

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



**In the Matter of**

**1-800 CONTACTS, INC.,  
a corporation,**

**Respondent.**

**Docket No. 9372**

**RESPONDENT 1-800 CONTACTS, INC.'S [PROPOSED]  
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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REFERENCES TO THE RECORD

References to the record are made using the following citation forms and abbreviations:

CX# — Complaint Counsel Exhibit

RX# — Respondent Exhibit

Name of Witness, Tr. XX — Trial Testimony

CX/RX# (Name of Witness, Dep. at XX) — Deposition Testimony

CX/RX# (Name of Witness, IHT at XX) — Investigational Hearing Testimony

Cmplt. ¶ X — Complaint

**{bold}** — In Camera Material

**I. Contact Lenses – Industry Background**

**A. Contact Lenses Are A Prescription-Only Medical Device**

1. Around 40 million consumers use contact lenses. (CX 8006-020; CX 429-029).
2. A consumer interested in wearing contact lenses must go to an optometrist or ophthalmologist for a contact lens prescription. (Bethers, Tr. 3511-12; CX 8006-020).
3. Contact lenses originally were made of a rigid material and required an eye care professional to custom fit each pair. (RX 569-005).
4. Beginning in the late 1980s, contact lens manufacturers began to sell disposable lenses that were designed to be replaced on a daily, weekly, or monthly basis. (RX 569-0009).
5. Technological improvements in manufacturing contact lenses eliminated the need for an ECP to fit each pair of contact lenses on the prescription has been finalized at the end of the contact lens fitting process. (RX 569-0009).
6. The evolution in contact lens technology now allows the sale of contact lenses to be unbundled from the fitting exam by an optometrist or ophthalmologist. (RX 569-0009).
7. Although not required in all states, a contact lens prescription will almost invariably include a brand name because different brands of contact lenses that have the same prescription will produce different fits for a consumer. (RX 569-0009, n.15).
8. The replacement contact lenses that consumers purchase, pursuant to a prescription that specifies a brand, will be identical, regardless of whether the patient receives the lens from his or her prescribing optometrist/ophthalmologist or from another seller. (RX 569-0009).
9. Contact lens prescriptions typically expire within one or two years. (Bethers, Tr. 3601; CX 8006-021). In most states, a contact lens prescription expires in one year. (Bethers, Tr. 3601; CX 8006-021). In seven states, a contact lens prescription expires in two years. (Bethers, Tr. 3601; CX 8006-021).

10. Because of the expiration of a contact lens prescription, a contact lens wearer must visit an optometrist or ophthalmologist at least once every year (or every two years in seven states) to renew their prescription or obtain a new prescription. (Bethers, Tr. 3601).

***B. Contact Lens Manufacturers***

11. There are four major manufacturers of contact lenses that account for about 95 percent of the U.S. market: Johnson & Johnson, Alcon, CooperVision, and Bausch & Lomb. (Clarkson, Tr. 183; RX 739-0085).

12. In the United States, the total sales of contact lens at retail in 2015 was estimated to be about \$4.7 billion. (Bethers, Tr. 3552; RX 428-0006).

13. In the United States, total sales of contact lens at retail grew about 4-5 percent annually from 2001 through 2015. (RX 428-0006; RX 904-0038).

***C. ECPs Prescribe And Sell Contact Lenses***

14. There are approximately 40,000 optometrists and 18,000 ophthalmologists in the United States. (Bethers, Tr. 3509-10).

15. Optometrists and ophthalmologists are commonly referred to as eye care practitioners or “ECPs.” (RX 569-0005).

16. ECPs operate in independent practices, with optical retail chains, and in conjunction with mass merchants and club stores. (Bethers, Tr. 3509-11; RX 739-0015-0016).

17. There are about 16,000 independent ECP practices in the United States. (Bethers, Tr. 3509-10 & 3546).

18. Independent ECPs represent approximately 60 percent of all contact lens prescriptions. (Bethers, Tr. 3543).

19. ECPs are permitted to sell the contact lenses that they prescribe. (Coon, Tr. 3685; Bethers, Tr. 3510; RX 569-0013).

20. ECPs have a unique position in the healthcare industry in that they are healthcare providers and are permitted to sell the product that they prescribe. (CX 9029 (Bethers, Dep. at 111); CX 9017 (Blackwood, Dep. at 101)).

21. ECPs have a competitive advantage over non-ECP retailers because ECPs write contact lens prescriptions and sell the contact lenses in the same location. (Alovis, Tr. 1026-27; CX 9037 (Owens, Dep. at 48)).

22. ECPs have a competitive advantage over non-ECP retailers as a result of preferential treatment from contact lens manufacturers. (Bethers, Tr. 3545-46). Because independent ECPs write contact lens prescriptions, manufacturers independent ECPs with assistance to compete in the retail sale of contact lenses that includes advantageous wholesale pricing, growth incentives, and rebates only available through ECPs. (Clarkson, Tr. 296-97; Bethers, Tr. 3545-46).

***D. Contacts Lens Retailers***

23. There are tens of thousands of locations where contact lens consumers can go to purchase contact lenses. (Bethers, Tr. 3509). There are also a large number of online retailers that sell contact lenses. (Bethers, Tr. 3538-41; RX 739-0017).

24. There are four different types of contact lens retailers: (1) independent ECPs; (2) optical retail chains; (3) mass merchants and club stores; and (4) “pure play” online retailers. (Bethers, Tr. 3509; RX 739-0015-0017).

25. Independent ECPs, optical retail chains, and mass merchants and club stores have physical retail locations where consumers can purchase contact lenses. (Bethers, Tr. 3512, 3522, & 3526-28).

26. Many independent ECPs, optical retail chains, and mass merchants and club stores also have online stores where consumers can purchase contact lenses. (Bethers, Tr. 3512-19, 3522, 3529, 3525-26 & 3530; CX 8007-042).

**II. 1-800 Contacts**

**A. *1-800 Contacts Was Founded In 1992 To Provide Better Service And Lower Prices Than ECPs***

27. Jonathan Coon (“Coon”) started the business that became 1-800 Contacts from his college dorm room in February 1992. (Coon, Tr. 2649).

28. Coon was CEO of 1-800 Contacts from its inception in February 1992 until about January 2014. (Coon, Tr. 2649).

29. Coon came up with the idea of starting the business that became 1-800 Contacts after he tried to purchase contact lenses for the first time from a store called Sixty Minute Eyewear. (Coon, Tr. 2649-50).

30. Coon was a college student at the time, had no money, and had to walk to Sixty Minute Eyewear in order to purchase contact lenses. (Coon, Tr. 2649-50).

31. Coon learned that while he could have glasses made in just one hour, he would have to make two trips and wait a week in order to get contact lenses. (Coon, Tr. 2649-50).

32. It did not make any sense to Coon that he could have glasses made in one hour but he would have to make multiple trips and wait a week to get contact lenses. (Coon, Tr. 2649-50).

33. Coon believed that the process of buying contact lenses was inconvenient, the service was not very good, and the prices were high. (Coon, Tr. 2650).

34. Coon believed that there was a good opportunity for a mail order business to provide contact lenses at lower prices and with better service than ECPs. (Coon, Tr. 2650-51).

35. Coon began his own mail order contact lens business called Eye Supply from his college dorm room in February 1992. (Coon, Tr. 2651).

36. Coon started the business with \$50. (Coon, Tr. 2651).

37. Coon used that \$50 to print 1,000 fliers (a nickel each) that he distributed around nearby college dorms. (Coon, Tr. 2651-52).

38. Eye Supply initially carried just four products that it sold exclusively to college students living in nearby dorms on campus. (Coon, Tr. 2652).

39. Eye Supply initially generated about \$200 per week in income. (Coon, Tr. 2652-53).

40. After about a year of doing business under the name Eye Supply, Coon obtained the phone number for 1-800 Lens Now. (Coon, Tr. 2653).

41. Coon changed the name of the business to 1-800 Lens Now and began Valpak and other print advertising under that name. (Coon, Tr. 2654).

42. In the first few years of 1-800 Lens Now, Coon became acquainted with John Nichols, who had started a mail order contact lens business called Discount Lens Club in Santa Monica, California. (Coon, Tr. 2654 55).

43. Coon and Nichols combined their respective businesses and ran them out of a rented house in Orem, Utah. (Coon, Tr. 2655-56).

44. Coon and Nichols set up eight cubicles in the living room to serve as the call center and used the garage and basement for inventory and distribution. (Coon, Tr. 2657-58).

45. After about a year of doing business under the name 1-800 Lens Now, Coon and Nichols obtained the 1-800 Contacts phone number for approximately \$163,500 in or about June 1995. (Coon, Tr. 2658-60).



46. Coon and Nichols paid \$10,000 upfront for the 1-800 Contacts phone number, which was all the money they had in the bank at that time, and agreed to pay the remainder in monthly installments. (Coon, Tr. 2659-60).

47. Coon considered the purchase of the 1-800 Contacts phone number to be a huge investment because the purchase price required all the cash that the company had in the bank and required future monthly payments representing approximately 10 percent of the company's recent total monthly revenue. (Coon, Tr. 2660).

48. After obtaining the rights to the 1-800 Contacts phone number, Coon and Nichols changed the name of the business to 1-800 Contacts. (Coon, Tr. 2661).

49. The company activated the 1-800 Contacts phone number on or about July 1, 1995. (Coon, Tr. 2661). 1-800 Contacts' sales more than doubled the first month after activating the 1-800 Contacts phone number, growing from \$35,000 in June 1995 to \$78,000 in July 1995. (Coon, Tr. 2661-62).

50. The goal in acquiring rights to the 1-800 Contacts phone number and name was to increase the return on advertising investments because it would be a memorable name and number that customers would not have to look up when they wanted to order or reorder. (Coon, Tr. 2662-63).

51. 1-800 Contacts began Valpak, free-standing inserts, and other print advertising under the 1-800 Contacts name in or about September 1995. (Coon, Tr. 2661 & 2663-64).

52. Once the company began advertising the 1-800 Contacts name and phone number, it saw a 20-25 percent increase in customer acquisition as well as customer retention. (Coon, Tr. 2662-63).

53. The 1-800 Contacts website was launched in or about 1996. (Coon, Tr. 2664).

54. 1-800 Contacts decided to raise capital for television advertising through an initial public offering. (Coon, Tr. 2665). 1-800 Contacts completed its initial public offering, listing on NASDAQ under the symbol CTAC, in or about February 1998. (Coon, Tr. 2665).

55. 1-800 Contacts began advertising on television in or about June 1998. (Coon, Tr. 2666).

56. 1-800 Contacts' television advertising had a huge and immediate impact on its business. (Coon, Tr. 2667).

57. 1-800 Contacts' business grew approximately 50 percent in just a couple months after it started doing television advertising. (Coon, Tr. 2667).

58. In order to meet the substantial increase in demand that ensued after the start of 1-800 Contacts' television advertising, 1-800 Contacts hired many new employees, developed a new order management system, increased its inventory, and opened a brand new distribution center. (Coon, Tr. 2667-68).

59. 1-800 Contacts opened a new distribution center in 1999 that it believed had the largest inventory of contact lenses in terms of the number and variety of SKUs in one location. (Coon, Tr. 2668-69). As a result, 1-800 Contacts began promoting itself as "The World's Largest Contact Lens Store." (Coon, Tr. 2668-69).

60. As a result of having the largest inventory of contact lenses, 1-800 Contacts was able to deliver orders faster and provide better service. (Coon, Tr. 2668-69).

61. Coon was named National Entrepreneur of the Year by Ernst & Young in 2000. (Coon, Tr. 2670-71).

62. 1-800 Contacts remained a public company from February 1998 to July 2007, when it was acquired by the private equity firm Fenway Partners. (Coon, Tr. 2672). 1-800 Contacts was later acquired in 2012 by Wellpoint/Anthem, and then by the private equity firm TH Lee in

2014. (Coon, Tr. 2677; RX 428-0023). Today, 1-800 Contacts is owned by the private equity firm AEA Investors.

***B. 1-800 Contacts' Principal Competitors Have Always Been The Independent ECPs***

63. 1-800 Contacts has always considered independent ECPs to be its principal competitors. (Bethers, Tr. 3542 (“Our principal competitor is the independent eyecare practice”); Bethers, Tr. 3600-01; Coon, Tr. 2695; CX 9029 (Bethers, Dep. at 149); CX 9017 (Blackwood, Dep. at 99)).

64. 1-800 Contacts' principal competitors are the independent ECPs because every customer must go to an ECP for a prescription, and independent ECPs write the majority of prescriptions. (Bethers, Tr. 3601).

65. 1-800 Contacts' principal competitors are the independent ECPs because independent ECPs always have enjoyed a large percentage of total contact lens sales, despite having generally high prices and poor service. (Coon, Tr. 2710; Bethers Tr. 3601; CX 9027 (Larson, Dep. at 128)).

***1. 1-800 Contacts' Marketing Efforts Have Focused On Attracting Contact Lens Customers Away From ECPs***

66. 1-800 Contacts' marketing efforts have focused on offering consumers a better alternative to buying from their ECP because most people buy contact lenses from their ECP. (Coon, Tr. 2687, 2695).

67. 1-800 Contacts' marketing efforts have focused on consumers buying contact lenses from their ECP because ECPs were and are 1-800 Contacts' principal competitor. (Coon, Tr. 2687; CX 9002 (Craven, IHT at 30, 34-36)).

68. It is very difficult to persuade consumers to buy online a prescription medical device, like contact lenses, that they typically buy from their doctor. (CX 9027 (Larson, Dep. at 65)).

69. 1-800 Contacts' marketing efforts have been tailored to address specific challenges faced by a non-ECP contact lens retailer in attracting customers from ECPs. (Coon, Tr. 2666-67, 2687; Bethers, Tr. 3611).

70. Trust is an important consideration of consumers in selecting a retailer for prescription contact lenses. (CX 9017 (Blackwood, Dep. at 46, 61, 74, 224); CX 9032 (L. Schmidt, Dep. at 237); RX 106-0001; [REDACTED]).

71. Being a medical device that people put on their eyes, trust is very important and consumers have to be convinced that a contact lens retailers is a trusted provider of the contact lenses that an ECP prescribed, and that is more than just a price decision in the consumer's mind. (CX 9017 (Blackwood, Dep. at 46)).

72. As a non-ECP retailer of contact lenses, building trust and credibility among consumers is particularly important to compete with ECPs. (Coon, Tr. 2666).

73. Consumers have to believe that a contact lens retailer is a quality provider, will provide quality service, and will provide the contact lenses that their ECP prescribed. (CX 9017 (Blackwood, Dep. at 61)).

74. A difficult challenge faced by 1-800 Contacts was persuading consumers to purchase a medical device like contact lenses from someone other than their ECP. (Coon, Tr. 2686).

75. ECPs sell the contact lenses that they prescribe, wear white coats, and are generally trusted by their patients. (Coon, Tr. 2666).

76. Some ECPs have told their patients that contact lenses sold online or by mail-order were not as good or were not right for their particular type of eye. (Coon, Tr. 2666-67).

77. Some ECPs have told their patients that if they bought contact lenses elsewhere, then they could not be sure the contact lenses were direct from the manufacturer. (CX 9017 (Blackwood, Dep. at 304)).

78. Some ECPs have told their patients that if they bought contact lens elsewhere, then the ECP would be worried that the patient might get the wrong contact lenses. (CX 9017 (Blackwood, Dep. at 304)).

79. In a consumer survey conducted by 1-800 Contacts in or about 2007, 37 percent of consumers believed that buying contact lenses through the phone, mail, or internet would be risky. (RX 1137-012-014; CX 9027 (Larson, Dep. at 123)).

80. In a consumer survey conducted by 1-800 Contacts in or about 2007, consumers expressed concerns about receiving “generic lenses,” the “wrong Rx,” or “inferior/defective lenses” if they purchased contract lenses from 1-800 Contacts. (RX 1137-012).

81. Consumers had inherent concerns about the reliability of products purchased online, and 1-800 Contacts marketing and customer service personnel went to great lengths to assuage those concerns. (CX 9013 (Aston, Dep. at 185-87)).

82. 1-800 Contacts’ marketing programs have been informed by concerns of contact lens wearers about purchasing from an Internet retailer regarding the legitimacy, trustworthiness, ability to return products, and whether they would be the same contact lenses sold by an ECP. (Bethers, Tr. 3612).

83. Earning the trust of its customers and establishing and maintaining credibility with its customers were immensely important to 1-800 Contacts, particularly since it was in the

business of selling medical devices that its customers would place in their eyes. (CX 9031 (Schmidt, Dep. at 79)).

84. Because trust and credibility with consumers was immensely important to 1-800 Contacts, it was sensitive to anything that might be detrimental to its brand. (CX 9031 (Schmidt, Dep. at 79)).

85. To compete with ECPs, 1-800 Contacts had to create a brand that consumers knew they could trust, given that they were purchasing a medical device. (Coon, Tr. 2687).

86. 1-800 Contacts' advertising message, which it repeated in many of its advertisements, was that the consumer could get the exact same contact lenses delivered to their door for less than they would pay to drive to their ECPs' office and pick them up. (Coon, Tr. 2666-67, 2687; CX 9013 (Aston, Dep. at 182-83); RX 904-0002).

87. During Coon's time period with 1-800 Contacts, the general purpose of the company's television advertising was to build trust and credibility in its brand. (Coon, Tr. 2666).

88. 1-800 Contacts' television advertising has emphasized that ECPs are not the only place where a consumer can buy contact lenses, there is a choice of different contact lens retailers. (CX 9017 (Blackwood, Dep. at 174)).

89. As a non-ECP retailer, 1-800 Contacts also had to overcome consumers' familiarity and preference with the status quo of purchasing contact lenses from their ECPs. (CX 9029 (Bethers, Dep. at 56)).

90. Historically, consumers were accustomed to buying contact lenses from their ECPs. (Coon, Tr. 2686).

91. The majority of consumers still buy contact lenses from their ECP and feel a tremendous amount of pressure to buy contact lenses from their ECP at the time that they receive

their contact lens prescription, even though they often pay a higher price than they could find elsewhere. (CX 9017 (Blackwood, Dep. at 101)).

92. Part of the focus of 1-800 Contacts' advertising has been to change the entrenched behavior of consumers in buying contact lenses from their ECP. (CX 9029 (Bethers, Dep. at 56)).

93. There has been substantial confusion among contact lens wearers about how to purchase contact lenses from 1-800 Contacts instead of their ECP. (Bethers, Tr. 3610).

94. In a consumer survey conducted by 1-800 Contacts in or about 2007, 62 percent of consumers believed they would have to mail, email, or fax their prescription to 1-800 Contacts to purchase contact lenses; and 33 percent of consumers were not sure how they would communicate their prescription information to 1-800 Contacts. (RX 1137-014).

95. Potential customers often did not know where their prescription was because the vast majority of the time a doctor would not give a customer a copy of their prescription. (Bethers, Tr. 3610). In order to address consumers' confusion about how to communicate their contact lens prescription to 1-800 Contacts, one of the most effective advertisements by 1-800 Contacts was a commercial that highlighted: "Don't know where your prescription is? It's right on the box." (Bethers, Tr. 3611).

**2. *1-800 Contacts' Customers Primarily Switch To And From Independent ECPs***

96. Independent ECPs are the primary source of 1-800 Contacts' new customers. (Bethers, Tr. 3547; CX 9017 (Blackwood, Dep. at 156); [REDACTED] [REDACTED] RX 1108-0006).

97. About 80 percent of 1-800 Contacts' new customers have indicated that 1-800 Contacts was the first place they had purchased contact lenses other than from their ECP. (CX 9017 (Blackwood, Dep. at 156-57)).

98. Most of 1-800 Contacts' customers come from independent ECPs, then retail optical chains, and then from mass merchants and club stores. (Bethers, Tr. 3625).

99. In a recent survey of 1-800 Contacts' new customers, 56 percent reported making their last purchase of contact lenses from an independent ECP. (RX 1108-0006). In that survey, the next largest source of 1-800 Contacts' new customers was national optical retail chains: 13 percent of 1-800 Contacts' new customers reported making their last purchase of contact lenses from a national optical retail chain. (RX 1108-0006).

100. The principal source of customers that 1-800 Contacts' targets is by far the independent ECPs. (Bethers, Tr. 3625).

101. 1-800 Contacts views its greatest opportunity as taking customers away from ECPs. (Bethers, Tr. 3601).

102. 1-800 Contacts' competitive focus is to get ECPs' patients to come and buy contact lenses from 1-800 Contacts. (CX 9001 (Bethers, IHT at 78)).

103. Every customer of 1-800 Contacts must go back to an ECP to renew their prescription or obtain a new prescription. (Bethers, Tr. 3626-27). Thus, 1-800 Contacts loses customers that return to their ECP and purchase contact lenses there. (Bethers, Tr. 3626-27).

