be higher for some consumers who see ads that are not very relevant when they put in a trademark search,”⁵⁷⁶ he does not provide any reason this general observation would support a conclusion that 1-800 Contacts’ rivals’ ads raise search costs when consumers search for 1-800 Contacts’ trademarks.⁵⁷⁷ As discussed above, Dr. Ghose did not disclose in his report any opinion that competitors’ ads are “not very relevant” to consumers who search for “1-800 Contacts” trademarks,⁵⁷⁸ and no evidence supports such a proposition. Instead, as Dr. Ghose candidly admitted, he simply reached no “conclusion about the effect of [the Bidding Agreements] directly on search costs.”⁵⁷⁹

⁵⁷⁵ *Id.* at 3928-3931.

⁵⁷⁶ *Id.* at 3989.

⁵⁷⁷ *Id.* at 3995-3996.

⁵⁷⁸ *See supra* pp. 170-171.

⁵⁷⁹ Ghose, Tr. 4007. *See id.* at 4011-4012 (no opinion on whether Bidding Agreements impacted search costs of a hypothetical consumer attempting to locate the lowest-priced contact lenses); *id.* at 4014 (no opinion on whether Bidding Agreements increased “consumer satisfaction.”).

Dr. Ghose opined that “in general, based on the literature that I am aware of, it *could be* that their search costs go up . . . that could be one example of *potential harm*.”⁵⁸⁰ No evidence supports the notion that this harm actually occurred, and the “literature” that Dr. Ghose relied on to reach his opinion on “potential harm” is entirely inapposite to search advertising for contact lenses. Dr. Ghose relied on literature discussing harms such as the “anxiety and regret” consumers may experience in selecting among numerous retirement investments⁵⁸¹ or more than fifteen health insurance plans.⁵⁸² These concerns are inapplicable to the online purchase of contact lenses,⁵⁸³ Indeed, any suggestion that such harms affect consumers who entered queries for “1-800 Contacts” is flatly contradicted by a far more relevant study, on which Dr. Ghose relied, relating to hotel listing on search results pages.⁵⁸⁴ The authors of this study described a meta-analysis of 50 experiments, which “shows there is insufficient evidence of adverse effects of increased choices.” The same study “confirms that when consumers have a well-defined preference prior to choice, they consider it better to have more options.”⁵⁸⁵ According to Dr. Ghose, consumers who search for 1-800 Contacts trademark terms have a well-defined preference (“navigational intent”), and thus would benefit from more options in the form of competitors’ ads.

⁵⁸⁰ *Id.* at 3930 (emphasis added).

⁵⁸¹ *Id.* at 4014-4020.

⁵⁸² *Id.* at 4022-4024.

⁵⁸³ *Id.* at 4017-4019.

⁵⁸⁴ *Id.* at 4027-4029 (discussing CX1941, Bing Pan, Lixuan Zhan, and Rob Law, *The Complex Matter of Online Hotel Choice*, Cornell Hospitality Quarterly 54(1) 74 (2013)).

⁵⁸⁵ Ghose, Tr. 4030 (quoting CX1941 at 002, Bing Pan, Lixuan Zhan, and Rob Law, *The Complex Matter of Online Hotel Choice*, Cornell Hospitality Quarterly 54(1) 74, 75 (2013)).

Finally, Dr. Ghose’s third proffered opinion should be disregarded entirely. Dr. Ghose has no basis to opine that the Bidding Agreements had “limited effects on consumers and advertisers” because he did not conduct *any* analysis of the counterfactual world that would have existed but for the Bidding Agreements. Indeed, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }⁵⁸⁶

Dr. Ghose’s failure to conduct any analysis of the counterfactual world renders entirely unreliable his assertion that the Bidding Agreements had “limited effects.” Not only did Dr. Ghose fail to conduct any analysis of how 1-800 Contacts’ rivals would have fared but for the Bidding Agreements, he conducted no analysis of whether the Bidding Agreements harmed consumers by denying them information about competing sellers of contact lenses⁵⁸⁷ and the lower prices offered by those sellers.⁵⁸⁸

Moreover, Dr. Ghose’s view that competitive ads were “not very relevant” to consumers searching for 1-800 Contacts formed a basis for his conclusion that the Bidding Agreements had

⁵⁸⁶ Ghose, Tr. 4065-4068, *in camera*.