104. The vast majority of contact lens wearers purchase some amount of contact lenses when they obtain an eye exam. (CX 9017 (Blackwood, Dep. at 158-59); [REDACTED])

105. [REDACTED]

[REDACTED]  
(RX 1082-0009).

106. [REDACTED]

[REDACTED] (RX 1082-0009).



107. [REDACTED]

[REDACTED] (RX 1082-0009).

108. [REDACTED]

[REDACTED] (RX 1108-0006).

109. In a survey conducted in or about 2013 of 1-800 Contacts' "lost" customers (customers who had stopped buying from 1-800 Contacts), over 50 percent reported marking their most recent purchase of contact lenses from an ECP (independent ECPs or optical retail chain); about 22 percent reported making their most recent purchase from Walmart or another national general retailer; and about 17 percent reported marking their most recent purchase from another online contact lens retailers. (RX 739-0041, 102; RX 1129-0015).

***C. 1-800 Contacts' Differentiation Strategy Is Designed To Provide The Best Customer Service At Prices Below ECPs***

110. 1-800 Contacts differentiates itself among contact lens retailers by focusing on exceptional service and retail prices lower than ECPs. (CX 9029 (Bethers, Dep. at 23)).

111. 1-800 Contacts has always deliberately positioned itself within the contact lens retail industry to have the highest levels of service and convenience with retail prices below independent ECPs and optical retail chains. (Coon, Tr. 2708-10; CX 9001 (Bethers, IHT at 80); RX 904-0016; CX 525-017; [REDACTED])

112. 1-800 Contacts' message to consumers through extensive marketing often has emphasized that 1-800 Contacts has excellent customer service and lower prices than ECPs. (CX 9029 (Bethers, Dep. at 10)).

113. 1-800 Contacts' founder and former CEO explained that the company's strategy of positioning itself within the market as having the best customer service was based on recognizing that it would be easy for another retailer to match prices but it is very difficult to create a brand and provide great service. (Coon, Tr. 2712).

114. Price is only one component of how consumers typically define value; consumers also consider service and satisfaction, along with price, in determining the value provided by a retailer. (CX 9017 (Blackwood, Dep. at 163)).

115. 1-800 Contacts offered an overall value proposition inclusive of several different factors: the price per box that you pay for your contact lenses, the price of shipping, the rebates that you might be able to receive by purchasing larger quantities, the guaranteed returns, and the customer support that you received. (Schmidt, Tr. 2929).

116. This overall value proposition in terms of price included the benefit of rebates from ordering in larger quantities and the benefit of free shipping. (Schmidt, Tr. 2930; CX 63-020).

117. 1-800 Contacts wanted to be perceived by its customers as being comparable to buying from one's ECP and it did not want to do anything that might undermine that perception. (CX 9031 (Schmidt, Dep. at 80-81)).

118. 1-800 Contacts viewed contact lens consumers in three segments: (1) customers committed to purchasing only from their ECP; (2) customers willing to consider purchasing their lenses from someplace other than their ECP, but who were apprehensive about compromising on quality, and therefore considered trust and quality of service as paramount next to price; and (3) customers ruthlessly focused on price and willing to take additional risk in order to pay a lower price. (CX 9031 (Schmidt, Dep. at 87-88)). 1-800 Contacts targeted its value proposition toward the second segment and was not willing to compromise its brand reputation or the quality of its services in order to gain traction with the third segment. (CX 9031 (Schmidt, Dep. at 88-89)).

119. While 1-800 Contacts wanted to be perceived as competitive on prices, it did not want to create a perception that it provided lower quality service or lower quality products; instead, 1-800 Contacts focused on creating the impression that it was the highest quality contact lens provider. (CX 9031 (Schmidt, Dep. at 80-81)).

120. 1-800 Contacts declined a partnership with Overstock out of a concern that Overstock's emphasis on price discounts and its reputation for discounted products of lower value might impact 1-800 Contacts' reputation as a provider of highest quality service and product. (CX 9031 (Schmidt, Dep. at 82-84); CX 9013 (Aston, Dep. at 181-182)).

121. In a marketing presentation dated April 29, 2005, 1-800 Contacts' employees used the phrase "Reduce Price Transparency versus Competition" to mean that 1-800 Contacts wished to present a message to consumers that reflected its overall value proposition as opposed to a single incomplete element of value. (Schmidt, Tr. 2929; CX 63-014).

122. 1-800 Contacts business model is different than most other online contact lens retailers. (CX 9029 (Bethers, Dep. at 10)).

123. Online contact lens retailers, other than 1-800 Contracts, generally chose to differentiate themselves solely based on price. (CX 9029 (Bethers, Dep. at 10-11)).

***1. 1-800 Contacts Has Made Enormous Investments In Customer Service***

124. Customer service is one means by which 1-800 Contacts has differentiated and continues to differentiate itself from many other contact lens retailers. (RX 736-006; CX 9017 (Blackwood, Dep. at 16) ("one of the primary differentiators was [1-800 Contacts'] service")).

125. Providing better service was the key thing that has differentiated 1-800 Contacts from other contact lens retailers. (Coon, Tr. 2707-08).

126. Although some consumers might be interested in just getting the lowest price, 1-800 Contacts found that many consumers valued speed and convenience just as much as price. (Coon, Tr. 2705-07).

127. [REDACTED]

[REDACTED] (RX 1117-0028).

128. A recent consumer survey conducted by 1-800 Contacts found that convenience is more important than price for customers using the internet or a mobile app to shop for contact lenses. (RX 1108-0010).

129. In a consumer survey conducted by 1-800 Contacts in or about 2007, consumers responded that “ease, price and speed are common considerations in the contact lens buying process”: “67% decide where to purchase contacts based on what is easiest”; “42% shop around to get the best price on contacts”; and “56% need contacts fast because they are almost out.” (RX 1137-009).

130. [REDACTED]

[REDACTED] (RX 1117-0028).

131. One of the best indicators that consumers value convenience and speed of delivery is that customers pay a premium for overnight shipping on about one-third of the orders placed with 1-800 Contacts. (Coon, Tr. 2705-06; Bethers, Tr. 3641).

132. Since its inception, 1-800 Contacts had the idea that it was going to win on service. (Coon, Tr. 2712-13).

133. 1-800 Contacts' business objective from the beginning was to make the process of buying contact lenses simple. (Coon, Tr. 2669-70).

134. 1-800 Contacts operated under the simple formula "satisfaction equals reality minus expectations," which conveys the importance of exceeding consumers' expectations. (Coon, Tr. 2698-700).

135. [REDACTED]

[REDACTED] (CX 547-011).

136. The first sentence in 1-800 Contacts' mission statement, which says "customer retention is what drives us," was meant to convey the importance of customer retention since 1-800 Contacts generally would lose money on a customer's first order, break even on the second order, and start becoming profitable on a customer's third order. (Coon, Tr. 2689).

137. The second sentence in 1-800 Contacts' mission statement, which says "the real value in this business is the reputation we build," was meant to convey the importance of building a reputation such that customers will recommend the company to their friends. (Coon, Tr. 2689-90).

138. The final portion of 1-800 Contacts' mission statement, which says "contact lenses are just the product we deliver, what we really sell is service," was meant to convey that it is the experience around the product that the company delivers that will distinguish its business. (Coon, Tr. 2690).

139. 1-800 Contacts' mission statement conveys to its employees that 1-800 Contacts is selling service, not a commodity, and that every interaction with a customer either builds or detracts from 1-800 Contacts' reputation. (Coon, Tr. 2688-89).

140. 1-800 Contacts tries to distinguish itself from other contact lens retailers by making it faster, easier, and more convenient to get contact lenses. (Coon, Tr. 2669-70).

141. 1-800 Contacts has focused on removing friction for the customer and making it as fast and easy as possible to get contact lenses. (Coon, Tr. 2669-70).

142. 1-800 Contacts has made extraordinary investments in providing a credible service and a high quality service to customers, including a very well-run and consistent call center, prompt shipping within two business days, packaging, quality control measures in inventory and prescription verification, and a 100% guaranteed return policy. (CX 9031 (Schmidt, Dep. at 90-91)).

143. 1-800 Contacts has made many substantial investments to build a reputation for superior customer service. (Coon, Tr. 2690).

***(a) 1-800 Contacts' Commitment To Customer Service Involves Many Aspects Of The Shopping Experience***

144. 1-800 Contacts has more inventory in stock than any other contact lens retailer, allowing 1-800 Contacts to fill 98 percent of all orders with inventory on hand. (Coon, Tr. 2690-91; Bethers, Tr. 3640; CX 9029 (Bethers, Dep. at 136); RX 904-0016; [REDACTED])

145. In comparison, independent ECPs typically have about 40 percent of orders in stock. (Bethers, Tr. 3641; Coon, Tr. 2669).

146. 1-800 Contacts offers customers the ability to place orders for contacts lenses 24/7 both online and by phone. (RX 904-0016; [REDACTED])

147. 1-800 Contacts' customer care representatives are always available to answer questions. (RX 904-0016; [REDACTED])

148. 1-800 Contacts' call center has over 300 trained employees. (RX 428-0031).

149. 1-800 Contacts' customer care representatives are empowered to take care of the customer. (CX 9029 (Bethers, Dep. at 37); CX 9017 (Blackwood, Dep. at 307); RX 428-0031).

150. 1-800 Contacts' customer care representatives answer most calls with a live person by the third ring. (Coon, Tr. 2691; RX 904-0019; CX 525-020).

151. 1-800 Contacts' customer care representatives answer most emails within 10 minutes. (RX 904-0019; CX 525-020).

152. 1-800 Contacts' has live customer care representatives available to answer text messages. (Coon, Tr. 2691).

153. 1-800 Contacts offers customer service through click-to-chat. (RX 904-0016).

154. 1-800 Contacts offers free replacements for torn contact lenses. (Coon, Tr. 2700; RX 904-0016; [REDACTED])

155. 1-800 Contacts invested in the "unboxing experience" by creating clean, attractive packaging for the purpose of enhancing credibility. (CX 9031 (Schmidt, Dep. at 90-91)).

156. The box that 1-800 Contacts uses to ship contact lenses to customers was designed to make it as simple as possible to open. (Coon, Tr. 2692).

157. 1-800 Contacts sends orders with no signature required, replacing at its own cost any package left on a customer's doorstep that the customer does not actually receive. (Coon, Tr. 2691).

158. 1-800 Contacts sends handwritten apology notes to customers if their order was late. (Coon, Tr. 2691).

159. 1-800 Contacts has a marketing program called the "WOW initiative" by which it sends small, personalized gifts to certain customers based on comments or feedback from the customer. (Bethers, Tr. 3646-47).

160. 1-800 Contacts designed its website to be as simple and efficient as possible for a customer to place an order. (CX 9027 (Larson, Dep. at 94)). 1-800 Contacts' website is designed to minimize the amount of time spent on the website and the number of clicks a consumer had to make to purchase contact lenses. (CX 9027 (Larson, Dep. at 94)). 1-800 Contacts' repeat customers could place an order for contact lenses with two clicks on the website. (CX 9027 (Larson, Dep. at 94)).

161. 1-800 Contacts has made recent changes to its website that allow a potential customer to enter just their ECP's name and 1-800 Contacts will contact the ECP to obtain the necessary prescription information. (Bethers, Tr. 3643).

162. 1-800 Contacts developed a mobile app to make it easier and simpler for customers to order contact lenses online. (Coon, Tr. 2678-79 & 2691-92).

163. 1-800 Contacts' mobile app allows a consumer to reorder contact lenses in just 3 clicks. (Coon, Tr. 2680).

164. 1-800 Contacts' mobile app allows a consumer to scan their prescription, scan the barcode on their contact lens box, and use their location to find a nearby eye doctor's office. (Coon, Tr. 2678-79).

165. 1-800 Contacts recently expanded its mobile app features to allow customers to take a photo with their mobile device of their prescription and send it to 1-800 Contacts immediately. (Bethers, Tr. 3643; [REDACTED])

[REDACTED]

166. Over one million people have downloaded 1-800 Contacts' mobile app. (Coon, Tr. 2678-80).

167. 1-800 Contacts' mobile app has had a 5 star rating from the beginning. (Coon, Tr. 2680).



168. 1-800 Contacts currently has plans to expand its distribution network from one distribution center currently in Salt Lake City to add another hub in the eastern United States with five additional distribution spokes. (Bethers, Tr. 3641-42). This will allow 1-800 Contacts to delivery contact lenses to 98 percent of the United States population with free, standard two-day delivery. (Bethers, Tr. 3641-42).

**(b) *1-800 Contacts' Customer Service Has Been Recognized For Its Excellence By Customers And Third-Parties***

169. 1-800 Contacts' service has been rewarded by customers through both repeat business and recommendations to friends. (Coon, Tr. 2706-07).

170. [REDACTED]

[REDACTED] (Bethers, Tr. 3571-72; RX 904-0019; CX 525-020).

171. [REDACTED]

172. The Net Promoter Score is based on asking customers one question: "How likely is it that you would recommend our company to a friend or colleague?" [REDACTED] RX 736-013). And the customer answers that one question on a scale of 0 to 10. [REDACTED] [REDACTED] RX 736-013).

173. The Net Promoter Score is calculated by subtracting the percentage of respondents who answer with a score of 0 to 6 from the percentage who answer with a score of 9 or 10 (those who answer with 7 or 8 are included only in the number of total respondents). [REDACTED] [REDACTED] RX 736-013).

174. The Net Promoter Score is considered a strong indicator of both the loyalty of a company's customers and the company's growth potential. [REDACTED] RX 736-013).

175. 1-800 Contacts' Net Promoter Score of 74 percent is considered to be very high. (CX 9017 (Blackwood, Dep. at 159-60); [REDACTED] RX 736-014).

176. In one comparison, 1-800 Contacts' Net Promoter Score was higher than Amazon.com, Netflix, Apple, and Trader Joe's. (CX 9017 (Blackwood, Dep. at 160); [REDACTED] RX 736-014).

177. 1-800 Contacts' Net Promoter Score shows that it has a large base of customers that are willing to share positive information about the company with prospective new customers. (RX 736-014).

178. 1-800 Contacts is a top performer in customer satisfaction for the health/beauty section in Answers Experience Index. (RX 739-0020).

179. The Answers Experience Index compares companies featured on Internet Retailer's Top 500 web and mobile commerce sites and the National Retail Federation's Top 100 Retailers. (RX 739-0020).

180. 1-800 Contacts is the only contact lens retailer to appear as a top firm on Answer's Experience Index. (RX 739-0020).

181. 1-800 Contacts' customer service has been recognized by, and received awards from, many third parties. (CX 9027 (Larson, Dep. at 71; Goodstein, Tr. 2396-97; RX 736-012-016, Table 2; RX 739-0020).

182. 1-800 Contacts' call center received the highest score ever given by J.D. Power and Associates to a call center. (RX 590-0002; CX 9027 (Larson, Dep. at 71-72); RX 904-0019; CX 525-020; Goodstein, Tr. 2397-98; RX 736-012).

183. J.D. Power and Associates explained that “[s]urvey results show 1-800-Contacts’ overall satisfaction index score to be 949 out of 1000, which falls well above the passing score of 768 that is needed for certification. In fact, it is the highest index score achieved in the history of our call center certification program, and can be compared to the average index score of other J.D. Power and Associates’ certified call centers, which is currently 864.” (RX 590-0002.)

184. 1-800 Contacts received the StellaService Elite award for its customer service: “Top scores by 1-800 Contacts across numerous service areas earned it the industry’s most coveted award for outstanding customer service—the StellaService Elite Seal.” (RX 155-0001; CX 9027 (Larson Dep. at 71)).

185. 1-800 Contacts was ranked #7 on a list of top 100 online retailers for customer satisfaction by Foresee (a commonly used company to measure customer satisfaction). (RX 901-001; RX 736-013).

186. Other customer service awards received by 1-800 Contacts include: 2016 Loyalty 360 CX Award for Customer Insights: Online Trust Alliance (“OTA”) 2015 Online Trust Honor Roll; 2015 Innovation in Service Excellence Award from the Gartner Group and 1to1 Media; 2014 Stella Service Elite Rating; 2011 Internet Retailer Hot 100; and Utah Best of State – Customer Service, Call Center. (RX 736-016, Table 2).

***(c) Many Other Contact Lens Retailers Provide Lower Levels Of Customer Service Than 1-800 Contacts***

187. Other online contact lens retailers generally did not offer a comparable level of service to what 1-800 Contacts offered. (Coon, Tr. 2703; CX 9017 (Blackwood, Dep. at 162)).

188. 1-800 Contacts has been well above other online contact lens retailers in terms of service standards and quality. (CX 9031 (Schmidt, Dep. at 93)).

189. Online contact lens retailers, other than 1-800 Contacts, focused on offering the cheapest lenses in a race to the bottom and for that reason were not able to afford to offer the superior quality of 1-800 Contacts. (CX 9031 (Schmidt, Dep. at 93)).

190. The perception from customer surveys was that companies like Vision Direct and Coastal Contacts offered a price discount, but service quality suffered; for example, they were difficult to reach, there were problems with the contact lenses shipped such as lenses that had already expired, and sketchy packaging, among other issues. (CX 9013 (Aston, Dep. at 187-88)).

191. 1-800 Contacts' founder and former CEO, Mr. Coon, believes that the level of service offered by other online contact lens retailers was not even close to what 1-800 Contacts offered during his tenure at 1-800 Contacts. (Coon, Tr. 2703).

192. In secret shopping other online contact lens retailers during Mr. Coon's tenure with 1-800 Contacts, 1-800 Contacts found that the service of other online contact lens retailers usually was not as good as the service 1-800 Contacts offered. (Coon, Tr. 2701).

193. In secret shopping other online contact lens retailers during Mr. Coon's tenure with 1-800 Contacts, 1-800 Contacts found that a customer would wait longer to get other online contact lens retailers to answer the phone and, in some cases, could not reach a live person at all. (Coon, Tr. 2701).

194. 1-800 Contacts observed first-hand the low quality of service received by customers of other online contact lens retailers, for example: if a customer ordered a specific contact lens prescription at some other online contact lens retailers, that retailer would indicate the lens was available on their website but then have a four to eight week delay between the time the order was placed and the lenses were shipped because those lenses were not actually in stock. (CX 9031 (Schmidt, Dep. at 95)).

195. In secret shopping other online contact lens retailers during Mr. Coon's tenure with 1-800 Contacts, 1-800 Contacts found that it might take other online contact lens retailers a day to respond to a customer's email while 1-800 Contacts' practice was to respond to emails within ten minutes with a live person. (Coon, Tr. 2701).

196. In secret shopping other online contact lens retailers during Mr. Coon's tenure with 1-800 Contacts, 1-800 Contacts found that the orders delivered by other online contact lens retailers arrived later than 1-800 Contacts' orders as a general rule. (Coon, Tr. 2701).

197. In secret shopping other online contact lens retailers during Mr. Coon's tenure with 1-800 Contacts, 1-800 Contacts found that some other online contact lens retailers intentionally did things that would undermine consumer trust. (Coon, Tr. 2701).

198. During Mr. Coon's tenure with 1-800 Contacts, 1-800 Contacts was concerned about some of the practices by other online contact lens retailers, even though those practices were not affecting 1-800 Contacts' customers, because in some cases those practices would get attributed to 1-800 Contacts. (Coon, Tr. 2701-02).

199. By secret shopping other online contact lens retailers during Mr. Coon's tenure with 1-800 Contacts, 1-800 Contacts found that other online contact lens retailers would advertise prices net of rebates for which the vast majority of people would not qualify. (Coon, Tr. 2701-02).

200. By secret shopping other online contact lens retailers during Mr. Coon's tenure with 1-800 Contacts, 1-800 Contacts found that one of them, a Canadian company called Coastal Contacts, was charging a 6.5 percent sales tax even though there was no applicable sales tax. (Coon, Tr. 2701-02).

201. By secret shopping other online contact lens retailers during Mr. Coon's tenure with 1-800 Contacts, 1-800 Contacts found that other online contact lens retailers set a very low bar on verifying prescriptions. (Coon, Tr. 2701-02, 2704-05).

202. As a general rule, 1-800 Contacts found during Mr. Coon's tenure with 1-800 Contacts that other online contact lens retailers were not maintaining outstanding service to consumers and in some cases were engaged in what 1-800 Contacts viewed as unethical or blatantly illegal behavior. (Coon, Tr. 2702).

203. During Mr. Coon's tenure with 1-800 Contacts, 1-800 Contacts had concerns about being associated with various practices of other online contact lens retailers that it viewed as unethical because 1-800 Contacts was getting blamed for those practices and those practices were making the whole industry look bad. (Coon, Tr. 2703).

204. During Mr. Coon's tenure with 1-800 Contacts, 1-800 Contacts had concerns about being associated with practices of other online contact lens retailers that it viewed as unethical because such practices were inconsistent with 1-800 Contacts' brand. (Coon, Tr. 2703-04).

205. During Mr. Coon's tenure with 1-800 Contacts, 1-800 Contacts had concerns about being associated with practices of other online contact lens retailers that it viewed as unethical because 1-800 Contacts had put a lot of effort into creating industry standards that other online contact lens retailers were not following. (Coon, Tr. 2705).

***(d) Dr. Athey's Analysis Of The Service Differential Is Not Reliable***

206. Dr. Athey relied upon the Net Promoter Scores of 1-800 Contacts and Vision Direct provided by the Stax survey in the Berkshire Partners presentation to reach her opinion that the 1-800 Contacts price premium is not justified by superior service offerings. (Athey, Tr. 751-54; CX 1109-047).

207. Dr. Athey relied on one slide from a Berkshire Partners document that purported to show that the Stax survey concluded that 1-800 Contacts' Net Promoter Score was almost identical to Vision Direct's Net Promoter Score. (Athey, Tr. 751).

208. The slide on which Dr. Athey relied indicates that the results of the Stax survey for Net Promoter Scores of all online contact lens retailers was based on only 226 total respondents: 101 respondents for 1-800 Contacts, 41 respondents for Vision Direct, and 84 respondents for all other online contact lens retailers. (CX 1109-047). Dr. Athey's expert report described no analysis of whether the number of respondents in total or individually for 1-800 Contacts, Vision Direct, or all other online contact lens retailers was sufficient to provide statistically significant (or otherwise meaningful) results on this issue. (CX 8007).

209. Dr. Athey failed to recognize that the results of the Stax survey, assuming they were reliable, show that 1-800 Contacts' Net Promoter Score was almost twice the Net Promoter Score of other contact lens retailers except for Vision Direct. (CX 1109-047).

210. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Athey, Tr. 825). [REDACTED]  
[REDACTED] (CX 1343-035).

211. [REDACTED]  
[REDACTED]  
[REDACTED] (CX 1343-035). Dr. Athey's expert report described no analysis of whether the number of respondents in total or individually for 1-800 Contacts, Vision Direct, or any of the other listed contact lens retailers was sufficient to provide statistically significant (or otherwise meaningful) results. (CX 8007).

212. [REDACTED]

(CX 1343-035).

213. In her expert report, Dr. Athey states that she relied on “statements by employees at 1-800 Contacts [that] demonstrate that 1-800 Contacts’ service offering is insufficient to offset the lower prices offered by online competitors,” but Dr. Athey cites as support for this opinion only one single email chain, dated August 7, 2012, among 1-800 Contacts’ marketing staff. (Athey, Tr. 747-48, 752-53; CX 8007-017-018). A single email, taken out of context by Dr. Athey, is insufficient to support the sweeping opinion that Dr. Athey offers regarding the ability of 1-800 Contacts to justify a price premium relative to other online contact lens retailers.

214. Dr. Athey did not consider the deposition testimony of the author of the relevant portions of the August 2012 email (Amber Powell) that Dr. Athey cites. Ms. Powell explained that 1-800 Contacts was concerned with the misleading nature of Internet comparison-shopping tools that only showed retail prices for a single box of contact lenses, which failed to accurately reflect the consumers’ true costs. (CX 9030 (Powell, Dep. at 113-15)).

215. Although Dr. Athey relies on the email written by Ms. Powell, Dr. Athey did not consider Ms. Powell’s deposition at all. (CX 8007-101 (listing Dr. Athey’s materials considered)). Nor did Dr. Athey address the evidence in the record, including many 1-800 Contacts business documents and the testimony of many 1-800 Contacts current and former employees, that discuss 1-800 Contacts’ pricing strategy and its level of customer service.



**2. *1-800 Contacts Sets Its Retail Prices In Reference Primarily To Independent ECPs' Pricing***

216. It is difficult and expensive to provide consistently superior customer service. (Coon, Tr. 2701, 2712-13).

217. 1-800 Contacts knew that in order to provide the highest levels of customer service, it would have to be positioned above discount retailers (including some other online retailers and club stores, like Costco) in terms of price. (Coon, Tr. 2708-09).

218. 1-800 Contacts did not want to sacrifice the customer service experience that its customers received in order to provide them with a lower price; thus, 1-800 Contacts maintained slightly higher margins than its low price/low service competitors. (CX 9031 (Schmidt, Dep. at 87-88)).

219. Because 1-800 Contacts strove to achieve the optimal balance of premium service and competitive price, it did not focus on having the lowest price of any contact lens retailer. (CX 9013 (Aston, Dep. at 193)).

220. 1-800 Contacts sets its retail prices for contact lenses on a product-by-product basis. (Bethers, Tr. 3773).

221. In 2006, 1-800 Contacts explained in an internal business plan document that its general pricing strategy was to set its retail prices below independent ECPs, close to optical retail chains, but above other online retailers and club stores like Costco; but then 1-800 Contacts would offer extensive rebates to provide more competitive pricing for customers who are price sensitive. (CX 535-010).

222. 1-800 Contacts today continues to set its retail prices based primarily on the retail prices of independent ECPs and then optical retail chains. (Bethers, Tr. 3544 (A: "We set our

pricing based on the prices that occur principally in independent practices and also in reference to what retail optical channels are doing.”)).

223. Independent ECPs’ retail prices for contact lenses drive 1-800 Contacts’ pricing decisions. (Bethers, Tr. 3548 (A: “And it’s helpful to understand what prices are for other eyecare providers in addition to independents, but it’s really the independent price that drives our pricing decisions. They’re the ones that we secret-shop the most.”)).

224. 1-800 Contacts sets its retail prices for contact lenses to reflect a discount to independent ECPs and optical retail chains. (Bethers, Tr. 3542 (A: “So our model has always been very focused on advertising and brand name recognition and high levels of service, and so we set our pricing in a manner that reflected a discount to the independent eyecare professional and a discount to the retailer optical locations that I described earlier.”); (CX 9025 (Osmond, Dep. at 99))).

225. For new contact lens products, 1-800 Contacts generally sets its retail prices five to ten percent below the average retail price for independent ECPs. (Bethers, Tr. 3549-50).

226. For mature contact lens products, 1-800 Contacts generally sets its retail prices at a discount to the average retail prices of independent ECPs, but the discount is typically less than it is for new products. (Bethers, Tr. 3550).

227. For legacy or discontinued contact lens products, 1-800 Contacts’ retail prices generally go up because of higher wholesale prices charged by the manufacturer. (Bethers, Tr. 3550).

**(a) *1-800 Contacts Invests Substantial Time And Effort Into Collecting Prices From Independent ECPs***

228. In order to set its retail prices, 1-800 Contacts conducts a sampling of the 16,000 independent ECP practices on a weekly basis to determine their current retail prices for major contact lens products. (Bethers, Tr. 3546; CX 9025 (Osmond, Dep. at 98-99); [REDACTED])

229. [REDACTED]

[REDACTED]

230. [REDACTED]

[REDACTED]

[REDACTED]

231. 1-800 Contacts also collects information on the pricing of contact lenses at optical retail chains, mass merchants, club stores, and other online retailers in order to have a perspective of the entire industry. (Bethers, Tr. 3548).

232. In order to set its retail prices, the majority of 1-800 Contacts' efforts to collect prices charged by other contact lens retailers goes towards collecting prices from independent ECPs. (CX 9025 (Osmond, Dep. at 98)).

233. While it is helpful for 1-800 Contacts to understand the prices for all contact lens retailers, it is really the independent ECPs' pricing that drives 1-800 Contacts' pricing decisions. (Bethers, Tr. 3548).

**(b) *1-800 Contacts Offers A Price Guarantee***

234. 1-800 Contacts offers customers a price guarantee that has been available since July 2006. (CX 9025 (Osmond, Dep. at 16); CX 9029 (Bethers, Dep. at 36)).

235. 1-800 Contacts' price guarantee started as an offer to match the price of other contact lens retailers. (CX 9025 (Osmond, Dep. at 16, 43-44)).

236. In March 2008, 1-800 Contacts revised the terms of its price guarantee so that it would beat another retailer's prices by 2 percent, rather than just match that retailer's price. (CX 9025 (Osmond, Dep. at 16, 43-44); CX 1341-001).

237. 1-800 Contacts' price guarantee applies for retail prices of contact lenses from any retailer except club stores, such as Costco, Sam's Club, and BJ's. (CX 9025 (Osmond, Dep. at 18); CX 1341-001).

238. 1-800 Contacts' price guarantee applies for retail prices of contact lenses offered by independent ECPs and retail optical chains. (CX 9025 (Osmond, Dep. at 39-40)).

239. Although 1-800 Contacts' price guarantee does not apply, as written, to retail prices for contact lenses offered by club stores, 1-800 Contacts has in fact matched prices to club stores for some consumers. (CX 9025 (Osmond, Dep. at 18-19); CX 9029 (Bethers, Dep. at 37-38)).

240. 1-800 Contacts' price guarantee is explained on 1-800 Contacts' website. (CX 9025 (Osmond, Dep. at 22)).

241. 1-800 Contacts has promoted its price guarantee through emails to consumers. (CX 9025 (Osmond, Dep. at 22)).

242. Approximately 2-6 percent of 1-800 Contacts' orders receive a discount from the retail list prices as a result of the price guarantee. (Bethers, Tr. 3797-98).

243. [REDACTED]  
[REDACTED] (CX 1334-002).

244. [REDACTED]  
[REDACTED] (CX 1334-007).

245. [REDACTED]  
[REDACTED] (CX 1334-007).

246. [REDACTED]

[REDACTED] (CX 1334-007).

247. [REDACTED]

[REDACTED] (CX 1334-007).

***D. 1-800 Contacts Has Made Enormous Investments In Broadscale Advertising***

248. 1-800 Contacts had a marketing strategy of generating brand awareness and encouraging new customers to try 1-800 Contacts. (Schmidt, Tr. 2927-2928).

249. 1-800 Contacts sought a multichannel integrated marketing plan that took into account both online and traditional offline advertising channels and integrated them to ensure consistency in messaging across channels. (Schmidt, Tr. 2932).

***1. 1-800 Contacts Engages In Many Different Types Of Advertising***

250. There are many different ways for a contact lens retailer to advertise to consumers. (Bethers, Tr. 3700-01).

251. 1-800 Contacts has used print advertising. (Bethers, Tr. 3700).

252. 1-800 Contacts has used television advertising. (Bethers, Tr. 3700).

253. 1-800 Contacts has used radio advertising. (Bethers, Tr. 3700).

254. 1-800 Contacts has used Internet search advertising. (Bethers, Tr. 3700-01).

255. 1-800 Contacts has used Internet display advertising. (Bethers, Tr. 3701).

256. 1-800 Contacts has used Internet affiliate marketing, such as Groupon and Ebates. (Bethers, Tr. 3701).

257. 1-800 Contacts has used social media advertising (*e.g.*, Facebook, Twitter, and YouTube). (Bethers, Tr. 3702).

258. 1-800 Contacts has used search engine optimization that is designed to improve the position of a company's organic link in search engine results. (Bethers, Tr. 3701-02).

259. Warby Parker, an online seller of glasses, has built incredible awareness through the use of earned media (*i.e.*, free public relations) rather than paid advertising. (Bethers, Tr. 3827). Earned media is a way for a company to create brand awareness with very limited advertising dollars. (Bethers, Tr. 3827).

**2. *1-800 Contacts Focuses On Television Advertising To Drive Traffic To Its Website And Build Brand Awareness***

260. 1-800 Contacts has spent over \$500 million in advertising during the life of the company. (Bethers, Tr. 3614; CX 1446-010).

261. The majority of 1-800 Contacts' advertising expenditures has been for TV advertising. (RX 844-001 (tab labeled "Request #3"); Coon, Tr. 2721; Bethers, Tr. 3614; RX 736-006; RX 739-0092).

262. Between 2002 and 2014, 1-800 Contacts spent [REDACTED] on advertising, more than [REDACTED]. (RX 844-001 (tab labeled "Request #3"); RX 736-006; RX 739-0092).

263. 1-800 Contacts understood that if it was going to build a brand, do national advertising, and set a high bar for service, it would need higher prices than it would otherwise. (Coon, Tr. 2712-13).

264. 1-800 Contacts' founder and former CEO believes that it was not possible for 1-800 Contacts to do television advertising and offer superior customer service and at the same time offer the lowest possible price on contact lenses. (Coon, Tr. 2701).

265. Television is 1-800 Contacts' principal means for driving growth in terms of brand awareness and identifying and finding customers. (CX 9001 (Bethers, IHT at 60); (Coon, Tr. 2727-29)).

266. Broadscale advertising drove traffic to the 1-800 Contacts website both directly when users typed in the URL and through paid internet search advertising. (CX 9002 (Craven, IHT at 40)).

267. 1-800 Contacts' investments in television advertising has increased the total number of consumers shopping online for contact lenses, mostly at 1-800 Contacts, but also at other online contact lens retailers. (CX 9001 (Bethers, IHT at 149)).

268. The benefits of TV advertising are seen immediately by 1-800 Contacts in terms of driving greater traffic to its website. (CX 9017 (Blackwood, Dep. at 176); CX 9029 (Bethers, Dep. at 98); CX 9032 (L. Schmidt, Dep. at 247); RX 736-008).

269. There is a high correlation between 1-800 Contacts' television advertisements and traffic to its website from clicks on a sponsored ad by 1-800 Contacts that appeared in response to a search for 1-800 Contacts' trademarks. (CX 9017 (Blackwood, Dep. at 176); CX 9029 (Bethers, Dep. at 98); CX 9032 (L. Schmidt, Dep. at 247); RX 736-008).

270. 1-800 Contacts observed that when it increased its broad-scale advertising spend in a particular region it saw a strong increase in internet traffic in that region on 1-800 Contacts search terms. (CX 9031 (Schmidt, Dep. at 97)).

271. Research conducted by 1-800 Contacts found that 40 percent of the traffic to its website from paid trademark search was directly related to television advertising. (CX 9017 (Blackwood, Dep. at 230)).

272. Internet search advertising does not itself generate significant consumer demand, rather it is typically a means to convert on consumer demand that already exists because of other forms of advertising. (CX 9017 (Blackwood, Dep. at 61)).

273. 1-800 Contacts' television advertising produces longer term benefits in the form of building brand awareness. (RX 736-008).

274. As a result of its television advertising, 1-800 Contacts is consistently one of the most familiar brand names among contact lens retailers. (RX 736-009-011).

275. 1-800 Contacts has extremely high brand awareness, particularly relative to other online contact lens retailers. [REDACTED] (RX 736-011).

276. 1-800 Contacts' unaided awareness has been the highest of any retailer in the contact lens industry. (Bethers, Tr. 3705; RX 904-0009; CX 1446-011; RX 736-009-11).

277. In 2012, 1-800 Contacts' unaided awareness was thirty-three times the unaided awareness of the nearest online contact lens retailer. (RX 904-0009; CX 525-010).

278. In 2015 and 2016, 1-800 Contacts' unaided awareness was often at least ten times the unaided awareness of the nearest online contact lens retailer. [REDACTED] [REDACTED] (RX 736-010).

279. 1-800 Contacts' unaided awareness is more than twice its actual market share. (Bethers, Tr. 3705; CX 525-010; RX 736-010).

280. Online contact lens retailers, other than 1-800 Contacts, generally do not engage in broadscale advertising, such as television advertising. (CX 9029 (Bethers, Dep. at 10-11)).

281. Online contact lens retailers, other than 1-800 Contacts, have not invested in broadscale advertising like 1-800 Contacts. (Bethers, Tr. 3614; CX 9029 (Bethers, Dep. at 10-11); CX 9035 (Coon, Dep. at 88); RX 736-009).



282. Online contact lens retailers, other than 1-800 Contacts, barely register in measures of unaided awareness. [REDACTED] RX 736-010).

283. Online contact lens retailers, other than 1-800 Contacts, had little to no brand awareness. (CX 9013 (Aston, Dep. at 144)).

284. In studies of “unaided awareness,” Vision Direct was the only online retailer, other than 1-800 Contacts, that frequently showed up in the results, with about 1 percent unaided awareness. (Bethers, Tr. 3706; [REDACTED])

285. Many online contact lens retailers, other than 1-800 Contacts, have levels of brand awareness lower than their market share, which suggests that some of their existing customers do not always remember their names. (Bethers, Tr. 3707).

**3. *Paid Search Trademark Advertising Represented Less Than One Percent Of 1-800 Contacts’ Advertising Expenditures***

286. 1-800 Contacts spends less than one percent of its total advertising expenditures on paid search advertising for sponsored ads that appear in response to an internet search for 1-800 Contacts’ trademarks. (Bethers, Tr. 3702; Coon, Tr. 2723).

287. For the time period from 2002 and 2014, [REDACTED] of 1-800 Contacts’ advertising expenses were for Internet-based advertising. (RX 844-001 (tab labeled “Request #3”); RX 736-006; RX 739-0092).

288. Between 2004 and 2014, overall internet advertising accounted for between [REDACTED] [REDACTED] of 1-800 Contacts’ total annual advertising costs. (RX 844-001 (tab labeled “Request #3”); RX 739-0092).

289. Between 2004 and 2014, paid internet search advertising accounted for between [REDACTED] [REDACTED] of 1-800 Contacts’ total annual *internet* advertising costs. (RX 844-001 (tab labeled “Request #3”); RX 739-0092).

290. Between 2004 and 2014, paid internet search advertising for sponsored that appeared in response to an internet search for 1-800 Contacts' trademarks accounted for between [REDACTED] of 1-800 Contacts' total paid internet search advertising costs. ((RX 844-001 (tab labeled "Request #3"); RX 739-0092).

291. Between 2004 and 2014, paid internet search advertising for sponsored ads that appeared in response to an internet search for 1-800 Contacts' trademarks ("paid search trademark expenses") accounted for between [REDACTED] of 1-800 Contacts' total annual advertising costs. (RX 844-001 (tab labeled "Request #3"); RX 739-0092).

292. From 2002 through 2014, the amount spent by 1-800 Contacts for sponsored ads that appeared in response to an internet search for 1-800 Contacts' trademarks was not material to 1-800 Contacts' business. (Coon, Tr. 2722-23).

*E. Customers Navigate To 1-800 Contacts In Many Different Ways*

293. [REDACTED]  
[REDACTED]  
[REDACTED] (Bethers, Tr. 3560-66; RX 428-0029).

294. More than [REDACTED] of 1-800 Contacts orders are placed over the phone. (Bethers, Tr. 3560 & 3564; RX 428-0029; RX 739-0091).

295. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

(Bethers, Tr. 3569-80; RX 428-0030).

296. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Bethers, Tr. 3575; RX 428-0030).

297. In 2015, mobile devices accounted for [REDACTED] of initial orders placed with 1-800 Contacts and [REDACTED] of the traffic to 1-800 Contacts' website. (CX 1446-033).

***F. 1-800 Contacts' Alliance With Walmart***

298. 1-800 Contacts had an alliance with Walmart from 2008 until about 2012. (Bethers, Tr. 3533-34, 3612-13; Coon, Tr. 2672).

299. Walmart's distribution center for contact lenses was set up to send multiple orders to roughly 2,500 stores rather than to send individual contact lens orders to customers. (Coon, Tr. 2672-73).

300. Walmart had approximately 2,500 stores with Vision Centers and contact lens solution aisles where there was an opportunity to market to contact lens wearers but little or no marketing was being done by Walmart. (Coon, Tr. 2672-74).

301. The general idea behind the alliance was that 1-800 Contacts and Walmart would work together to provide better service to Walmart customers and to expand their respective marketing efforts. (Coon, Tr. 2672-74).

302. During the alliance, 1-800 Contacts ran Walmart's contact lens business on the 1-800 Contacts' website and handled fulfillment for the approximately 2,500 Walmart retail locations. (Coon, Tr. 2675-76).

303. The Walmart Alliance changed the nature of 1-800 Contacts' business from being a pure-play online retailer to having a physical presence in approximately 2,500 Walmart retail locations. (Coon, Tr. 2674).

304. 1-800 Contacts then-CEO, Mr. Coon, believed that 1-800 Contact's primary competitor, the independent ECP, gained credibility and trust from having a physical presence and interaction with consumers. (Coon, Tr. 2674).

305. Coon believed that 1-800 Contacts' physical presence in approximately 2,500 Walmart retail locations would help it to build trust and credibility with consumers. (Coon, Tr. 2674).