⁵⁸⁷ *Id.* at 4071 (“I haven’t done that analysis. You’re asking me if I’ve done the analysis about harmful effects. I haven’t done that analysis.”).

⁵⁸⁸ *Id.* at 4072.

“limited effects on consumers and advertisers.”⁵⁸⁹ As explained above, Dr. Ghose’s opinion regarding the relevance of competing ads must be disregarded, which further undermines Dr. Ghose’s opinion regarding the “limited effects” of the Bidding Agreements.

For all of these reasons, Dr. Ghose’s expert report and related testimony should be disregarded by the Court.

6. Kevin Murphy

The testimony and expert report of Kevin Murphy, 1-800 Contacts’ second economic expert, should be rejected. Dr. Murphy’s expert testimony is neither credible nor relevant to the issues in this case.⁵⁹⁰ Dr. Murphy avers that trademarks are critical for defining the relevant market and understanding the competitive effects of 1-800 Contacts’ conduct.⁵⁹¹ Because 1-800 Contacts uses its trademark to compete against ECPs, he concludes that the relevant product market must include ECPs.⁵⁹² However, Dr. Murphy could not offer a single economic or legal authority to support his concocted theory that a party’s use of its trademarks broadens the relevant market.⁵⁹³ Indeed, using conventional tools and widely-accepted principles of market

⁵⁸⁹ *Id.* at 3953-3955; *see id.* at 3995-3996. *See also id.* at 3960 (suggesting that the Bidding Agreements might have helped consumers because agreements that suppress “ads that are not very relevant . . . can be *helpful* for consumers.”)

⁵⁹⁰ Further, Dr. Murphy does not rebut Professor Evans’ analysis and conclusions that (i) the bidding agreements had a direct harmful effect on competition in auctions to present ads on 1-800 Contacts brand queries, and (ii) the bidding agreements harmed competition for online retail sales of contact lenses and resulted in consumers paying higher prices. Standing alone, these un rebutted conclusions are sufficient to find liability based on harms to search engines and online contact lens consumer. CX8009 at 007-009 (¶¶ 5-6) (Evans Rebuttal Expert Report) (listing 12 un rebutted analyses and the conclusion that follow).

⁵⁹¹ Murphy Tr. 4090-4091; *id.* at 4116.

⁵⁹² *Id.* at 4152 -4155.

⁵⁹³ CX9048 (Murphy Dep., at 156-157; 255-256) (“Q. Are you familiar with any economic articles that discuss how trademarks affect market definition? . . . I can’t think of an article that would be helpful in that regard.”).

definition, Dr. Murphy *agrees* with Professor Evans that the relevant market is the online sale of contact lenses.⁵⁹⁴

Notwithstanding the centrality of trademarks to his conclusions, Dr. Murphy admits that the effect of competition on a firm's incentive to develop a brand is ambiguous,⁵⁹⁵ and concedes that he did not measure the effect of more advertising competition on 1-800 Contacts' branding incentives in this case.⁵⁹⁶ Thus, Dr. Murphy offers no analysis to support his conclusion that the appearance of rival ads would diminish 1-800 Contacts' incentives to invest in its brand.

Dr. Murphy's opinion that the Bidding Agreements are not competitively significant also lacks any basis in fact.⁵⁹⁷ He relies on two charts showing that a set of non-settling retailers obtained three percent or less of their impressions and clicks from ads placed in response to bids on 1-800 trademarks.⁵⁹⁸ Yet, he concedes that both those charts misclassify impressions by under-counting impressions on 1-800 Contacts trademarks, while over-counting impressions on generic terms, and that correction of the misclassification would "change the numbers."⁵⁹⁹

⁵⁹⁴ Murphy, Tr. 4169 ("If I use the SSNIP test, I could say 1-800 and online sellers is a relevant market.).

⁵⁹⁵ CX9048 (Murphy Dep. at 45).

⁵⁹⁶ CX9048 (Murphy Dep. at 47-52): ("I haven't gone down and say in the but-for world this is how things would be different and this is how much it was changed, I haven't gone through all those steps.").

⁵⁹⁷ Murphy, Tr. 4194-4195, *in camera*

⁵⁹⁸ Dr. Murphy also does not refute Professor Evans' finding that this group of ad impressions account for somewhere between { } of 1-800 Contacts' new online customers. Evans, Tr. 1601, *in camera*; CX8006 at 087 (¶ 192) (Evans Expert Report).