306. 1-800 Contacts' alliance with Walmart was designed to provide customers an opportunity to buy contact lenses at their place of choice, either online or in a store, and to obtain an eye exam at Walmart. (Bethers, Tr. 3617; RX 904-0025).

307. During the alliance, 1-800 Contacts and Walmart did cobranding on television and cobranding in stores. (Bethers, Tr. 3617).

308. Prior to the alliance, 1-800 Contacts' average retail prices were higher than Walmart's on a number of products on a per-box basis, but 1-800 Contacts' average retail prices were lower than Walmart's on a number of products when accounting for volume discounts. (Bethers, Tr. 3619).

309. During the alliance, 1-800 Contacts and Walmart had uniform pricing on contact lenses so that the retail prices were the same for a customer who purchased over the phone, on the internet, or in the store. (Bethers, Tr. 3619).

310. When the alliance ended, 1-800 Contacts and Walmart returned to being competitors in the sale of contact lenses. (Bethers, Tr. 3621-22).

311. Walmart has been a major competitor of 1-800 Contacts in the retail sale of contact lenses since the end of the alliance. (Bethers, Tr. 3725).

312. Competition between 1-800 Contacts and Walmart following the end of the alliance has been fierce, in part because they shared customers for the four-and-half years of the alliance. (Bethers, Tr. 3621-22).

313. Following the end of the alliance, Walmart placed big placards in its Vision Centers that compared Walmart's prices on specific contact lens products directly to prices of the "most popular Internet seller," which was 1-800 Contacts. (Bethers, Tr. 3622-23; CX 547-002, slide 47).

***G. 1-800 Contacts Has Led Numerous Regulatory And Legal Battles To Permit Greater Competition With ECPs***

***1. Supporting The Fairness To Contact Lens Consumers Act ("FCLCA")***

314. 1-800 Contacts has faced significant challenges as a non-ECP retailer of contact lenses. (Coon, Tr. 2684-85).

315. One major challenge that 1-800 Contacts faced in competing with ECPs was that ECPs would not release contact lens prescriptions as a general rule. (Coon, Tr. 2684-85).

316. In 1-800 Contacts' early years, consumers had no legal right to a copy of their contact lens prescription in approximately half the states and in other states they often had to argue with their ECP to get it. (Coon, Tr. 2685-86).

317. At one point, 1-800 Contacts was engaged in disagreements with approximately 25-30 different state optometry boards. (Coon, Tr. 2714-15).

318. A number of state optometry board regulations impeded online sales of contact lenses by regulations requiring that contact lenses be sold in a face-to-face transaction or by an ECP who was licensed and resided in that state. (Coon, Tr. 2714-15).

319. The broadest issue 1-800 Contacts faced were state regulations requiring "affirmative verification" for contact lens prescriptions. (Coon, Tr. 2715).

320. Affirmative verification meant that the retailer would need to contact the prescriber and wait indefinitely for an affirmative response verifying the prescription or confirming that the order could be filled. (Coon, Tr. 2715-16).

321. Unlike a doctor-pharmacy relationship, the contact lens prescriber is also a competitor of other contact lens retailers. (Coon, Tr. 2716-17). In making a verification request, a contact lens retailer is asking the prescribing ECP for permission to sell to that ECP's own customer. (Coon, Tr. 2716-17).

322. Affirmative verification was a disaster for 1-800 Contacts' business because ECPs would just ignore the verification requests or respond in ways that would not allow 1-800 Contacts to fill the customer's order. (Coon, Tr. 2715-16).

323. 1-800 Contacts entered into an agreement with the Texas optometry board to affirmatively verify prescriptions in exchange for it sending a notice out to ECPs that it would be a violation of Texas law not to respond to 1-800 Contacts' verification requests. (Coon, Tr. 2716). 1-800 Contacts ended up having to cancel 50 percent of its orders in Texas because ECPs would just ignore its prescription verification requests. (Coon, Tr. 2716).

324. The Texas optometry board received 4,000 handwritten complaints from consumers about the failure of ECPs to respond to 1-800 Contacts' verification requests but failed to pursue a single complaint. (Coon, Tr. 2717).

325. In response to the problems it encountered with affirmative verification, 1-800 Contacts proposed an alternative system called "presumed verification." (Coon, Tr. 2716-18).

326. Under presumed verification, the retailer would communicate the customer's prescription to the prescriber and may presume it is valid unless the prescriber informs it within a certain time period that the prescription is incorrect, invalid, or expired. (Coon, Tr. 2717-18).

327. ECPs responded to presumed verification by arguing that it was not an appropriate way to verify a prescription for a medical device like contact lenses. (Coon, Tr. 2718).

328. 1-800 Contacts took many steps to establish presumed verification as the applicable standard for verifying contact lens prescriptions. (Coon, Tr. 2718).

329. 1-800 Contacts' representatives visited more than two dozen state capitals, as well as Washington, D.C., in an effort to change both state and federal law with respect to verification of contact lens prescriptions. (Coon, Tr. 2718).

330. 1-800 Contacts' then-CEO, Mr. Coon, personally visited numerous state capitals, and spent over 300 days in Washington, D.C. over a five-year period, to establish presumed verification as the applicable standard for verifying contact lens prescriptions. (Coon, Tr. 2718-19).

331. Ultimately, 1-800 Contacts was successful in urging the U.S. Congress to pass the Fairness to Contact Lens Consumers Act ("FCLCA"), which adopted presumed verification as a national standard for verifying contact lens prescriptions. (Coon, Tr. 2719-20).

332. 1-800 Contacts' primary opponents in nearly all of its various legal and regulatory battles relating to competition in the sale of contact lenses were ECPs and their trade associations. (Coon, Tr. 2720).

***2. Supporting Access To Supply Of Contact Lens For Non-ECP Retailers***

333. Another major challenge that 1-800 Contacts faced was that the major contact lens manufacturers refused to supply product to 1-800 Contacts and other non-ECP retailers. (Coon, Tr. 2685-86).

334. 1-800 Contacts believed that major contact lens manufacturers refused to supply their products to 1-800 Contacts because ECPs threatened not to prescribe the products of a manufacturer who provided supply to 1-800 Contacts. (Coon, Tr. 2685-86).

335. 1-800 Contacts was involved in a major lawsuit brought by approximately 32 State Attorneys General against the American Optometric Association (“AOA”), individual ECPs, and the major contact lens manufacturers. (Coon, Tr. 2685).

336. The lawsuit alleged that the AOA, individual ECPs, and major manufacturers unlawfully conspired to restrict the supply of contact lenses to non-ECP retailers and to restrict consumer access to their prescriptions. (Coon, Tr. 2685-86).

337. As part of the settlement of this litigation, the defendant contact lens manufacturers agreed to sell contact lenses to alternative distribution channels, including non-ECP retailers. (RX 567-0011-0012).

**3. *The Battles Against Unilateral Pricing Policies (“UPPs”)***

338. Unilateral pricing policies were implemented by the four major contact lens manufacturers, starting in 2013. (Bethers, Tr. 3670; RX 739-0090).

339. A unilateral pricing policy sets a minimum retail price for specific contact lenses. (Bethers, Tr. 3671).

340. Alcon was the first manufacturer to implement a unilateral pricing policy in June 2013, and it did so only with respect to new products (starting with Dailies Total 1). (Bethers, Tr. 3671-74; RX 739-0090).

341. Bausch & Lomb then introduced a new product, Ultra, with a unilateral pricing policy in February 2014. (Bethers, Tr. 3671-74; RX 739-0090).

342. Johnson & Johnson Vision Care followed by implementing a unilateral pricing policy on many of its existing products in July and August 2014. (Bethers, Tr. 3671-74; RX 739-0090).



343. The last manufacturer to introduce a unilateral pricing policy was CooperVision, which did so with respect to certain products sold by a company it had acquired, Sauflon. (Bethers, Tr. 3671-74; RX 739-0090).

344. Both manufacturers and ECPs have publicly supported unilateral pricing policies because of their effect on the ability of ECPs to compete against lower priced contact lens retailers. (RX 739-0019).

345. The president of Johnson & Johnson Vision Care described its unilateral pricing policy as giving the optometrist the ability to improve his or her capture rate in the office by reducing the incentives of consumers to shop around. (RX 739-0019).

346. At the peak of unilateral pricing policies in the contact lens industry, 1-800 Contacts estimated that approximately 57 percent of consumers in the United States experienced a price increase because the contact lenses that they purchased were subject to a unilateral pricing policy. (Bethers, Tr. 3673).

347. Unilateral pricing policies concerned 1-800 Contacts because they took away the concept of consumers shopping around to find a lower price. (Bethers, Tr. 3673).

348. Unilateral pricing policies threatened 1-800 Contacts' principal source of new customers by reducing the incentives for consumers to shop for contact lenses beyond their ECP. (Bethers, Tr. 3686).

349. Unilateral pricing policies threatened 1-800 Contacts' ability to retain customers and to motivate non-customers to try its service. (Bethers, Tr. 3687).

350. The minimum retail price established by unilateral pricing policies was often just below or slightly above 1-800 Contacts' retail prices at the time. (Bethers, Tr. 3674).

351. Unilateral pricing policies forced 1-800 Contacts to raise some of its retail prices on contact lenses. (CX 9025 (Osmond, Dep. at 70-71)).

352. Unilateral pricing policies forced 1-800 Contacts to reduce some of the rebates that it offered to consumers. (CX 9025 (Osmond, Dep. at 71)).

353. Unilateral pricing policies forced some independent ECPs to raise their retail prices on contact lenses. (Bethers, Tr. 3675).

354. Unilateral pricing policies caused some ECPs to lower their retail price to the minimum retail price required by the manufacturer. (CX 9025 (Osmond, Dep. at 71)).

355. [REDACTED]  
[REDACTED] (CX 1346-014).

356. [REDACTED]  
[REDACTED] (CX 1346-018).

357. [REDACTED]  
[REDACTED]  
(CX 1346-018).

358. [REDACTED]  
[REDACTED] (CX 1346-018).

359. [REDACTED]  
[REDACTED] (Bethers, Tr. 3676; CX 1346-018; CX 9037 (Owens, Dep. 80 (“In some instances it increased. In some instances it may have decreased a little bit.”))).

360. Unilateral pricing policies forced Costco to raise some of its retail prices on contact lenses. (Bethers, Tr. 3675-76).

361. Johnson & Johnson Vision Care’s unilateral pricing policy set minimum prices for contact lens significantly higher than Costco’s retail prices, and forced Costco to increase its retail prices on contact lens subject to the policy by 20 to 30 percent. (CX 8004-002).

362. In conjunction with its unilateral pricing policy, Johnson & Johnson Vision Care lowered its wholesale price to 1-800 Contacts but also eliminated cooperative marketing and other advertising funds, which had the net impact of increasing 1-800 Contacts' costs for Johnson & Johnson Vision Care's contact lenses. (Bethers, Tr. 3677).

363. In conjunction with its unilateral pricing policy, Johnson & Johnson Vision Care introduced a 24-pack of its leading product Oasys, which was more conducive to selling an annual supply of contact lenses at one time. (Bethers, Tr. 3678).

364. 1-800 Contacts, Costco, Lens.com, and the National Association of Optometrists and Opticians (which includes Luxottica, Walmart, Sam's Club, Costco, and Visionworks) established a coalition in opposition to unilateral pricing policies. (Bethers, Tr. 3680-81).

365. 1-800 Contacts' counsel made presentations to state attorneys general and the Federal Trade Commission in opposition to unilateral pricing policies. (Bethers, Tr. 3681).

366. 1-800 Contacts' executives testified before the United States Congress in opposition to unilateral pricing policies. (Bethers, Tr. 3682).

367. 1-800 Contacts presented its arguments in opposition to unilateral pricing policies to legislators in 14 different states. (Bethers, Tr. 3682).

368. Utah (one of the states where 1-800 Contacts presented arguments in opposition to unilateral pricing policies) passed a law that prohibited unilateral pricing policies in the contact lens industry. (Bethers, Tr. 3682).

369. After the enactment of the Utah law prohibiting unilateral pricing policies in the contact lens industry, Alcon, Bausch & Lomb, and Johnson & Johnson Vision Care dropped their unilateral pricing policies. (Bethers, Tr. 3684).

**III. Contact Lens Retailers – The Competitive Landscape**

***A. There Are Different Types Of Contact Lens Retailers, Many Of Which Sell Contact Lens Online***

***1. Independent Eye Care Professionals***

370. There are about 16,000 independent ECP practices in the United States. (Bethers, Tr. 3509-10, 3546).

371. Independent ECPs sell contact lenses in their physical retail stores. (Bethers, Tr. 3543).

372. [REDACTED]

[REDACTED]

373. Independent ECPs represent approximately 40 percent of all contact lens sales in the United States. (Bethers, Tr. 3552-56; RX 904-0039; CX 525-040; [REDACTED] [REDACTED] RX 736-009 (citing Federal Trade Commission, Notice of Proposed Rulemaking, Contact Lens Rule, 81 FR 88526 (Dec. 7, 2016)); RX 739-0086 (showing that the average market share for 2012-2015 of independent ECPs was 39.7 percent)).

374. Each of the major contact lens manufacturers offers to ship its contact lenses either to an ECP's office or directly to the ECP's patient, which gives the independent ECP the ability to provide home delivery of contact lenses to their patients. (Bethers, Tr. 3514).

375. A significant number of independent ECPs sell contact lens online through, or in conjunction with, services provided by contact lens manufacturers, contact lens wholesale distributors, or vision insurance providers. (Bethers, Tr. 3513-14).

376. CooperVision, one of the four major contact lens manufacturers, provides a service to consumers under the name LensFerry. (Bethers, Tr. 3514-15).

377. LensFerry offers consumers a subscription service that allows them to order or reorder an annual supply of contact lenses from their ECP through the internet, and the contact lenses are shipped directly to their home. (Bethers, Tr. 3514-15; Clarkson, Tr. 285).

378. ABB Vision Group (“ABB”), the largest distributor of contact lenses for independent ECPs, has a service named YourLens.com that allows an independent ECP to create her or his own website that customers can visit to buy contact lenses. (Bethers, Tr. 3515-16).

379. YourLens.com explains to ECPs that it is easy to set up a personalized website and webstore. (RX 45-0001).

380. Essilor, one of the world’s largest optical companies, provides a service called MyOnlineOptical that allows independent ECPs to customize his or her own website for selling glasses and contact lenses online, at prices set by the ECP. (Bethers, Tr. 3516-17).

381. VSP, the largest provider of vision insurance, has a website called Eyeconic where customers can use their vision insurance benefits to purchase contact lenses. (Bethers, Tr. 3518).

382. Eyemed, the second largest vision insurance provider, owns ContactsDirect.com, where a consumer can use vision insurance benefits to purchases contact lenses or glasses and the prescribing ECP receives a dispensing fee. (Bethers, Tr. 3519).

383. Guardian, a vision insurance company, operates LensBenefits.com, where a consumer can use insurance benefits to purchase contact lenses. (Bethers, Tr. 3519).

384. [REDACTED]  
(RX 1117-0004-0031).

385. [REDACTED]  
[REDACTED] (RX 1117-0004, -0031).

386. [REDACTED]  
[REDACTED] (RX 1117-0004, -0031).

387. Independent ECPs' retail prices for contact lenses vary substantially. (CX 9001 (Bethers, IHT at 82) ("Some were outrageously high, and they marked up very high. Some were below our price. It depended on the independent doctor and how they wanted to approach the marketplace.")).

388. Independent ECPs on average have the highest retail prices for contact lenses in the industry. (Bethers, Tr. 3544).

389. ABB distributes a quarterly price monitor for independent ECPs to use in setting their retail prices. (Bethers, Tr. 3632-33; RX 819-0002-0005).

390. The ABB quarterly price monitor provides information on the retail prices of 1-800 Contacts, Walmart, a leading retail optical chain, and a sample of independent ECPs. (Bethers, Tr. 3632-33; RX 819-0002-0005).

391. Independent ECPs use ABB's quarterly price monitor to consider how to set their retail prices for contact lenses. (Bethers, Tr. 3633).

392. ABB's decision to include the prices of 1-800 Contacts and Walmart in its quarterly price monitor for independent ECPs reflects ABB's determination, as the largest wholesale distributor of contact lenses, that those prices are relevant to independent ECPs in setting their own retail prices for contact lenses. (RX 819-0002-0005).

## ***2. Optical Retail Chains***

393. In the United States, there are national and regional optical retail chains that sell contact lenses. (Bethers, Tr. 3520).

394. Optical retail chains offer an eye exam and have one or more optometrists that work at a location. (Bethers, Tr. 3522).

395. National optical retail chains include LensCrafters, Pearle Vision, Visionworks, America's Best Contacts and Glasses, and MyEyeDr. (Bethers, Tr. 3520-21).

396. Regional optical retail chains include Cohen Optical, Sterling Optical, and many others. (Bethers, Tr. 3520-21).

397. For many optical retail chains, a consumer can purchase contact lenses in the store, by phone, or on the chain's website. (Bethers, Tr. 3522).

398. Optical retail chains on average have retail prices for contact lenses that are below independent ECPs but higher than other retailers. (Bethers, Tr. 3544).

**3. *Mass Merchants And Club Stores***

399. Many mass merchant and club stores have an onsite optometrist and a separate optical department located within the store. (Bethers, Tr. 3526, 3528).

400. Mass merchants, such as Walmart, Target, Sears, Fred Meyer, and JC Penny, sell contact lenses in their stores. (Bethers, Tr. 3583)

401. Walmart sells contacts lenses in its stores, over the phone, and through its own website. (Bethers, Tr. 3529; CX 9037 (Owens, Dep. at 10)).

402. Targets, Sears, and JC Penney sell contact lenses in their stores and online. (CX 8007-042).

403. Mass merchants on average have retail prices for contact lenses below independent ECPs, optical retail chains, and 1-800 Contacts, but higher than club stores and other pure-play online retailers. (Bethers, Tr. 3544).

404. Club stores—Costco, Sam's Club, and BJ's Wholesale Club—sell contact lenses in their stores and online through their own websites. (Bethers, Tr. 3525-26, 3530).

405. Club stores on average have the lowest retail prices for contact lenses. (Bethers, Tr. 3545).

**(a) Walmart**

406. Walmart's retail prices for contact lenses are the same in-store and online. (CX 9037 (Owens, Dep. at 26)).

407. Walmart considers all retailers of contact lenses to be its competitors in the retail sale of contact lenses. (CX 9037 (Owens Dep. at 14)).

408. Walmart considers its largest competitor in the retail sale of contact lenses to be independent ECPs. (CX 9037 (Owens, Dep. at 11)).

409. Walmart considers both its in-store and online sales of contact lenses to be competing against independent ECPs. (CX 9037 (Owens, Dep. at 60)).

410. Walmart considers 1-800 Contacts to be one of its biggest competitors in the retail sale of contact lenses. (CX 9037 (Owens, Dep. at 13)).

411. Walmart considers Target, Walgreens, and other online contact lens retailers to be its competitors in the retail sale of contact lenses. (CX 9037 (Owens, Dep. at 13-14)).

412. In order to set its retail prices, Walmart tracks the prices of 1-800 Contacts, Target, independent ECPs, Sears, JC Penney, ACLens, club stores, LensCrafters, PearleVision, America's Best, and Visionworks. (CX 9037 (Owens, Dep. at 22, 52)).

413. Walmart tries to set its retail prices for contact lenses to have better pricing than 1-800 Contacts. (CX 9037 (Owens, Dep. at 25, 54)).

**(b) Costco**

414. Costco had about \$230 million in contact lens sales in 2015. (CX 8004-001).

415. Costco seeks to be the lowest-cost seller of contact lenses. (CX 8004-001).

416. Costco has been selling contact lenses in its brick-and-mortar stores for over twenty-five years. (CX 8004-001).

417. Costco has ECPs located within its brick-and-mortar stores. (CX 8004-001).



418. Costco began selling contact lenses online in October 2016. (CX 8004-001).

419. Costco's retail prices for contact lenses are the same in-store and online.  
(CX 8004-002).

420. In order to set its retail prices for contact lenses, Costco checks the prices of brick-and-mortar stores and online stores. (CX 8004-002).

**4. *Pure-Play Online Retailers***

421. Contact lens retailers who sell online but do not have a physical store are often referred to as "pure-play" online retailers. (Bethers, Tr. 3536-38).

422. 1-800 Contacts is generally categorized as a "pure-play" online retailer, although it recently opened four physical retail stores under the name Lumen Optical in the Chicago area.  
(Bethers, Tr. 3535).