⁵⁹⁹ Murphy, Tr. 4190-4191; *in camera id.* at 4188, *in camera*.

Further, he admits that his report contains no chart showing “how many impressions are showing up in response to a specific user query.”⁶⁰⁰

Dr. Murphy also asserts that 1-800 Contacts’ Bidding Agreements had no significant effect on competition because changes in the number of Bidding Agreements over time seemingly had little effect on 1-800 Contacts’ gross margin.⁶⁰¹ However, Dr. Murphy ignores the fact that not all Bidding Agreements would have the same effect on competition.⁶⁰² Additionally, Dr. Murphy notes that other factors could confound a time-series analysis of the type he used.⁶⁰³ Yet, Dr. Murphy concedes he did nothing to control for these other factors.⁶⁰⁴

In his testimony, Dr. Murphy opines that “when you have more ads showing up, it makes it harder for those who are looking for a particular trademark to identify the sellers and get to the place they ultimately were trying to get to.”⁶⁰⁵ Yet, he offers no economic authority or analysis of his own for the radical proposition that truthful, informative advertising is likely to harm

⁶⁰⁰ *Id.* at 4127; *see* CX8009 at 010-011 (¶¶ 8-9) (Evans Rebuttal Expert Report) (listing five analyses and ten tables in the Murphy Report that misclassify ad impression).

⁶⁰¹ Murphy, Tr. 4197-4200, *in camera*.

⁶⁰² Evans, Tr. 1661-1662, *in camera*. In fact, when Dr. Evans repeated it using the number of ad impressions on queries for 1-800 Contacts brand terms, he found “a statistically significant decrease in 1-800 Contacts’ margins.” CX8009 at 095 (¶ 180) (Evans Rebuttal Expert Report).

⁶⁰³ CX9048 (Murphy, Dep. at 225-231).

⁶⁰⁴ Murphy, Tr. 4272, *in camera* { [REDACTED] }. Further, Dr. Murphy’s abstract “model” of settlements economics rests on incorrect assumptions, and, by design, does not account of the harms to consumers from the reduction in advertising competition that Complaint Counsel’s experts proved in their empirical analysis of actual search advertising data. CX8009 at 044-049 (¶¶ 74-79) (Evans Rebuttal Expert Report).

⁶⁰⁵ Murphy, Tr. 4125.

consumers.⁶⁰⁶ Instead, Dr. Murphy misuses empirical work by Complaint Counsel’s expert Professor Athey as a foil purporting to show that “consumers are less successful at completing a sales transaction when those other ads are present than when they’re not.”⁶⁰⁷ Dr. Murphy’s “empirical analysis” uses flawed data, and does not support his opinion at all. Specifically, he combines a prediction from Professor Athey’s model about the expected number of clicks that ad by 1-800 Contacts and its rivals would receive in a world without settlement agreements with an assumption that he alone makes about the conversion rate (essentially the sales those clicks would generate). In his deposition, Dr. Murphy conceded that he did not know whether the true conversion rate would be higher or lower than what he assumed, and that he did not do anything to assess whether it was higher or lower.⁶⁰⁸

Faced with Complaint Counsel’s evidence of lower prices in search auctions and degraded quality of search results with the Bidding Agreements, Dr. Murphy presents no analysis at all concerning the effect of the Bidding Agreements on search engines. Also, he wrongly ignores search engines’ incentives to display relevant ads to users while avoiding confusion, distraction, or unwelcome clutter.⁶⁰⁹

Dr. Murphy’s opinions on other issues similarly lack any factual basis. For example, his market definition test ignores key information, which undermines his conclusions;⁶¹⁰ and he

⁶⁰⁶ CX8009 at 038, 100 (¶¶ 60, 191) (Evans Rebuttal Expert Report).

⁶⁰⁷ Murphy, Tr. 4127.

⁶⁰⁸ RX9048 (Murphy, Dep. at 262-268).

⁶⁰⁹ CX8009 at 006-008, 015-016 (¶¶ 3, 5, 17-18) (Evans Rebuttal Expert Report).

⁶¹⁰ Murphy, Tr. 4328 (for example, failing to determine diversion ratios for consumers switching between 1-800 Contacts and ECPs).

testified that several firms illustrated ease of entry, but was unaware that these firms had very low market shares.⁶¹¹

For all of these reasons, Dr. Murphy's expert report and related testimony should be disregarded by the Court.