423. "Pure-play" online retailers of contacts lenses include:

- (a) 1-Save-On-Lens.com,
- (b) 2020Direct.com,
- (c) AAlens.com,
- (d) ACLens.com (DiscountContactLenses.com),
- (e) Essilor (CoastalContacts.com, Clearly Contacts, LensWay, and FramesDirect.com),
- (f) ContactsLand.com,
- (g) ContactLens.com,
- (h) ContactLensKing.com,
- (i) CVS,
- (j) EyecareUniverse.com,
- (k) EZContactsUSA.com,
- (l) Lens.com (123ContactLenses.com, 1-800GetLens.com, ContactsAmerica.com, ContactLensConnection.com, JustLenses.com),

- (m) LensDirect.com,
- (n) LensDiscounters.com (Contacts1st, OptiContacts, PostalContacts.com, and Lens247.com),
- (o) LensFast.com,
- (p) LensesForLess.com,
- (q) LowestPriceContacts.com,
- (r) MajorLens.com,
- (s) PerfectLensWorld.com,
- (t) ReplaceMyContacts.com,
- (u) SmartBuyGlasses.com,
- (v) WebEyeCare.com,
- (w) Walgreens (Walgreens.com, Vision Direct.com, LensMart.com, LensQuest.com, and LensWorld.com), and
- (x) X-Contacts.com.

(Bethers, Tr. 3538-41).

424. Pure-play online retailers (other than 1-800 Contacts) on average have retail prices for contact lenses generally between the retail prices of mass merchants and club stores. (Bethers, Tr. 3545).

425. 1-800 Contacts on average has retail prices for contact lenses below independent ECPs and retail optical chains but higher than mass merchants, club stores, and other pure-play online retailers. (Bethers, Tr. 3544).

**(a) *LensDirect***

426. LensDirect is a “pure-play” online retailer of contact lenses. (Bethers, Tr. 3538-41; CX 9023 (Alovis, Dep. at 106)).

427. Services offered by contact lens distributors make it easy for an online retailer like LensDirect to sell contact lenses to consumers without keeping a large inventory of contact lenses on hand. (Alovis, Tr. 1026).

428. LensDirect competes with every retailer of contact lenses, including ECPs, Walmart, other brick-and-mortar retailers, and online retailers of contact lenses based in Canada. (Alovis, Tr. 1026-27; CX 9023 (Alovis, Dep. at 39)).

429. LensDirect tries to differentiate itself based on customer service and its auto-refill program. (Alovis Tr. 979-81; CX 9023 (Alovis, Dep. at 106-07)).

430. LensDirect tries to set its retail prices for contact lenses to be in the middle of the industry; LensDirect does not attempt to have the lowest retail prices for contact lenses. (CX 9023 (Alovis Dep. at 108)).

431. LensDirect has no agreement with 1-800 Contacts with respect to paid search advertising. (Alovis, Tr. 1018).

432. LensDirect has used 1-800 Contacts' trademarks as keywords for internet search advertising since about 2010. (Alovis, Tr. 1018 & 1019-20).

433. LensDirect has been either unprofitable or has barely broken even in each year since it started using 1-800 Contacts' trademarks as keywords for internet search advertising. (Alovis, Tr. 1019-21).

434. LensDirect had total revenue of \$3.3 million in 2016 and was not profitable, but expects to earn total revenue of approximately \$6 million in 2017. (Alovis, Tr. 983-85).

435. LensDirect attributes its expected success in 2017 to a redesigned website, dedicated account representatives to help with retention, its subscription program, and tremendous organic growth, not to any form of internet search advertising. (Alovis, Tr. 985).

**(b) *WebEyeCare***

436. WebEyeCare started in 2009. (CX 9000 (Batushansky, IHT at 8)).

437. WebEyeCare is an online retailer of contact lenses, glasses, and accessories. (CX 9000 (Batushansky, IHT at 9)).

438. WebEyeCare's net revenue increased from [REDACTED]

[REDACTED]

[REDACTED] (CX 1820; CX 9000 (Batushansky, IHT at 8, 34, 38-40)).

439. [REDACTED]

[REDACTED] (CX 9000 (Batushansky, IHT at 9)).

440. [REDACTED]

[REDACTED]

[REDACTED] (CX 9014 (Batushansky, Dep. at 36-37)).

**(c) *Vision Direct And Walgreens***

441. Vision Direct and Walgreens both sell contact lenses online. (Bethers, Tr. 3538-41; Hamilton, Tr. 388-90).

442. [REDACTED]

443. [REDACTED]

444. [REDACTED]

[REDACTED]

[REDACTED]

445. [REDACTED]

[REDACTED]

446. [REDACTED]

[REDACTED]

[REDACTED]

447. [REDACTED]

[REDACTED]

448. [REDACTED]

[REDACTED]

[REDACTED]

449. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

450. [REDACTED]

[REDACTED]

[REDACTED]

451. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

452. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

***B. Market Share Of Contact Lens Retailers***

453. In recent years, about 40 percent of contact lens sales in the United States were by independent ECPs; 20 percent were by optical retail chains; 23 percent were by mass merchants and club stores; and 17 percent were by pure-play online retailers, including 1-800 Contacts.

(Bethers, Tr. 3552-56; RX 904-0039; CX 525-040; [REDACTED] RX 736-009 (citing Federal Trade Commission, Notice of Proposed Rulemaking, Contact Lens Rule, 81 FR 88526 (Dec. 7, 2016)); RX 739-0086).

454. 1-800 Contacts accounts for about 10 percent of total contact lens sales in the United States. (Bethers, Tr. 3552-53).

455. Walmart accounts for about 6 to 10 percent of total contact lens sales in the United States. (Bethers, Tr. 3553; CX 9037 (Owens, Dep. at 16, 59); RX 182-0001).

456. Costco accounts for about 5 percent of total contact lens sales in the United States. (Bethers, Tr. 3553).

457. 1-800 Contacts measures market shares for contact lens retailers by starting with the 16,000 independent ECP practices that account for about 40 percent of total contact lens sales in the United States. (Bethers, Tr. 3552).

458. 1-800 Contacts regularly tracks its own market share based on all contact lens sales in the United States. (Bethers, Tr. 3552-56; RX 904-0039; CX 525-040; CX 1446-009; RX 1117-0024).

459. Walmart calculates its market share in the sale of contact lenses based on all retail sales of contact lenses. (RX 182-0001).

460. In the last 14 years, the market share of pure-play online retailers as an entire group has increased, relative to other groups of contact lens retailers. (Bethers, Tr. 3554-55; RX 904-0039).

461. In the last 14 years, the market share of 1-800 Contacts and other pure-play online retailers has increased from about 7.5 percent to 17 percent. (Bethers, Tr. 3554-55).

462. In the last 14 years, the increase in market share for pure-play online retailers is a result of pure-play online retailers gaining market share primarily from independent ECPs and retail optical chains. (Bethers, Tr. 3554-55).

***C. Recent New Entrants To The Contact Lens Retail Industry***

463. It is relatively easy to enter the business of selling contact lenses online. (CX 9029 (Bethers, Dep. at 132-33)).

464. To start a new business selling contact lenses online, a company needs knowledge of contact lenses, a supply source for contact lenses (which is easy to obtain from existing distributors or directly from manufacturers), and the ability to verify prescriptions. (CX 9029 (Bethers, Dep. at 132-33)).

465. In the last two years, there have been new entrants to the contact lens retail market that offer different services and new business models, including a number of new online retailers of contact lenses. (Bethers, Tr. 3584, 3588).

***1. Simple Contacts***

466. Simple Contacts is a new entrant that offers customers the ability to extend their contact lens prescription online and purchase contacts lens online from Simple Contacts. (Bethers, Tr. 3588-89).

467. To extend a contact lens prescription, Simple Contacts allows consumers to use the camera on a mobile device to record a video while looking at a visual acuity chart. (Bethers, Tr. 3588-89). The results are reviewed by an ophthalmologist who determines the prescription. (Bethers, Tr. 3588-89).

468. Simple Contacts sells online all of the major contact lenses manufactured in the United States. (Bethers, Tr. 3589).

**2. *Sightbox***

469. Sightbox is a new entrant that sells contact lens online and also arranges for its customers to obtain an eye exam with an ECP. (Bethers, Tr. 3589-90).

470. Sightbox operates on a subscription model. (Bethers, Tr. 3589-90).

471. A Sightbox customer pays a monthly subscription fee, and Sightbox takes care of the customer for the whole year by supplying contact lenses, arranging an appointment for an eye exam with an ECP, and paying for the eye exam. (Bethers, Tr. 3589-90).

**3. *Hubble***

472. Hubble Contacts is a new entrant that launched around the end of 2016 and has its own brand of contact lenses and sells those directly to consumers online. (Bethers, Tr. 3593-94; Clarkson, Tr. 289-90).

473. Hubble Contacts is a very well-funded start-up company that has already raised about \$25 million in capital. (Clarkson, Tr. 290).

474. Hubble Contacts' contact lenses are manufactured in Taiwan by St. Shine. (Bethers, Tr. 3594).

475. Hubble Contacts operates with a subscription model that costs a consumer \$30 per month for daily disposable lenses (in comparison, other daily disposable lenses can cost between \$500 and \$750 per year). (Bethers, Tr. 3595).

476. Instead of using traditional online marketing approaches of internet search advertising and marketing affiliates, Hubble Contacts introduced its concept through Facebook and other vehicles of social media. (Bethers, Tr. 3594).



477. Hubble Contacts has been very successful in growing their orders and attracting customers to their business. (Bethers, Tr. 3595).

478. Since Hubble Contacts started, customers have called 1-800 Contacts asking if it carries the Hubble brand of contact lenses. (Bethers, Tr. 3720).

479. Although Hubble Contacts has been in existence for a very short time, consumers are already going into their ECPs' offices asking for Hubble Contacts' contact lenses. (Clarkson, Tr. 290-91).

480. Peter Clarkson, the founder and President of ACLens.com (Clarkson, Tr. 172), sees Hubble as a potential threat to ACLens.com over the next five to ten years. (Clarkson, Tr. 296).

#### ***4. Daysoft***

481. Daysoft is a manufacturer of contact lenses that sells its lenses directly to consumers online. (Bethers, Tr. 3591-92).

482. Daysoft is run by one of the original inventors of daily-disposable contact lenses. (Bethers, Tr. 3591).

483. Although Daysoft is located in the United Kingdom, a consumers in the United States can use Daysoft's website and have contact lenses delivered to the United States. (Bethers, Tr. 3593).

#### ***5. Opternative***

484. Opternative is a new entrant that offers customers a refraction through a desktop computer. (Bethers, Tr. 3584-85).

485. Opternative has contracted with ophthalmologists to review the results of the refraction and write a contact lens prescription for the customer that can be used to purchase the same brand of contact lenses that the customer is currently wearing. (Bethers, Tr. 3585-86).

486. 1-800 Contacts has partnered with Opternative because it allows customers to extend their contact lens prescription and, if necessary, change the power of the prescription with a lower-cost exam from the comfort of their home. (Bethers, Tr. 3586-87).

487. Opternative provides an opportunity for any online retailer to provide its customers with the ability to extend their contact lens prescription and, if necessary, change the power of the prescription without visiting an ECP's office. (Bethers, Tr. 3587).

**IV. The Relevant Market In This Matter Is All Retail Sales Of Contact Lenses In The U.S.**

488. The relevant market for analyzing the competitive effects of the settlement agreements is the market for retail sales of contact lenses. (RX 739-007-9, 037-043 (Murphy Report); Murphy, Tr. 4092, 4148).

**A. *The Structure Of Competition And 1-800 Contacts' Business Model Reflects That Offline Sellers Constrain Its Pricing***

489. The appropriate way to define the relevant market is to identify other retailers that are sufficiently close substitutes for buyers of contact lenses that they constrain contact lens retailers' prices and prevent 1-800 Contacts or other retailers from exercising monopoly power. (RX 739-0040 (Murphy Report); Murphy, Tr. 4149).

490. The goal of market definition is to understand the competitive constraints on pricing in the marketplace and how that pricing might change in a world without the challenged conduct. (RX 739-0040 (Murphy Report); Murphy, Tr. 4149).

491. [REDACTED]

[REDACTED] (Evans, Tr. 1668-669).

492. Market definition should avoid rigid boundaries. (Evans, Tr. 1430-31). ("we should avoid rigid boundaries . . . I believe that you have got to look both inside the market and – and take on board what else is happening in the – in the broader – in the broader sphere.").

493. The first step in assessing the relevant market is to identify the set of retailers to which 1-800 Contacts' customers might be willing to substitute because they provide services similar to 1-800 Contacts. (RX 739-0040 (Murphy Report)).

494. In order to determine that online retailers are not in the same market as ECPs, one would have to find that the services offered by the different types of retailers were sufficiently different that a large enough share of consumers would not be willing to substitute between the two types of retailers such that the ECPs would not constrain online retailers' prices. (RX 739-0040 to -0041, -0076 (Murphy Report)).

495. Consumers have numerous options regarding where to buy contact lenses. (RX 739-0039, -0040, -0086 (Murphy Report); Bethers, Tr. 3509, 3538-3541).

496. Surveys show that customers switch from 1-800 Contacts to retailers in other channels in rough proportion to the share of sales accounted for by retailers in each channel. (RX 739-0041 to -0042 (Murphy Report); CX 1117-016).

497. Dozens of firms sell contact lenses online. (Bethers, Tr. 3537-3541).

498. In the 2001-2002 time period, approximately 7.5 percent of contact lens sales were made by firms that primarily sell online. (Bethers, Tr. 3555).

499. Today, approximately 17 percent of contact lens sales are made by firms that primarily sell online. (RX 739-0086 (Murphy Report); Bethers, Tr. 3555).

500. The proportion of contact lens sales made by firms that primarily sell online grew from approximately 7.5 percent in the 2001-2002 time period to 17 to 18 percent today at the expense of the share of sales made by independent ECPs and optical chains. (Bethers, Tr. 3554-55).

501. [REDACTED]

[REDACTED] (RX 739-0087 (Murphy Report); Murphy, Tr. 4104-06)).

502. Optical chains such as LensCrafters, Pearle Vision, Visionworks and America's Best sell contact lenses. (Bethers, Tr. 3520-3521).

503. Optical chains offer eye exams by optometrists in many of their brick-and-mortar locations. (Bethers, Tr. 3521-22).

504. Optical chains make approximately 20 percent of all contact lens sales. (Bethers, Tr. 3553; RX 739-0086 (Murphy Report)).

505. Independent ECPs make approximately 40 percent of all contact lens sales. (Bethers, Tr. 3552; RX 739-0086 (Murphy Report)).

506. Independent ECPs and optical chains with ECPs in their stores make approximately 60 percent of contact lens sales. (RX 739-0017, -086 (Murphy Report)).

507. Though prices vary by SKU, on average, the price of contact lenses offered independent ECPs and optical chains are approximately 25 to 30 percent higher than prices offered by online retailers and mass merchants. (RX 739-0089 (Murphy Report)).

508. Consumers who must visit their physician—a competing seller—every one to two years are the ultimate source of business for all contact lens retailers. (Evans, Tr. 1700-1701; RX 739-0042 (Murphy Report); Murphy, Tr. 4151; Bethers, Tr. 3601).

509. 1-800 Contacts considers independent ECPs to be its primary competitors. (Bethers, Tr. 3600-01).

510. 1-800 Contacts' core business model is persuading ECP customers to switch to buying contacts online. (Murphy, Tr. 4097-99, 4100-01, 4105; RX 739-0019; Bethers, Tr. 3600-01).

511. The fact that 1-800 Contacts' core business model is persuading ECP customers to switch to buying contacts online makes it economically important to consider ECPs in analyzing

competition in the relevant market. (RX 739-0020 to 0021 (Murphy Report); Murphy, Tr. 4100-01, 4105, 4115-16, 4149).

512. ECP customers are 1-800 Contacts' largest source of new customers. (Murphy , Tr. 4159; Bethers, Tr. 3625).

513. 1-800 Contacts' largest growth opportunity is the possibility of inducing customers currently buying contacts from their ECPs to substitute to 1-800 Contacts. (RX 739-0020 to 0021 (Murphy Report); Murphy, Tr. 4100, 4104-05; Bethers, Tr. 3600-01).

514. Dr. Evans agreed that 1-800 Contacts competes for new customers from ECPs. (CX 9042 (Evans, Dep. at 248-249)).

515. The fact that most of 1-800 Contacts' potential new customers are ECP customers makes it economically important to consider ECPs in analyzing competition in the relevant market. (RX 739-0020-0021 (Murphy Report); Murphy, Tr. 4149).

516. How firms price their product is direct evidence of market definition when pricing decisions are based directly on prices of particular competitors. (RX 739-0042 (Murphy Report)).

517. 1-800 Contacts prices its contact lenses at a 5 to 10 percent discount off the prices offered by independent ECPs. (Bethers, Tr. 3549-50).

518. 1-800 Contacts' decision to price at a discount off of ECPs' prices makes economic sense. (RX 739-0042 to -0043 (Murphy Report)).

519. The fact that 1-800 Contacts prices at a discount off of ECPs' prices makes it economically important to consider ECPs in analyzing competition in the relevant market. (RX 739-0042 to 0043 (Murphy Report); Murphy, Tr. 4100-01, 4115-16, 4149; CX 9048 (Murphy, Dep. at 126-27, 187, 194-95)).

520. 1-800 Contacts' policy of pricing its contact lenses at a 5 to 10 percent discount off the prices offered by independent ECPs indicates that those prices constrain 1-800 Contacts' ability to raise its own prices. (RX 739-0041 to -0042 (Murphy Report)).

521. Dr. Evans did "not disagree with Professor Murphy that 1-800 Contacts price checks ECPs and mass merchants and that ECPs and mass merchants play some role in constraining prices at online sellers." (CX 8009-057 (Evans Rebuttal Report, at n.128)).

522. Raising prices would inhibit 1-800 Contacts' ability to attract new customers from ECPs. (Murphy, Tr. 4158, 4161-62; Evans, Tr. 1757).

523. According to Dr. Evans, "one consequence of raising prices is a reduction in the ability to attract consumers from the physical retailers, including the ECPs." (Evans, Tr. 1757).

524. Dr. Evans did not analyze how 1-800 Contacts' increase in price would affect its ability to attract new customers from ECPs. (Murphy, Tr. 4162-63).

525. If a reduction in price induces a small share of ECP buyers to substitute to buying from 1-800 Contacts, that would represent a much larger increase in sales than would a reduction in price that induces a similar share of buyers from other online retailers to substitute to 1-800 Contacts. (RX 739-0008, 0042 to -0043 (Murphy Report)).

526. Dr. Evans agreed that, because 1-800 Contacts' prices are lower than ECPs' prices, it would make economic sense for 1-800 Contacts to consider how raising prices would affect the relationship between its prices and ECPs' prices. (Evans, Tr. 1732).

527. Surveys have found that a higher proportion of customers who switch from 1-800 Contacts switch to ECPs than to other online retailers. (CX 1117-016).

528. Club stores such as Costco, Sam's Club and BJ's sell contact lenses. (Bethers, Tr. 3525-3526).

529. Club stores offer eye exams by optometrists in many of their brick-and-mortar locations. (Bethers, Tr. 3526-27).

530. Club stores such as Costco, Sam's Club and BJ's and mass merchandisers such as Walmart, Target and Sears make approximately 25 percent of retail contact lens sales in the United States. (Bethers, Tr. 3552-53; RX 739-0017, -086 (Murphy Report)).

531. Walmart makes approximately 8 percent of U.S. retail contact lens sales. (CX 9037 (Owens, Dep. at 16)).

532. Though prices vary by SKU, on average, club stores such as Costco, Sam's Club and BJ's generally offer lower prices than 1-800 Contacts and other online sellers. (RX 739-0089 (Murphy Report); Bethers, Tr. 3544-45; CX 9037 (Owens, Dep. at 27); Coon, Tr. 2710). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
(RX 739-0089 (Murphy Report)).

533. Though prices vary by SKU, Walmart offers lower prices on average than 1-800 Contacts. (CX 9037 (Owens, Dep. at 24-25)).

534. Dr. Evans agreed that if Costco, Walmart or mass merchandise chains were lower than 1-800 Contacts' prices, it would make economic sense for 1-800 Contacts to consider how many customers it would lose to Costco or Walmart if it raised prices. (Evans, Tr. 1729-30; Evans, Tr. 1731-32 ("Q. So if 1-800 Contacts was going to raise their prices, one of the things they would have to think about is whether they're going to lose business to Costco to a greater extent than they're losing it now because the price gap between 1-800 Contacts and Costco would be increased; correct? A. Be something they'd consider.")).

535. Dr. Evans did not calculate the percentage of customers who would leave online suppliers for mass merchandisers if online retailers raised their prices. (Evans, Tr. 1746. ("Q. So did you in your analysis calculate the percentage of consumers who would leave online suppliers of contact lenses if prices were to go up 12 percent and switch instead to mass merchandisers? A. In terms of calculating a number for that, no.")).