* * * * *

In sum, although 1-800 Contacts has served up numerous experts, not a single one of them has disputed the significant volume of evidence proffered by Complaint Counsel, which shows that 1-800 Contacts' Bidding Agreements have directly harmed competition for the online sale of contact lenses, and that the Bidding Agreements are not justified by any plausible or cognizable procompetitive benefit or efficiency.

V. REMEDY

Complaint Counsel has proven that 1-800 Contacts violated Section 5 of the FTC Act by agreeing with rival sellers of contact lenses to restrain price competition and to restrain advertising. When a violation of Section 5 is established, the Court is empowered to enter an appropriate order to prevent a recurrence of the violation. *Polygram I*, 136 F.T.C. at 379 (discussing Commission order also remedying price and advertising restraints). The Court has wide discretion in its choice of remedy. *FTC v. National Lead Co.*, 352 U.S. 419, 428 (197); *Jacob Siegel & Co. v. FTC*, 327 U.S. 608, 611 (1946). The Court "is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past," but "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

⁶¹¹ Murphy, Tr. 4262-4266, *in camera*.

Consistent with this precedent, Complaint Counsel submits to the Court a proposed Order, *infra*, in Section VII. This proposed Order would restore and maintain competition, while permitting 1-800 Contacts to safeguard its legitimate interests under trademark law. If entered by the Court:

Paragraph II.A. enjoins 1-800 Contacts from agreeing with competitors to restrain competition in the purchase of advertising through auction, including by requiring a competitor to forbear from bidding on any keyword, or requiring a competitor to implement any negative keyword.

Paragraph II.B. enjoins 1-800 Contacts from agreeing with competitors to place any limitations on search advertising, subject to certain enumerated exceptions. First, the parties may agree that the *text* of a search advertisement shall not include (i) a claim that is false or deceptive; (ii) a representation that 1-800 Contacts is the source of the goods or services advertised therein; (iii) a representation that the seller is affiliated with or sponsored by 1-800 Contacts; or (iv) a name that is identical to or confusingly similar to any trademark owned by 1-800 Contacts.

Paragraph II.B.1. Second, the parties may agree that the advertisement shall clearly identify the seller. Paragraph II.B.2. These provisions afford 1-800 Contacts protection against trademark-related confusion, and is consistent with the remedy favored by trademark courts.

Paragraph II.C. enjoins 1-800 Contacts from agreeing with competitors to restrict or suppress truthful, non-deceptive, and non-infringing advertising. This provision is targeted at all forms of advertising, including search advertising. This provision is similar to a provision in the Commission's order in *Polygram*, 136 F.T.C. 310 (truthful and non-deceptive), but adds a

reference to advertising that may infringe a trademark. (Trademark infringement was not an issue in *Polygram*.)

Paragraph II.D. enjoins 1-800 Contacts from agreeing with competitors to fix or raise prices or price levels, and from allocating or dividing markets or customers.

1-800 Contacts has argued throughout this litigation that, due to certain complexities, a simple prohibition on false, deceptive and non-infringing search advertising would be difficult to abide by and difficult to enforce; and that the parties to a trademark dispute arising in connection with search advertising require greater specificity. The proposed order addresses this concern.

These order provisions permit 1-800 Contacts and its rivals to pursue litigation (Paragraph II.B) or to settle any trademark dispute under terms that reasonably protect the parties' trademark rights. These order provisions prohibit the overbroad settlement terms at issue in this litigation.

VI. CONCLUSION

Because the evidence establishes that 1-800 Contacts has violated Section 5 of the FTC Act, as alleged in the Complaint, this Court should enter the proposed Order to restore competition and ensure that 1-800 Contacts cannot continue to engage in anticompetitive conduct.

VII. PROPOSED ORDER

- I. “Search Engine” means a computer program, available to the public, that enables Persons to search for and identify websites and sources of information on the World Wide Web.
- J. “Search Engine Results Page” means a web page displayed by a Search Engine in response to a user query.
- K. “Seller” means any Person that markets or sells any contact lens product and includes its employees, agents, and representatives.
- L. “Trademark Infringement Claim” means a lawsuit threatened or filed in the United States of America purporting to enforce rights under a trademark.