536. Surveys have found that a higher proportion of customers who switch from 1-800 Contacts switch to Walmart or other primarily brick-and-mortar retailers than to other online retailers. (CX 1117-016).

537. Trademarks play an important role in 1-800 Contacts' ability to attract customers from ECPs. (Murphy, Tr. 4116-18, 4152-53; RX 739-0042 (Murphy Report); CX 9048 (Murphy, Dep. at 40-41, 114-16, 145)).

538. 1-800 Contacts' brand name plays an important role in 1-800 Contacts' ability to attract customers from ECPs. (Murphy, Tr. 4116-118, 4152-53; RX 739-0042 (Murphy Report); CX 9048 (Murphy, Dep. at 40-41, 117, 145)).



539. The fact that 1-800 Contacts' trademarks and brand name play an important role in attracting customers from ECPs makes it economically important to consider ECPs in analyzing the market in which trademark protection affects competition. (Murphy, Tr. 4116; CX 9048 (Murphy, Dep. at 40-41, 114-16, 117, 128-32, 188, 254-55); RX 739-0042 (Murphy Report)).

***B. The Industry Recognizes That Offline And Online Sellers Compete***

540. Walmart views ECPs, brick-and-mortar stores, and online retailers as competitors. (CX 9037 (Owens, Dep. 13-15, 60)).

541. ACLens views ECPs, brick-and-mortar stores, and online retailers as competitors. (CX 9023 (Alovis, Dep. at 8-39)).

542. In enacting the Fairness to Contact Lens Consumers Act ("FCLCA"), Pub. L. 108-164, 117 Stat. 2024 (Dec. 6, 2003), Congress found that "[t]he practice of optometrists withholding the prescription has limited the consumer's ability to shop for the best price and has impacted competition (H.R. REP. 108-318, 4, 2004 U.S.C.C.A.N. 1759, 1759).

543. "Consumers are now offered a myriad of competitive options to fill contact lens prescriptions from the optometrist's office, to third party sellers like pharmacies, department stores, and Internet or mail order outlets." (H.R. REP. 108-318, 4, 2004 U.S.C.C.A.N. 1759, 1760).

544. "[D]espite the range of options, consumers continue to face a difficult time getting prescriptions filled by alternative third party sellers due to prescription verification obstacles." (H.R. REP. 108-318, 4, 2004 U.S.C.C.A.N. 1759, 1760).

545. The FCLCA "promotes competition, consumer choice, and lower prices by extending to contact lens wearers the same automatic right to copies of their own prescriptions and allows consumers to purchase contact lenses from the provider of their choice." (H.R. REP. 108-318, 5, 2004 U.S.C.C.A.N. 1759, 1760).

546. The economic logic behind the FCLCA was that requiring ECPs to provide patients with their prescriptions would make it easier for those patients to substitute between ECPs and lower priced alternatives, such as online or mass merchant contact lens retailers. (RX 739-0043 (Murphy Report); Murphy, Tr. 4154).

547. The FCLCA directed the Commission to “undertake a study of the strength of competition in the sale of prescription contact lenses.” 15 U.S.C. § 7609.

548. In 2005, the Commission published a report entitled *The Strength of Competition in the Sale of Rx Contact Lenses: An FTC Study*. (RX 569).

549. According to the Commission, “[c]ompetition will constrain an ECP’s pricing for contact lenses as long as a sufficient proportion of his patients know that they can purchase replacement lenses elsewhere, and the ECP cannot distinguish between informed and uninformed patients.” (RX 569-0024).

550. According to the Commission, “empirical evidence suggests that most consumers know that they can use a prescription from an ECP to purchase contact lenses elsewhere, including from mail-order companies.” (RX 569-0024).

551. The FCLCA directed the Commission to “prescribe rules pursuant to section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) to carry out” the FCLCA. 15 U.S.C. § 7607.

552. According to the Commission, “[t]he development of disposable soft contact lenses, followed by the growth of ‘alternative’ retail sources of contact lenses (*e.g.*, non-eye care practitioners), including mail order and Internet firms, and mass merchants, has given consumers a greater choice of sellers and means of delivery when they purchase contact lenses.” (RX 566-002).

553. The Commission promulgated the Contact Lens Rule, 16 C.F.R. § 315, *et seq.*, requiring ECPs to give patients a copy of their prescription in order to “increase[] consumers’ ability to shop around when buying contact lenses.” (RX 620).

554. The economic logic of the Commission’s Contact Lens Rule was that giving patients who purchase contact lenses from their ECPs access to their prescription would encourage entry and growth by non- ECP retailers. (CX 8006-021 (Evans Opening Report) (“The Contact Lens Rule made it easier for non-ECPs to refill contact lens prescriptions obtained from an ECP and thereby encouraged non-ECP retailers to enter and grow.”); RX 703-0001).

555. According to Dr. Evans, the FCLCA and the Contact Lens Rule “provided significant opportunities for online sellers who couldn’t offer prescriptions but could sell contact lenses more conveniently and more cheaply than ECPs.” (CX 8006-105 (Evans Opening Report)).

556. According to the Commission, the Contact Lens Rule “was intended to facilitate the ability of consumers to comparison shop for contact lenses.” (RX 703-0001).

557. Manufacturers adopted UPP policies to protect ECPs from losing sales to other retailers, including online retailers. (Evans, Tr. 1764; Murphy, Tr. 4154-55; RX 739-0019 (Murphy Report)).

558. Both manufacturers and ECPs publicly supported UPP policies because of their effect on ECPs’ ability to compete against lower priced contact lens retailers. (RX 739-0019 (Murphy Report); Murphy, Tr. 4154-55, 4172).

559. It would be economically irrational for manufacturers to use resale price maintenance policies such as UPP unless ECPs were in the same relevant market as retailers that offer lower prices. (RX 739-0044 (Murphy Report)).

560. The economic logic of UPP policies reflects competition between online and ECPs. (RX 739-0044 (Murphy Report); Murphy, Tr. 4154-55, 4173).

561. There are many omni-channel suppliers of contact lenses that supply lenses through more than one channel. (Evans, Tr. 1728; Bethers, Tr. 3529-31; CX 9037 (Owens, Dep. at 13, 15)).

562. Walmart, Costco, Sam's Club, BJ's, Target, and JCPenney are omni-channel sellers of contact lenses. (Bethers, Tr. 3529-31; CX 9037 (Owens, Dep. at 13, 15)).

563. [REDACTED]

[REDACTED] (CX 9037 (Owens, Dep. at 26)).

564. Dr. Evans, however, split Walmart's contact lens business into online and brick-and-mortar parts for purposes of his market definition analysis. (Evans, Tr. 1726).

***C. Critical Loss Analysis Shows That The Market Is Broader Than Online Sales***

565. Critical loss analysis is one method economists sometimes use to define relevant markets for analyzing competition. (RX 739-0076 (Murphy Report)).

566. A critical loss analysis asks whether it would be profitable for a set of firms that make up a candidate relevant market to raise prices by some threshold level if they jointly chose their profit maximizing prices. (RX 739-0076 (Murphy Report); Murphy, Tr. 4156-57).

567. For any given price increase by a set of firms that make up a candidate relevant market, there is some critical loss in sales the set of firms would experience above which it would not be profitable to raise prices. (RX 739-0076, -077 (Murphy Report)).

568. If the actual loss that a set of firms that make up a candidate relevant market would suffer from lost sales in response to a price increase exceeds the critical loss, raising prices would not be profitable. (RX 739-0077 (Murphy Report)).

569. A critical loss analysis depends on the diversion ratio and the margins of firms in the candidate relevant market. (RX 739-0077 (Murphy Report)).

570. Whenever firms have high margins, using critical loss analysis can yield a market that is too narrowly defined. (RX 739-0079 (Murphy Report)).

571. A diversion ratio is the share of the firm's lost sales that would be diverted to other firms in the candidate market in response to a price increase of some specified level. (RX 739-0077 (Murphy Report)).

572. A critical loss analysis based on estimates of the diversion ratio from 1-800 Contacts to ECPs found in documents that Dr. Evans cites and relies on for purposes of his critical loss analysis shows that a hypothetical monopolist that owned 1-800 Contacts and all ECPs could profitably raise prices ██████████ threshold set forth in the Merger Guidelines. (RX 739-0079, -0110 (Murphy Report); Murphy, Tr. 4164-65).

573. A critical loss analysis based on estimates of the diversion ratio from 1-800 Contacts to ECPs found in documents that Dr. Evans cites and relies on for purposes of his critical loss analysis shows that ECPs and 1-800 Contacts constitute a relevant market. (RX 739-0079, -0110 (Murphy Report); Murphy, Tr. 4164-66).

574. Dr. Evans did not conduct a critical loss analysis with respect to a candidate market of 1-800 Contacts and ECPs. (Murphy, Tr. 4169-70).

575. Where a critical loss analysis defines more than one candidate market, economists look to direct evidence of effects in the market. (Murphy, Tr. 4170; CX 9048 (Murphy Dep. at 141-42)).

***D. Dr. Evans' Critical Loss Analysis Is Flawed And Unreliable***

576. In order to be reliable, a critical loss analysis must be based on reliable estimates of actual diversion ratios. (RX 739-0077 (Murphy Report)).

577. Dr. Evans cited but did not rely on surveys that provide a wide range of data regarding the percentage of 1-800 Contacts customers that actually switched to other online

retailers as compared to ECPs or mass merchants. (RX 739-0078 (Murphy Report); CX 8006-120 to -122 (Evans Report)).

578. Some of the surveys that Dr. Evans cited found that as few as 17 percent of 1-800 Contacts' former customers have substituted to other online suppliers. (RX 739-0078 (Murphy Report); CX 8006-122 (Evans Report); CX 1117-016).

579. Applying Dr. Evans' critical loss methodology, using the switching data that Dr. Evans cited but did not rely on, results in findings that it would not be profitable for a candidate market of online firms to raise prices by more than the 5 percent standard set forth in the Merger Guidelines. (RX 739-0078, -0109 (Murphy Report); Murphy, Tr. 4166-68).

580. Applying Dr. Evans' critical loss methodology, using the switching data that Dr. Evans cited but did not rely on, yields the conclusion that the relevant market is broader than online sales of contact lenses. (RX 739-0078 (Murphy Report); Murphy, Tr. 4166-68).

581. In his teaching regarding the diversion ratio in critical loss analysis, Dr. Evans has cited a survey that asked customers of two parties to a merger about where they would buy if their current supplier raised prices. (Evans, Tr. 1770-1772).

582. For purposes of his analysis in this case, Dr. Evans calculated the diversion ratio without conducting or relying on any survey of contact lens customers about where they would buy contact lenses if 1-800 Contacts or other online sellers raised their prices by 10 percent or by any other amount. (Evans, Tr. 1773, 1776).

583. Dr. Evans based his critical loss analysis on the results of a so-called "Deadfile" survey, CX 1117-015. (Evans, Tr. 1452-1454). Among other things, the survey asked respondents to rate on a 0 to 10 scale how likely they were to make their next purchase of contact lenses from 1-800 Contacts. (Evans, Tr. 1452-1454; CX 1117-015).

584. According to Dr. Evans, some 40 percent of respondents who responded with a number between 0 and 5 reported that they would likely make their next purchase of contact lenses from another online retailer. However, Dr. Evans did not know what question the respondents were asked after being asked to rate on a 0 to 10 scale how likely they were to make their next purchase of contact lenses from 1-800 Contacts. (Evans, Tr. 1782-1783).

585. The “Deadfile” survey did not ask consumers what they would do if 1-800 Contacts raised prices. (Evans, Tr. 1777).

586. Dr. Evans did not know whether the respondents in the “Deadfile” survey were randomly selected or were representative of 1-800 Contacts’ customers. (Evans, Tr. 1777-78).

587. The “Deadfile” survey included respondents who did not make their last purchase from 1-800 Contacts. (Evans, Tr. 1779).

588. Dr. Evans did not survey any consumers of online sellers other than 1-800 Contacts. (Evans, Tr. 1787-88).

589. The “Deadfile” survey found that more than 50 percent of surveyed former 1-800 customers made their last purchase from an independent ECP or optical chain. (CX 1117-016).

590. The “Deadfile” survey found that only 17 percent of surveyed former 1-800 customers made their last purchase from another online retailer. (CX 1117-016).

591. Dr. Evans did not include paid advertising expenses in calculating the contribution margin for 1-800 Contacts that he used in his critical loss analysis. (Evans, Tr. 1797).

592. Dr. Evans claims that if online sellers raised their prices by 10 percent, some 40 percent of their customers would switch to 1-800 Contacts. (Evans, Tr. 1793-94). However, Dr. Evans has no data regarding where customers of online sellers other than 1-800 Contacts would buy their contact lenses if online sellers raised their prices by 10 percent. (Evans, Tr. 1788).

593. Dr. Evans agreed that the hypothetical monopolist test was a valiant but problematic effort to draw a boundary around a set of firms at a particular distance from the original product considered. (Evans, Tr. 1745).

594. In order to be reliable, a critical loss analysis must be based on reliable estimates of actual diversion ratios. (RX 739-0077) (Murphy Report). Because Dr. Evans' critical loss analysis does not meet this standard, and for the other reasons stated above, the analysis is unreliable and entitled to no weight.

***E. Dr. Evans' UPP "Natural Experiment" Is Flawed***

595. Prices during UPP would only provide an appropriate natural experiment for conducting critical loss analysis of an online market for contact lenses if it increased prices only for online retailers. (RX 739-0079 (Murphy Report)).

596. Club stores such as Costco increased contact lens prices as a result of UPP. (Evans Tr., 1441-42 ("what we observed in the 2015-'15 period is there was an across-the-board increase for the – most of the online firms, and I should add here, this is also true for the club stores, principally Costco."); Evans, Tr. 1445; Murphy, Tr. 4172-73; Bethers, Tr. 3675-76).

597. Walmart increased some contact lens prices as a result of UPP. (Bethers, Tr. 3676; CX 9037 (Owens, Dep. at 79-80)).

598. UPP is not a natural experiment to analyzing a candidate market of online contact lens retailers. (RX 739-0079 (Murphy Report); Evans, Tr. 1446, 1748; Murphy, Tr. 4173).

599. Dr. Evans agreed that that his analysis of online retailers' profits during UPP does not indicate anything about the extent of competition between Costco and online contact lens retailers. (Evans, Tr. 1446, 1748).

600. Repeat customers are one of the most important aspects of an online business. (Evans, Tr. 1750).



601. A critical loss analysis should account for the effect of a price increase on firms' ability to attract new customers. (Murphy, Tr. 4158-59).

602. UPP made it very difficult for ACLens to attract new customers, which made UPP a "long-term disaster" for ACLens. (Clarkson, Tr. 198).

603. Dr. Evans, however, made no effort to quantify the extent to which online sellers lost new customers as a result of UPP. (Evans, Tr. 1752).

604. For these reasons, Dr. Evans' UPP "natural experiment" is unreliable and entitled to no weight.

***F. Dr. Evans Lacks Any Basis To Treat Online Sales Differently Because They Are More Convenient***

605. For consumers who regularly shop at a club store, there is very little difference in convenience of buying contact lenses in person or online. (Evans, Tr. 1731).

606. Doctors do not always have in stock the contact lenses that their patients purchase. (Evans, Tr. 1437).

607. Dr. Evans did not know what proportion of contact lens orders ECPs could fill by mail or that were shipped directly to patients by ECPs' major distributor, ABB. (Evans, Tr. 1439, 1441, 1689 ("Q. And can you tell us what percentage of ABB's sales were made of shipments that ultimately went from ABB directly to a patient on behalf of a physician." A. No.")).

**V. 1-800 Contacts Lacks Market Power**

***A. There Is No Direct Evidence That 1-800 Contacts Has Market Power Because There Is No Evidence That It Is Charging Supracompetitive Margins***

608. One way that economists typically assess whether a firm has monopoly power is to look for direct evidence that the firm is charging monopoly prices. (RX 739-0073 (Murphy Report)).

609. Another way that economists typically assess whether a firm has monopoly power is to indirectly infer that a firm has monopoly power by defining the market in which the firm competes and calculating its share in that putative market. (RX 739-0073 (Murphy Report)).

610. Economists generally prefer to use direct evidence to determine whether a firm has monopoly power because the market definition exercise required for the indirect method can be imprecise. (RX 739-0074, -0075 (Murphy Report)).

611. Direct evidence of monopoly power is particularly preferable when market definitions lead to very different calculations of market shares. (RX 739-0074 (Murphy Report)).

612. [REDACTED]

[REDACTED] (RX 739-0064, -0107 (Murphy Report); Murphy, Tr. 4198-99). [REDACTED]

[REDACTED]  
[REDACTED] (RX 739-0107 (Murphy Report)).

613. [REDACTED]

[REDACTED] (RX 739-0074, -075 (Murphy Report); Murphy, Tr. 4198-99).

614. Dr. Evans has not analyzed 1-800 Contacts' margins. (RX 739-0075 (Murphy Report)).

***B. 1-800 Contacts And The Other Settling Parties' Share Of All Retail Sales Is Too Small To Reflect Market Power***

615. [REDACTED]

[REDACTED] (RX 739-0087 (Murphy Report); Murphy, Tr. 4103-04).

616. A firm that makes 10 percent of sales in a market cannot exercise market power. (RX 739-0038, -0044 (Murphy Report)).

617. 1-800 Contacts lacks market power in the overall retail market for contact lenses. (RX 739-0038, -0044 (Murphy Report)).

618. Together, 1-800 Contacts and the other settling parties account for less than [REDACTED] [REDACTED] of contact lens sales. (RX 739-0045 (Murphy Report)).

619. Firms that make [REDACTED] of sales in a market cannot exercise market power (RX 739-0045 (Murphy Report)).

620. 1-800 Contacts and other settling parties do not jointly have market power in the overall retail market for contact lenses. (RX 739-0038, -0044 (Murphy Report)).

***C. There Are No Barriers To Entry Or Expansion For Online Contact Lens Retailers And 1-800 Contacts, And The Other Settling Parties Lack Market Power In A Market For Online Sales Of Contact Lenses***

621. 1-800 Contacts lacks market power even in a market for online sales of contact lenses. (RX 739-0038, -0044 (Murphy Report)).

622. 1-800 Contacts and other settling parties do not jointly have market power even in a market for online sales of contact lenses. (RX 739-0038, -0044 to 46 (Murphy Report)).

623. Whether a firm or firms with a market share of approximately [REDACTED] can have monopoly power depends, in part, on the supply elasticity of other firms in the industry. (RX 739-0044 (Murphy Report); Evans, Tr. 1699; CX 8006-130 (Evans Opening Report)).

624. Firms' ability to jointly exercise monopoly power depends on their ability to agree on a method for reducing output. (RX 739-0046 (Murphy Report)).

625. When firms compete on multiple dimensions, agreements to collude on one dimension will induce firms to compete more aggressively on other dimensions, which can eliminate any possible collusive profits. (RX 739-0046 (Murphy Report)).

626. The settlement agreements did not limit the retailers' ability to compete on price, output or service quality. (RX 739-0046 (Murphy Report)).

627. If 1-800 Contacts and the settling retailers raised prices, economics teaches that they would respond by competing on other dimensions such as raising output or increasing service quality. (RX 739-0046 (Murphy Report)).

628. It is not appropriate to rely only on market share data in determining market power; an economist must consider a variety of other factors. (Evans, Tr. 1699).

629. Economists analyzing competitive constraints take into account barriers to entry. (Murphy, Tr. 4171; Evans, Tr. 1765).

630. Economists analyzing competitive constraints consider the possibility of expansion by existing competitors. (Evans, Tr. 1765).

631. According to Dr. Evans, "[e]ven when a firm has a high market share it is possible that entry or the threat of entry could significantly restrain its market power." (CX 8006-130 (Evans Opening Report)).

632. For a firm or firms to be able to exercise monopoly power, there have to be barriers to entry for firms that would increase competition. (RX 739-0045 to -0046 (Murphy Report)).

633. If 1-800 Contacts' rivals could easily increase their output in response to higher contact lens prices, then 1-800 Contacts would not be able to exercise monopoly power. (RX 739-0044 to -0045 (Murphy Report)).

634. Barriers to entry are factors that would prevent entry even if incumbent firms were earning monopoly profits. (RX 739-0045 (Murphy Report)).

635. There are no significant barriers to entering a market for online sales of contact lenses. (Murphy, Tr. 4171-72; RX 739-0045 (Murphy Report)).

636. Entry into a market for the online sale of retail contact lenses would not require significant upfront capital investment. (RX 739-0045 (Murphy Report)).

637. Online contact lens retailers have a relatively elastic supply, so they would be able to easily expand production if prices rose above the competitive level. (RX 739-0045 (Murphy Report); Murphy, Tr. 4184).