II.

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

- A. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on the ability of a Seller to participate in a Search Advertising auction, or to provide instructions to a Search Engine regarding the nature and extent of a Seller’s participation, including but not limited to, prohibiting or restricting the use of a Keyword or requiring the use of a Negative Keyword.
- B. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place a limitation on any Search Advertising; *provided, however,* that nothing in this Paragraph II.B. shall prohibit Respondent from entering into or complying with a written agreement providing that a:
 - 1. Seller shall not include in the text of any Search Advertising (a) a false or deceptive claim, (b) a representation that Respondent is the source of the goods or services advertised therein, (c) a representation that the Seller is affiliated with or sponsored by Respondent, or (d) a name that is identical to or confusingly similar to any trademark owned by Respondent; or
 - 2. Seller’s Search Advertising shall clearly identify the Seller (for the avoidance of doubt, including the name of the Seller in the URL, website address, or domain name shall constitute clear identification of the Seller); and

Provided further that nothing in this Paragraph II.B. shall prohibit Respondent from (a) initiating or prosecuting a lawsuit, (b) communicating to any Seller Respondent’s

intention to initiate or prosecute a lawsuit, or (c) implementing or enforcing the order entered by any court of law at the conclusion of a contested litigation.

- C. Entering Into any combination, conspiracy, or agreement with a Seller to prohibit, restrict, regulate, or otherwise place any limitation on truthful, non-deceptive, and non-infringing advertising or promotion;
- D. Entering Into any combination, conspiracy, or agreement with a Seller to:
 - 1. Fix, raise, or stabilize prices or price levels, or engage in any other pricing action; or
 - 2. Allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories.
- E. Attempting to engage in any conduct that is prohibited by Paragraph II. of this Order.

III.

IT IS FURTHER ORDERED that Respondent shall:

- A. Cease and desist from enforcing or attempting to enforce an existing agreement or court order that imposes a condition on a Seller that is not consistent with Paragraph II. of this Order.
- B. Within sixty (60) days after the date this Order is issued, take whatever action is necessary to vacate or nullify any court order or agreement that imposes a condition on a Seller that is not consistent with Paragraph II. of this Order.

IV.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days from the date this Order is issued:
 - 1. Distribute by first-class mail, return receipt requested or by electronic mail with return confirmation, a copy of this Order and the Complaint to each of its officers, directors, and managers;
 - 2. Send by first-class mail, return receipt requested or by electronic mail with return confirmation, on Respondent's official letterhead, the statement attached to this Order as Appendix A to each Person:

- (a) To whom Respondent communicated regarding that Person's involvement as a plaintiff or defendant in any actual or potential Trademark Infringement Claim; and
 - (b) With whom Respondent entered into any agreement prohibited by Paragraph II. of this Order.
- B. For a period of five (5) years from the date this Order is issued:
 - 1. Provide to Commission staff a copy of any Communication by Respondent with any Person regarding that Person's suspected trademark infringement no later than ten (10) days after Communicating with such Person;
 - 2. Send by first-class mail, return receipt requested or by electronic mail with return confirmation, on Respondent's official letterhead, the statement attached to this Order as Appendix A to each Person referenced in Paragraph IV.B.1. of this Order no later than the time Respondent initially Communicates with such Person;
 - 3. Provide to Commission staff a copy of any agreement (or description, if the agreement is not in writing) that Respondent enters into with a Seller relating to Search Advertising, no later than thirty (30) days after it enters into such agreement; and
 - 4. Distribute by first-class mail, return receipt requested or by electronic mail with return confirmation, a copy of this Order and the Complaint to each Person who becomes an officer, director, or manager and who did not previously receive a copy of this Order and Complaint, no later than ten (10) days after the date such Person assumes his or her position.
- C. Retain documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph IV.

V.

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

- A. No later than ninety (90) days from the date this Order is issued, and
- B. One (1) year from the date this Order is issued and annually thereafter for four (4) years on the anniversary of the date on which this Order is issued, and at such other times as the Commission may request.

VI.

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

- A. Any proposed dissolution of Respondent;
- B. Any proposed acquisition, merger, or consolidation of Respondent; or
- C. Any other change in Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VII.

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

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and
- B. To interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date it is issued.