638. Online retailers do not actually produce contact lenses, so they would not have the same regulatory or intellectual property constraints on their ability to expand output as manufacturers. (RX 739-0045 (Murphy Report)).

639. Online retail sales of contact lenses are not a high fixed cost business, so the costs of adding capacity would be relatively low. (RX 739-0045 (Murphy Report)).

640. [REDACTED]  
(Evans, Tr. 1576).

641. [REDACTED]  
(Evans, Tr. 1576-77).

642. The only barrier to entry into the supposed market for online retail sales of contact lenses that Dr. Evans identified was building awareness in the marketplace. (CX 9042, Evans, Dep. at 136-138).

643. The only barrier to expansion in the supposed market for online retail sales of contact lenses that Dr. Evans identified was building awareness in the marketplace. (CX 9042 (Evans, Dep. at 137-138).

644. [REDACTED]

[REDACTED] (Evans, Tr. 1691).

645. [REDACTED]

[REDACTED]

[REDACTED] (Evans, Tr. 1691-92).

646. [REDACTED]

[REDACTED] (Evans, Tr. 1692).

647. The contact lens manufacturer CooperVision provides a service known as LensFerry that enables independent ECPs to sell their patients an annual supply of contact lenses. (Bethers, Tr. 3514-15; Clarkson, Tr. 285).

648. [REDACTED] (Evans, Tr. 1687).

649. Dr. Athey was not aware of LensFerry. (Athey, Tr. 855).

650. The contact lens distributor ABB Vision Group provides a service known as YourLens.com to independent ECPs that enables them to set up a website to sell contact lenses to their patients online. (Bethers, Tr. 3515-16).

651. Essilor provides a service known as MyOnlineOptical to independent ECPs that enables them to set up a website to sell contact lenses to their patients online. (Bethers, Tr. 3516-18).

652. The monthly cost of Essilor's MyOnlineOptical service is \$129. (Bethers, Tr. 3517).

653. CVS began selling contact lenses online during the term of the challenged settlement agreements. (Bethers, Tr. 3583).

654. Costco began selling contact lenses online during the term of the challenged settlement agreements. (Bethers, Tr. 3529).

655. Simple Contacts began selling contact lenses during the term of the challenged settlement agreements. (Bethers, Tr. 3588-89).

656. Simple Contacts offers a service that enables customers to take eye exams through their mobile devices. (Bethers, Tr. 3588-89).

657. Sightbox began selling contact lenses during the term of the challenged settlement agreements. (Bethers, Tr. 3589-91).

658. Sightbox offers a service that sends a customer contact lenses and makes an appointment for the customer with an ECP. (Bethers, Tr. 3589-90).

659. Hubble Contacts began selling contact lenses during the term of the challenged settlement agreements. (Bethers, Tr. 3593-98)).

660. Hubble Contacts recently raised \$16.5 million in funding from investors. (Bethers, Tr. 3598).

661. WebEyeCare began selling contact lenses online in 2009. (CX 9000 (Batushansky, IH at 8)).

## **VI. Internet Advertising**

### ***A. There Are Multiple, Varied Methods Of Advertising On The Internet.***

662. There are multiple, varied marketing channels available to advertisers on the internet. These channels include display advertising, retargeting advertising, social media advertising, affiliate marketing, email advertising, mobile applications, natural search engine

optimization, paid search advertising, and product listing advertisements. (RX 426-0002 at 6-17; CX 9005 (Dansie, IHT at 23-24); Clarkson, Tr. 219-229).

663. 1-800 Contacts has used each of these varied internet marketing channels to advertise its products and services. (RX 426-0002 at 6-17; CX 9005 (Dansie, IHT at 23-24); CX 764-003-004, 010-014).

664. Other online retailers of contact lenses also use each of these varied marketing tools to advertise their products and services on the internet. (RX 426-0002 at 20 (“Online competitors use all marketing tools that are employed by 1800 with the exception of TV and other broadband video . . . .”); CX 1095-099; CX 9007-006 (Fedele, IHT at 19-21); Clarkson, Tr. 219-229; Aloviss, Tr. 1029-1030).

665. The settlement agreements at issue in this litigation only affect paid search advertising that is generated in response to search queries containing 1-800 Contacts’ trademarks and confusingly similar variations of 1-800 Contact’s trademarks. (Evans, Tr. 1725-26; CX 310; CX 311; CX 313; CX 314; CX 315; CX 317; CX 318; CX 319; CX 320; CX 321; CX 322; CX 324; CX 325; CX 326).

666. The settlement agreements do not place any restrictions on forms of advertising other than paid search advertising generated in response to search queries containing 1-800 Contacts’ trademark. (CX 310; CX 311; CX 313; CX 314; CX 315; CX 317; CX 318; CX 319; CX 320; CX 321; CX 322; CX 324; CX 325; CX 326; Hogan, Tr. 3276).

***1. Display Advertising***

667. Display advertising refers to various methods of displaying a graphic advertisement to consumers on the internet. (Bethers, Tr. 1674).

668. [REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED] (CX 9000 (Batushansky, IHT at 106)).

669. [REDACTED]

[REDACTED] (CX 9000 (Batushansky, IHT at 106); CX 9010 (Larson, IHT at 22–23)).

670. [REDACTED]

[REDACTED] (CX 9038 (Hamilton, Dep. at 53–54)).

**2. *Retargeting And Remarketing Advertising***

671. Another form of display advertising is referred to as “retargeting” or “remarketing” advertising. (Evans, Tr. 1674).

672. “Retargeting” or “remarketing” refers to a type of advertising where a specific advertisement is displayed to a consumer based on the consumer’s past browsing history. (Evans, Tr. 1674-75; Alovis, Tr. 1030; [REDACTED] CX 9004 (Coon, IHT at 285)).

673. “Retargeting is where a consumer has visited a website, and then they go away. If they haven’t purchased, the third party providing the retargeting service, which could be Google [or it] could be others, will show them [an advertisement for the initial website] in display form when they visit other websites.” (Clarkson, Tr. 229; Alovis, Tr. 1030; CX 9000 (Batushansky, IHT at 35-36); CX 9004 (Coon, IHT at 285)).

674. For example, if a consumer previously visited Memorial Eye’s website, it would be possible for Memorial Eye to use retargeting to display Memorial Eye’s banner advertisement to that consumer the next time the consumer logged onto the internet. (Evans, Tr. 1675).

675. [REDACTED]

[REDACTED] (CX 9038 (Hamilton, Dep. at 53-54)).

676. Many of the settling retailers engage in retargeting advertising. (Clarkson, Tr. 229; CX 9038 (Hamilton, Dep. at 24-25); CX 9007 (Fedele, IHT at 19-20); [REDACTED]

[REDACTED]

677. Executives and employees of three contact lens retailers — ACLens, LensDirect, and Vision Direct — testified that they engage in retargeting marketing. (Clarkson, Tr. 229; Alovio, Tr. 1030; CX 9038 (Hamilton, Dep. at 24-25)).

678. Several other settling contact lens retailers, including Walgreens and WebEyeCare, testified that they engage in retargeting advertising. (CX 9007 (Fedele, IHT at 19-20); [REDACTED]

### ***3. Social Media Advertising***

679. Social media advertising involves displaying advertisements and other content to consumers on social media websites, such as Facebook, Instagram, and Twitter. (Clarkson, Tr. 223; [REDACTED] CX 9008 (Hamilton, IHT at 64)).

680. Social networks, such as Facebook, maintain demographic information about their users, such as age, gender, hobbies, and interests. (CX 9003 (Clarkson, IHT at 55)).

681. The social networks use demographic information about their users to allow advertisers to target their advertisements to specific consumers based on the consumer's demographics and interests. (CX 9003 (Clarkson, IHT at 55-56); CX 9043 (Athey, Dep. at 279)).

682. In addition to displaying advertisements over social media, companies can engage directly with consumers over social media and obtain feedback from customers about their products and services. (See CX 764-004; RX 155-0002; RX 736-015).

683. Many of the settling retailers engage in social media advertising. (Clarkson, Tr. 219; CX 9038 (Hamilton, Dep. at 25-26); CX 9007 (Fedele, IHT at 20); [REDACTED]

684. Executives and employees of four contact lens retailers — ACLens, LensDirect, Vision Direct, and Walgreens — testified that they advertise on social media platforms. (Clarkson, Tr. 219; Alovís, Tr. 1029-30; CX 9038 (Hamilton, Dep. at 25-26); CX 9007 (Fedele, IHT at 20)).

685. Several other contact lens retailers, including Walmart and WebEyeCare, also engage in social media advertising. (CX 9037 (Owens, Dep. at 93); [REDACTED]

#### ***4. Affiliate Marketing***

686. Affiliate marketing is a method of advertising where an advertiser enlists the assistance of an affiliated website to refer traffic to the advertiser's website in return for a commission on sales resulting from the referred traffic. (Clarkson, Tr. 221; Craven, Tr. 639-640; Schmidt, Tr. 2891; Bethers, Tr. 3578).

687. Affiliate marketing is an efficient method for generating new customers because an advertiser only pays a commission when a sale is realized. (Clarkson, Tr. 222; CX 9023 (Alovís, Dep. at 26)).

688. For several online contact lens retailers, including Walgreens and Vision Direct, affiliate marketing is the "most efficient form of advertising." (CX 9008 (Hamilton, IHT at 65-66)).

689. For Vision Direct and Walgreens, affiliate advertising is more efficient than keyword-based paid search advertising and generates approximately the same amount of revenue. (CX 9008 (Hamilton, IHT at 65-66)).

690. Affiliate marketing is also effective because affiliates frequently offer discount coupons for the advertisers' products. (Clarkson, Tr. 221; CX 9001 (Bethers, IHT at 86)).

691. Affiliate advertising, therefore, frequently appeals to “consumers that are price sensitive [and] are looking for coupons.” (CX 9001 (Bethers, IHT at 86)).

692. [REDACTED]

[REDACTED] (RX 428-0030; Bethers, Tr. 3569, 3578).

693. Many of the settling retailers engage in affiliate advertising. (Clarkson, Tr. 219, 221; CX 9007 (Fedele, IHT at 17-18); CX 9008 (Hamilton, IHT at 65-66)).

694. Executives and employees of four contact lens retailers — ACLens, Walgreens, Vision Direct, and LensDirect — testified that they engage in affiliate advertising. (Clarkson, Tr. 219, 221; CX 9007 (Fedele, IHT at 17-18); CX 9008 (Hamilton, IHT at 65-66); Aloviss, Tr. 1030).

##### ***5. Email Advertising***

695. Email advertising allows advertisers to send promotions and advertisements to current and prospective customers by email. (Clarkson, Tr. 222-23; Bethers, Tr. 3572-73; [REDACTED] CX 9036 (Duley, Dep. at 18)).

696. Online contact lens retailers frequently contact former customers by email to let them know it is time for them to reorder their contact lenses and to provide them an easy method to take advantage of current promotions. (Holbrook, Tr. 1892; CX 9010 (Larson, IHT at 48)).

697. Email marketing is frequently referred to as “customer relationship management” or CRM. (CX 9001 (Bethers, IHT at 200)).

698. The cost of email advertising “is minimal to nothing.” (Holbrook, Tr. 1892).

699. Due to its low cost and high rate of returning customers, email advertising is “by far the most important [marketing] vehicle for retaining customers.” (CX 9001 (Bethers, IHT at 200)).

700. [REDACTED]

[REDACTED] (RX 428-0030; Bethers, Tr. 3569, 3575).

701. Many of the settling retailers engage in email advertising. (Clarkson, Tr. 219; CX 9008 (Hamilton, IHT at 54); CX 9007 (Fedele, IHT at 20); CX 9023 (Alovis, Dep. at 26); Holbrook, Tr. 1892; CX 9000 (Batushansky, IHT at 17); CX 9036 (Duley, Dep. at 18)).

702. Executives and employees of five contact lens retailers — ACLens, Vision Direct, Walgreens, LensDirect and Memorial Eye— testified that they engage in email advertising. (Clarkson, Tr. 219; CX 9008 (Hamilton, IHT at 54); CX 9007 (Fedele, IHT at 20); CX 9023 (Alovis, Dep. at 26); Holbrook, Tr. 1892).

703. Several other settling retailers, including WebEyeCare and Vision Works, also engage in email advertising. (CX 9000 (Batushansky, IHT at 17); CX 9036 (Duley, Dep. at 18)).

**6. *Mobile Applications***

704. A mobile application is a program downloaded from the Apple or Android app store onto a smartphone or tablet device that allows consumers to interact with a retailer using a mobile device. (Bethers, Tr. 3565).

705. Mobile applications are important marketing tools for returning customers because they permit returning customers to easily repurchase products. (Bethers, Tr. 3565).

706. Mobile applications allow a retailer to remind customers when it is time to reorder. (CX 9010 (Larson, IHT at 48)).

707. [REDACTED]

[REDACTED] (RX 428-0030; Bethers, Tr. 3569, 3575).

708. 1-800 Contacts' mobile application is the company's fastest growing marketing channel. (Bethers, Tr. 3568).

**7. *Search Engine Optimization***

709. Search engine optimization is a method used by advertisers to increase the likelihood that their website will display in a prominent position in the organic listings of a search engine's results page. (Athey, Tr. 760; Alovio, Tr. 1030; Bethers, Tr. 3655 (“Search engine optimization is looking at methods to improve your natural search ranking.”))

710. Most online contact lens retailers engage in search engine optimization. (Bethers, Tr. 3655).

711. In the contact lens industry, “search engine optimization is the process of trying to get your website to rank highly when people search for terms you care about, like ‘contact lenses’ or particular brands of contact lenses.” (Clarkson, Tr. 225).

712. Techniques used to increase the position of organic listings on search engine results include, inter alia, ensuring that a website has “new content, new reviews . . . [a] lot of interaction, page load speed . . . multiple screen sizes. . . more content and a lot of links.” (CX 9033 (Mohan, Dep. at 111)).

713. Search engine optimization is a particularly efficient form of advertising because the advertiser does not accrue any costs to the search engine when a user clicks on an organic link. (Alovio, Tr. 985 (“It’s free traffic that Google, you know, deems you relevant to certain keywords, so that’s completely free.”)).

714. Many of the online contact lens retailers engage in search engine optimization. (Alovio, Tr. 1030-31; CX 9023 (Alovio, Dep. at 26); Holbrook, Tr. 1944; CX 9033 (Mohan, Dep. at 111)).

715. Executives and employees of two contact lens retailers — LensDirect and Memorial Eye — testified that they engage in search engine optimization. (Alovio, Tr. 1030-31; CX 9023 (Alovio, Dep. at 26); Holbrook, Tr. 1944).

716. Other online contact lens retailers, such as Walmart, also engage in search engine optimization. (CX 9033 (Mohan, Dep. at 111)).

**8. *Product Listing Advertisements (PLAs)***

717. Product listing advertisements, known as PLAs or comparison shopping feeds, are a type of targeted advertisement that appears on search engine results pages in response to a search for a particular type of product. (RX 715-0115; RX 739-0026; Juda, Tr. 1322; CX 9000 (Batushansky, IHT at 50-51); CX 9002 (Craven, IHT at 25)).

718. PLAs offer consumers richer product information than typical paid search advertising, including an image of the product, the price of the product, and the specific names of retailers who sell the product. (RX 715-0115; RX 739-0026; Juda, Tr. 1322; [REDACTED] [REDACTED] CX 9002 (Craven, IHT at 25)).

719. A PLA typically has photographs of the products for sale, the price of the product, and a link to the website of the retailer who sells the product. (Juda, Tr. 1322).

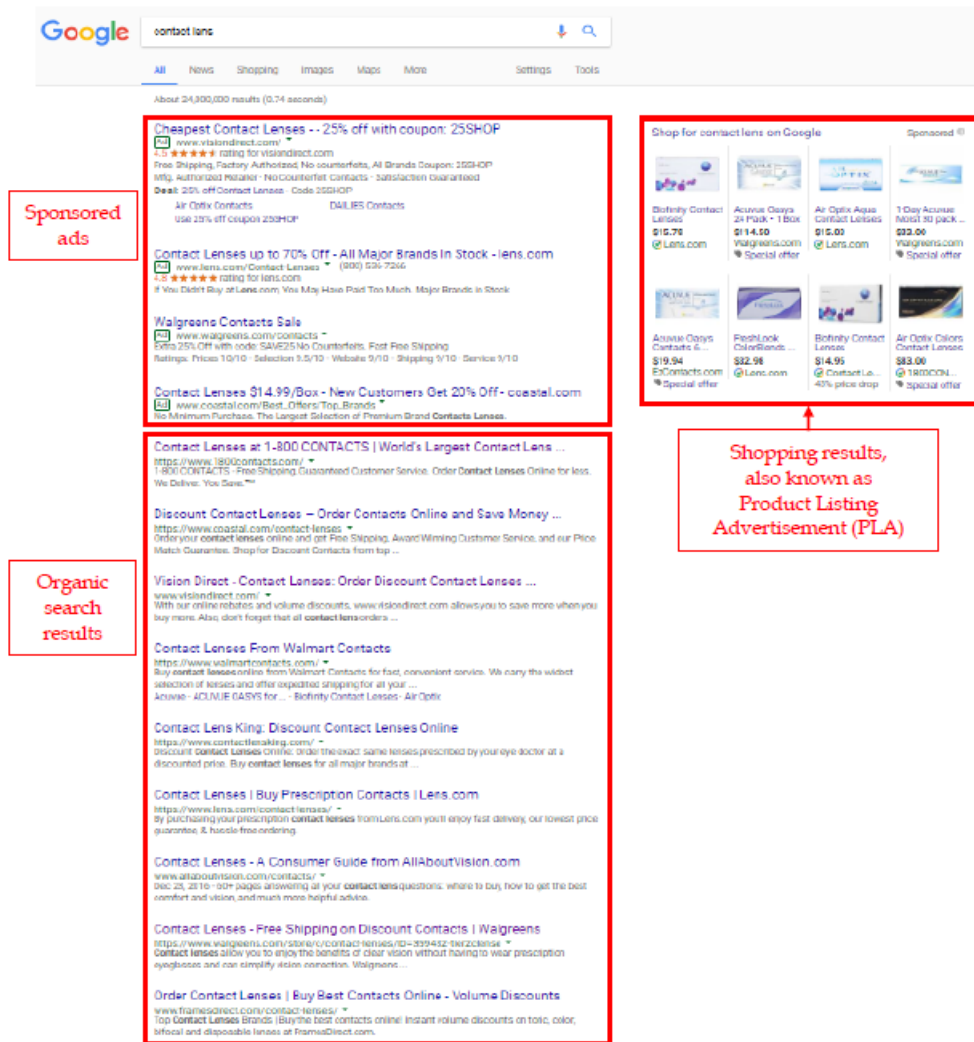
720. PLAs “appear in their own box on Google Search, separate from text ads and on Google Shopping.” (RX 716-0074).

721. PLAs are not displayed in response to advertisers selecting specific keywords. (Juda, Tr. 1322-23, 1334; RX 715-0116, 0158).

722. Rather than using keywords, “Google will automatically show the most relevant products along with the associated image, price and product name,” for a given search query. (RX 715-0116; see also RX 715-0158).

723. For example, a search for the keyword “contact lenses” using either Google or Bing will display a box in the upper area or on the right-hand side of the search results page with prices for contact lens brands at different online retailers. (RX 739-0026).

724. The image below (RX 739-0094) depicts the position of PLAs relative to the organic search results and the sponsored ads with respect to a Google search for “contact lens.”



725. On Google, users can also access PLAs by viewing the “Google Shopping” page, which is accessible from the Google results page. (Juda, Tr. 1324-26).

726. At the top of Google search results, including results pages in response to the query “1-800 Contacts” and its variations, is a link entitled “Shopping.” (See, e.g., RX 310-0001; RX 311-0001; RX 312-0001).

727. Clicking such a link takes the user to the “shopping-specific Google property.” (Juda, Tr. 1324-1325; see also RXD 022 (illustrating testimony)).