By the Commission

Donald S. Clark
Secretary

SEAL

ISSUED:

Appendix A

[Letterhead of 1-800 Contacts]

[Name and Address of the Recipient]

Dear (Recipient):

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

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

1. Enter into, enforce, or attempt to enforce any agreement between or among 1-800 Contacts and a contact lens seller to restrict the ability of the seller to participate in any internet search advertising auction, including restricting the use of keywords or requiring the use of negative keywords;
2. Enter into, enforce, or attempt to enforce any agreement with a contact lens seller that otherwise places any limitation on any search advertising; or
3. Enter into, enforce, or attempt to enforce any agreement with a contact lens seller to allocate or divide markets or customers; or to raise, fix, maintain, or stabilize prices or price levels.

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

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

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

Dated: June 22, 2017

Respectfully Submitted,

/s/ Daniel Matheson

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

Federal Trade Commission
Bureau of Competition
Counsel Supporting the Complaint

EXHIBIT A

LIST OF ONLINE RETAILERS

In addition to **1-800 Contacts**, the following are the other major online retailers of contact lenses in the United States:¹

1. **Vision Direct.** Vision Direct (owned by Walgreens²), a “pure play” online retailer, is the { } online contact lens retailer. It had { } million in sales in 2015, representing approximately { } percent of the online contact lens market.
2. **Lens.com.** Lens.com, a “pure play” online retailer, had { } million in sales in 2015, representing approximately { } percent of the market.
3. **Walgreens.** Walgreens, which sells contact lenses only online, had { } million in sales in 2015 through its website, walgreens.com, representing approximately { } percent of the market.
4. **Lens Discounters.** LensDiscounters.com, a “pure play” online retailer, had { } million in sales in 2015, representing approximately { } percent of the market.
5. **AC Lens.** Arlington Contact Lens Service Inc., d/b/a/ AC Lens, a “pure play” online retailer, had { } million in sales in 2015, representing approximately { } percent of the market.
6. **Walmart.** From approximately 2008 to 2012, Walmart and 1-800 Contacts operated in an alliance and jointly set contact lens prices available in Walmart stores, on Walmart.com, and on 1800contacts.com. After the alliance ended, Walmart began to sell contacts on walmartcontacts.com, which is now managed by AC Lens. In 2015, Walmart had { } million in sales, representing approximately { } percent of the market.
7. **Coastal.** Coastal, a “pure play” online retailer, had { } million in sales in 2015, representing approximately { } percent of the market.
8. **Web Eye Care.** Web Eye Care, a “pure play” online retailer, had { } million in sales in 2015, representing approximately { } percent of the market.
9. **EZ Contacts.** EZ Contacts USA, Inc., a “pure play” online retailer, had { } million in sales in 2015, representing approximately { } percent of the market.
10. **Lensfast.** Lensfast, a “pure play” online retailer, had { } million in sales in 2015, representing { } percent of the market.
11. **Lens Direct.** Lens Direct, a “pure play” online retailer, had { } million in sales in 2015, representing { } percent of the market.

¹ These numbers are taken from CX8006 (Evans Report) ¶ 54, Table 1.

² { }

Other online retailers collectively accounted for some {█} million in sales in 2015, representing approximately {█} percent of the online market. These sellers include: **Contact Lens King, Empire Vision (Visionworks), Lenses For Less, Replace My Contacts, and Standard Optical.**

In addition, there is at least one retailer – **Memorial Eye** – which exited the online contact lens market as a result of the challenged Bidding Agreements.

EXHIBIT B

Sample Query Search for “contact lenses”

contact lenses - Google Se... x +

https://www.google.com/#q=contact+lenses&

Google contact lenses

All Shopping News Images Maps More Settings Tools

About 30,700,000 results (0.44 seconds)

Contact Lenses \$14.99/Box - New Customers, 20% Off - coastal.com
www.coastal.com/Rx_Contacts/Online
 Find the Exact Brand Your Doctor Prescribed at Our Lowest Price Match Guarantee!
 In-house Opticians - Free Shipping & Returns
 Types: Daily Contact Lenses, Colored Contacts...
 Shop Monthly Contacts Shop Daily Contacts
 Contacts Start @14.99/Box Shop Weekly Contacts

1800CONTACTS - Lowest Prices - We Beat Any Price On Contacts
www.1800contacts.com/Contact-Lenses
 4.8 ★★★★★ rating for 1800contacts.com
 Free Shipping & No Hidden Fees. Crazy Fast Delivery. Order Now!
 24/7 Customer Service - Satisfaction Guarantee - Free Lens Replacement - Easy Ordering
 Ratings: Shipping 10/10 - Website 10/10 - Prices 10/10 - Customer service 9.5/10 - Selection 9.5/10
 Air Optix Contacts - Renew Your Rx Online - \$10 Off Coupon - All Students Get 10% Off

Contact Lenses up to 70% Off - All Major Brands In Stock - lens.com
www.lens.com/Contact-Lenses (800) 536-7266
 Find All the Major Contact Lens Brands at Unbeatable Prices. Shop Today!
 Avoid Multiple Dr. Visits - 100% Money Back Guarantee - 1-Click Reordering
 Excellent Shopping Experience - Google Trusted Stores
 Biofinity Contacts - All Brands Up to 70% Off - Dailies Total 1 - Biotrue ONEday

Contact Lenses at 1-800 CONTACTS | World's Largest Contact Lens ...
<https://www.1800contacts.com/>
 1-800 CONTACTS - Free Shipping, Guaranteed Customer Service. Order Contact Lenses Online for less. We Deliver. You Save.™

Contact Lenses | Buy Prescription Contacts | Lens.com
<https://www.lens.com/contact-lenses/>
 By purchasing your prescription contact lenses from Lens.com you'll enjoy fast delivery, our lowest price guarantee, & hassle-free ordering.

Buy Contact Lenses | Affordable Contact Lenses - LensDirect
<https://www.lensdirect.com/contact-lenses>
 Buy Contact Lenses at LensDirect. Americas leading provider of affordable contact lenses & eyewear. Free Shipping on orders over \$49. Price Match ...

Discount Contact Lenses - Order Contacts Online and Save Money ...
<https://www.coastal.com/contact-lenses>
 Order your contact lenses online and get Free Shipping, Award Winning Customer Service, and our Price Match Guarantee. Shop for Discount Contacts from top ...

Contact Lenses From Walmart Contacts
<https://www.walmartcontacts.com/>
 Buy contact lenses online from Walmart Contacts for fast, convenient service. We carry the widest selection of lenses and offer expedited shipping for all your ...
 Acuvue - Ordering Contact Lenses - ACUVUE OASYS for ... : Air Optix

Shop for contact lenses on Google Sponsored









			
Biofinity Contact Lenses \$14.94 Lens.com	Acuvue Oasys Contacts 6 Months \$19.94 EzContacts.com Special offer	Air Optix Aqua Contact Lenses \$15.03 Lens.com	DAILIES AquaComfort ... \$31.99 EzContacts.com Special offer
			
1-Day Acuvue Moist 30 pack \$33.00 Walgreens.com Special offer	Acuvue Oasys for Astigmatism \$23.20 OptiContac... Free shipping	Air Optix Night & Day Aqua ... \$30.74 Lens.com	Air Optix Aqua Multifocal ... \$32.94 Lens.com

EXHIBIT C

1-800 CONTACTS' BIDDING AGREEMENTS WITH COMPETITORS¹

Competitor	Agreement Date	Agreement Exhibit No.
Vision Direct	June 2004 May 2009	CX0311 CX0314
Coastal	October 2004	CX0310
EZ Contacts	May 2008	CX0313
Lensfast	December 2009	CX0315
AC Lens	March 2010	RX0028
Lenses for Less	March 2010	CX0320
Contact Lens King	March 2010	CX0323
Empire Vision	May 2010	CX0319
Tram Data (ReplaceMyContacts)	May 2010	CX0321
Walgreens	June 2010	CX0322
Web Eye Care	September 2010	CX0324
Standard Optical	February 2011	RX0408
Memorial Eye	November 2013	CX0326

¹ This list does not include 1-800 Contacts' Bidding Agreement with Luxottica, CX0331 (Dec. 23, 2013, Contact Lens Sourcing and Services Agreement between Luxottica and 1-800 Contacts), Section 17.10-11.

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2017, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

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 1-800 Contacts, Inc.

Dated: June 22, 2017

By: /s/ Daniel J. Matheson
Attorney

CERTIFICATE FOR ELECTRONIC FILING

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

June 22, 2017

By: /s/ Daniel J. Matheson
Attorney