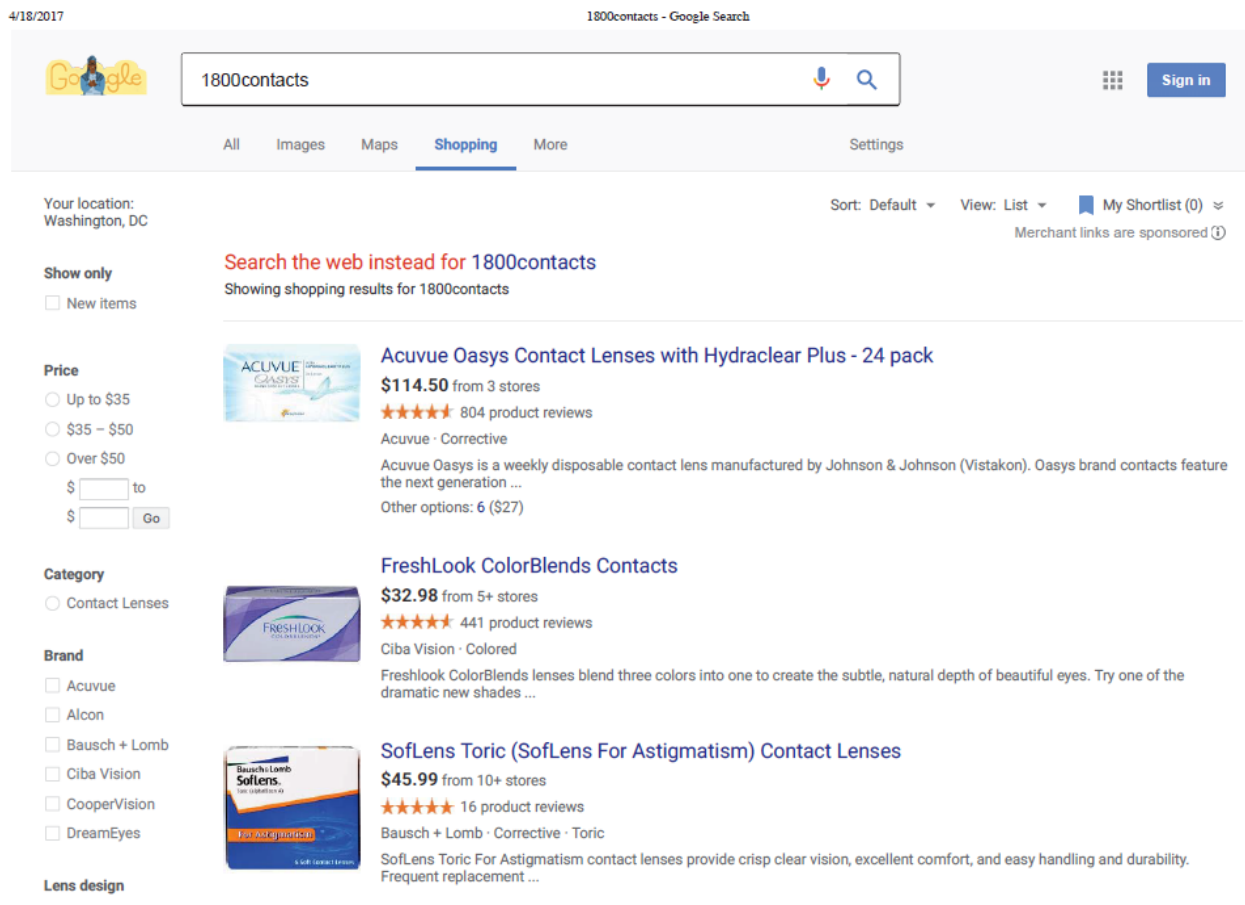


728. The shopping-specific Google property for a search on the term “1800contacts” may contain listings for different types of contact lenses. (Juda, Tr. 1325; *see also* RXD 024 (illustrating testimony)).

729. The Google Shopping page displays a series of PLAs, including brands, prices and retailers for the specific product searched for. (Juda, Tr. 1324-26; [REDACTED])

730. Advertisers do not have to pay Google for their Shopping ads to be shown; advertisers pay Google only when a user clicks on a Shopping ad. (Juda, Tr. 1322).

731. For illustrative purposes, the image below (RXD 024-0001) depicts the first three PLAs displayed on the Google Shopping page in response to a search for “1800contacts.”



732. Google Shopping is also available to consumers on mobile devices, such as tablets and mobile phones. “Just like on desktop computers, Google Shopping for mobile makes it easier for . . . customers to find and compare different products.” (RX 715-0213).

733. PLAs “enable shoppers to make quick visual comparisons while browsing products.” (RX 715-0213).

734. Consumers can refine the results to “help to surface the brands, features and price point they want, so shoppers can easily buy the product they want from the merchant of their choice.” (RX 715-0213).

735. PLAs are “helpful for consumers who want to do price comparison shopping” because they allow the consumer to compare “the price of the same product across multiple retailers.” (Ghose, Tr. 3875).

736. A PLA “allows a consumer to go to a single page and do a price comparison between different websites.” (Clarkson, Tr. 224).

737. [REDACTED]

[REDACTED] (CX 9000 (Batushansky, IHT at 51)). [REDACTED]

[REDACTED] (CX 9000 (Batushansky, IHT at 51)).

738. Many of the “small budget” “more recent entrants” in the online contact lens market have found PLAs “to be more effective” than keyword advertising at attracting new customers. (CX 9008 (Hamilton, IHT at 69)).

739. For Walgreens and Vision Direct, comparison shopping engines, such as Google Shopping, are a more efficient form of advertising than paid search advertising. (CX 9008 (Hamilton, IHT at 66)).

740. According to a Google study from November 2010, consumers “are twice as likely to click on a Product Listing Ad as they are to click on a standard [keyword-based] text ad in the same location.” (RX 715-0157).

741. In addition to PLAs, Google also displays the “Knowledge Graph” or “Knowledge Card” on many search engine results pages. The “Knowledge Graph” or “Knowledge Card” is a summary of content relevant to a user’s search query, which is displayed on the right side of certain Google search results. (RX 721-0001-0004.)

742. Google introduced the Knowledge Graph in May 2012. (RX 721-0001).

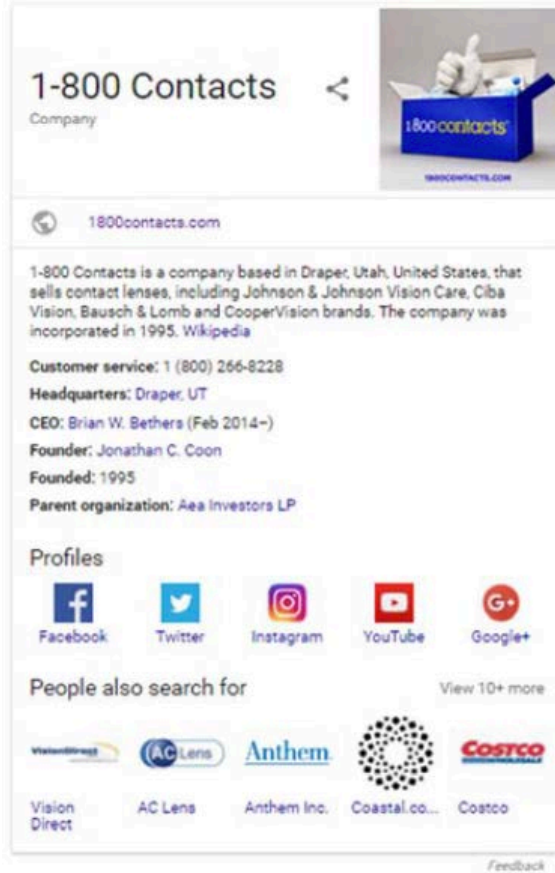
743. Information displayed in the Knowledge Graph is based on Google’s assessment of user searches about the particular item. (RX 721-0004.) For instance, the Knowledge Graph for a user query on “Marie Curie” includes information and links to further information about her husband, children, and the family’s Nobel Prizes. (RX 721-0004).

744. The Knowledge Graph also contains a “People Also Searched For” feature, which includes links to other sites. (RX 721-0005).

745. The links in the People Also Searched For feature are not the result of any payment to Google. (Juda, Tr. 1307-1308).

746. Google search results for the query “1-800 Contacts” and variants of that search term include a Knowledge Graph regarding 1-800 Contacts. (*See, e.g.*, RX 310-001, 005; RX 311-001-003; *see also* CX 8007-010).

747. An example of a Knowledge Graph shown in response to the search query “1-800 contacts” as shown in the report of one of Complaint Counsel’s experts:

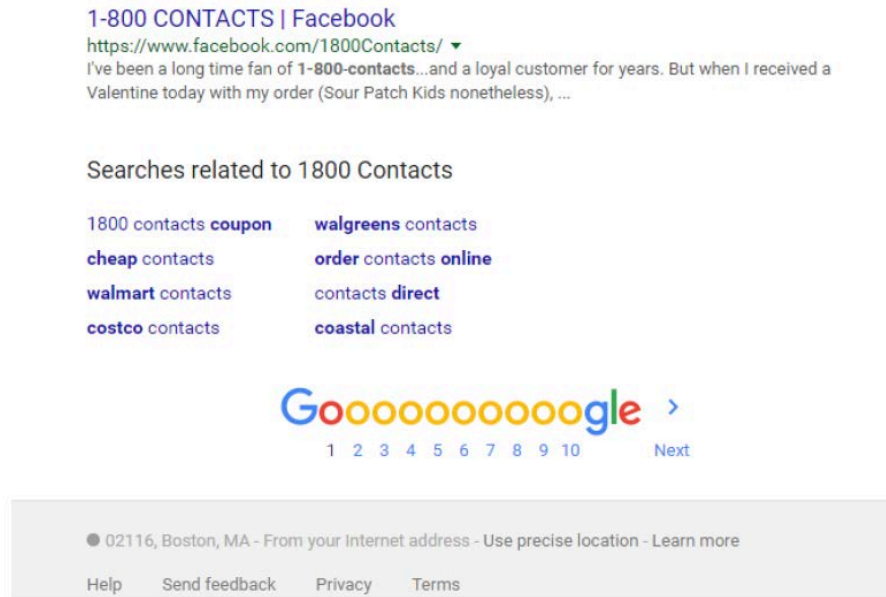


(CX 8007-010).

748. The Knowledge Graph shown in response to the query “1-800 Contacts” and variants of that search term includes links to competing contact lens retailers, including some that entered into settlement agreements with 1-800 Contacts, such as ACLens and Coastal Contacts. (See, e.g., RX 310-0001). Clicking on one of these links takes the user to the website of the retailer. (Juda, Tr. 1308).

749. At the bottom of a Google search results for the query “1-800 Contacts” and variants of that search term is a section entitled “Searches related to,” which includes links to searches for competing retailers, such as Walgreens, Vision Direct, Costco, and Coastal Contacts. (Juda, Tr. 1308-1309; RX 312-835; see also RX 310-0032, 0072; RX 311-0002).

750. An example of the Searches related to section shown in response to the search query “1-800Contacts” as shown in the report of one of Complaint Counsel’s experts:



(CX 8010-020).

**9. Paid Search Advertising**

751. Paid search advertising, also referred to as sponsored advertisements, refers to a method of advertising where the advertiser pays the search engine to place its advertisement on the search engine results page. (Juda, Tr. 1065; RX 733-013-24).

**B. Search Engines 101**

752. There are three major search engine providers in the US: Google, Bing, and Yahoo!. (Craven, Tr. 509; Aloviz, Tr. 991).

753. Users can access these search engines through desktop computers, laptop computers, tablets, and mobiles phones. (RX 733-008; Joint Stipulation Containing Glossary of Terms, Appendix 1).

754. Estimates of the market shares of these search engines vary across sources, but it is generally recognized that Google accounts for the large majority of spending on search advertising. (Joint Stipulation Containing Glossary of Terms, Appendix 1).

***1. Organic And Paid Search Results***

755. When a user enters a search query, the search engine generally displays two types of results. (RX 716-0105; RX 704 (Iyer Decl., ¶ 3 [REDACTED]  
[REDACTED]  
[REDACTED])). The first are “organic” or “natural” results, which are links to websites the search engine has determined are relevant to the user’s search terms. (RX 716-0068 (organic results are a “free listing in Google Search that appears because it’s relevant to someone’s search terms”); Juda, Tr. 1330 (organic results are “useful and relevant information based on the user’s search query”)).

756. In general, organic results are ranked in order of relevance, with the most relevant result at the top of the list. (RX 716-0099 (for organic results, the “more relevant the site to the search term, the higher the link will appear in the list”)).

757. The relevance of organic results is determined by algorithms that are proprietary to each search engine. (Juda, Tr. 1330; RX 704 (Iyer Decl., ¶ 8 [REDACTED]  
[REDACTED]  
[REDACTED])).

758. Organic links are “free,” i.e., the company whose link appears is not charged any money by the search engine for the appearance of its link or if a user clicks on the link. (RX 716-0068; see also RX 716-0100 (“Ads will never appear within the organic search results

themselves.”)). Moreover, no one can pay to have an organic result appear or to change the ranking of a particular organic result. (RX 716-0068).

759. The second type of result is paid search advertising. These advertisements are displayed above, below, and (on some search engines) to the side of the organic results. (RX 716-0099; RX 704-002 (Iyer Decl., ¶ 3)).

760. Google and Bing, for instance, will display [REDACTED] at the top of the page, above the organic results. (CX 9019, Juda Dep. at 53; RX 704 (Iyer Decl.) ¶ 3).

## **2. *Keyword Advertising – The Google AdWords Auction***

761. Google and other search engines use an “auction” to determine which ads will appear on a search engine results page (SERP). (RX 716-0038; see also RX 704 (Iyer Decl., ¶¶ 8-11)). Every time a user enters a search query, the search engine runs an instantaneous auction to determine which, how many, and the position of paid ads to be displayed on the results page. (RX 716-0038; see also CX 9019 (Juda, Dep. at 134)).

762. Google’s paid search platform is called AdWords. (Juda, Tr. 1065).

763. The Google AdWords auction has three steps. First, “the AdWords system finds all ads whose keywords match [the user] search.” (RX 716-0038). Second, the AdWords system “ignores” any ads that the system determines are not eligible to appear, “like ads that target a different country or are disapproved.” (RX 716-0038). Third, of the remaining ads, “only those with a sufficiently high Ad Rank may show. Ad Rank is a combination of [the advertiser’s] bid, ad quality, and the expected impact of extensions and other ad formats.” (RX 716-0038).

### **(a) *Keywords And Match Types***

764. Keywords are “words or phrases” the advertiser believes “potential customers are likely to use when searching for products or services” provided by the advertiser. (RX 716-0087).

The advertiser matches the keywords with an ad or ads in an “ad group.” (RX 716-0087; RX 716-0029).

765. An advertiser’s ad may be shown when the ad’s keywords “match” a user’s search query. (RX 716-0087; RX 716-0016; RX 119-0002 (“The relationship between queries and keywords is at the heart of search advertising with AdWords.”)).

766. Advertisers frequently bid on hundreds or thousands of keywords. Walmart, for instance, bids on somewhere under 5,000 keywords related to contact lens. (CX 9033 (Mohan, Dep. at 26–27). Keywords may consist of a single word (e.g., “contacts”), a set of words (e.g., “contacts,” “Accuvision,” and “coupon”), a phrase (e.g., “contact lens”), or a combination of words and phrases. (Joint Stipulation Containing Glossary of Terms, Appendix 1).

767. There are several “match types” or “matching options” in AdWords. (RX 716-0016-17).

**(i) *Broad Match***

768. “Broad match” allows an ad to be matched to “relevant variations” of the ad’s keywords, “including synonyms, singular or plural forms, possible misspellings, stemmings (such as floor and flooring), related searches, and other relevant variations.” (RX 716-0090).

769. Broad match is a “semantic” match; it seeks to match with the “meaning of the user’s search.” (RX 119-0005). For example, a broad match keyword “low-carb diet plan” may match with a search for “carb-free foods” or “Mediterranean diet plans.” (RX 716-0090).

**(ii) *Modified Broad Match***

770. “Modified broad match” allows the advertiser to “specify that certain broad match keyword terms, or their close variants, must appear to trigger [the] ad.” (RX 716-0090).



771. Modified broad match keywords are indicated by a “+” symbol. (RX 716-0016). For instance, the modified keyword “+women’s +hats” would match to a search for “hats for women.” (RX 716-0016).

**(iii) *Phrase Match***

772. “Phrase match” allows an ad to be matched to searches that include the ad’s “exact keyword and close variants of [the] exact keyword, with additional words before or after.” (RX 716-0094; RX 716-0117).

773. Phrase match keywords are indicated by quotation marks. (RX 716-0094). For example, for the phrase match keyword “tennis shoes,” ads may be shown on searches for “red leather tennis shoes” or “buy tennis shoes on sale.” (RX 716-0094). But such ads will not be shown on searches for “shoes for tennis” or “tennis sneakers laces.” (RX 716-0094).

**(iv) *Exact Match***

774. “Exact match” allows an ad to be matched to searches that include the ad’s “exact keyword, or close variants of [the] exact keyword, exclusively.” (RX 716-0092).

775. Exact match keywords are indicated by square brackets. (RX 716-0092). For instance, the exact match keyword “[tennis shoes]” may be matched to searches for “tennis shoes” but not for “red tennis shoes.” (RX 716-0092).

**(v) *Negative Keywords***

776. “Negative keywords” are a type of keyword that prevents an “ad from being triggered by a certain word or phrase.” (RX 716-0067). For example, a retailer that sells eyeglasses may add the negative keyword “wine glasses” to prevent its ads from showing in response to searches for that term. (RX 716-0019).

777. According to Google, negative keywords are “an essential part of a well-rounded keyword strategy.” (RX 119-0011).

778. Negative keywords also have match types, but these match types have differences from the normal match types. (RX 119-0011).

779. One difference is that “negative broad match” will not “exclude queries that are synonyms or close variations of the negative keyword. It will only exclude queries that include all words within a keyword, irrespective of the order in which the words appear.” (RX 119-011).

780. Another difference is that queries “that are close variations of phrase and exact match negative keywords won’t be excluded.” (RX 119-0011). Because of this matching behavior, an advertiser must separately add close variations as negative keywords. (RX 119-011).

***(b) Ad Rank And Its Components***

781. In AdWords, which ads appear and the order in which an ad appears on a page (the Ad Position) is determined by a “formula called Ad Rank.” (RX 716-030).

782. For those ads that have keywords that match the user’s search query and are otherwise eligible to be shown, the AdWords system determines each ad’s Ad Rank. (RX 716-0038).

783. Ad Rank is a “score that’s based on [the advertiser’s] bid, auction-time measurements of expected CTR [(click-through rate)], ad relevance, landing page experience, and the expected impact of extensions and other ad formats.” (RX 716-001).

784. Google’s algorithms consider factors other than the advertiser’s bid and will show no ads in response to some searches to avoid the long-term “negative ramifications of users not clicking on ads.” (Juda, Tr. 1081). Based on experiments, Google has found that the “natural rate at which users are clicking on ads actually decreases over time” when AdWords shows “additional ads or lower-quality ads.” (Juda, Tr. 1084).

785. Google considers factors other than the advertiser’s bid because showing ads that do not meet Google’s criteria could lead to [REDACTED]

[REDACTED] (CX 9019 (Juda, Dep. at 129-130); see also Juda, Tr. 1198 (Google considers predicted click-through rate, landing page experience, and ad relevance because, among other things, doing so will [REDACTED] [REDACTED]).

**(i) Bids**

786. In AdWords, each advertiser specifies a bid for each keyword, which is the maximum the advertiser will pay for a click on its ad. (RX 716-0041). This amount is the “maximum cost-per click” or “max. CPC.” (RX 716-0041).

787. The advertiser’s bid, or max. CPC, is one of factors considered in calculating Ad Rank, which determines whether and in what position the ad may appear. (RX 716-001).

**(ii) Expected CTR**

788. Expected CTR is a measurement of “how likely it is that [the advertiser’s] ads will get clicked when shown for [the particular] keyword.” (RX 716-0049).

789. Google’s algorithms calculate expected CTR based on a variety of inputs, including “the actual search of the user, information about the ad copy, the geography of the user, the time and day in which the user’s search term was conducted.” (Juda, Tr. 1096). In addition, if “the user has personalization turned on,” the algorithm will also “use various historical information about that user and their past activities.” (Juda, Tr. 1096).

790. Predicted CTR is not [REDACTED] (CX 9019 (Juda, Dep. at 31-32)). Rather, [REDACTED] (CX 9019 (Juda, Dep. at 31)). The assessment is based on [REDACTED] [REDACTED] (Juda, Tr. 1099).

791. To predict CTR for new ads the system uses [REDACTED] [REDACTED]

[REDACTED]

[REDACTED] (CX 9019 (Juda, Dep. at 31-32)).

792. The predicted CTR for a given ad may [REDACTED] (Juda, Tr. 1260). It may [REDACTED] (Juda, Tr. 1260).

*(iii) Ad Relevance*

793. Ad relevance is a measure of “how closely related [the advertiser’s] keyword is to [the advertiser’s] ads.” (RX 716-0032; see also Juda, Tr. 1104 (Ad relevance is “trying to predict how relevant the text associated with the ad is to the search term, so is it, you know, so to speak, an on-topic ad or an off-topic ad.”)).

794. In the AdWords algorithms, ad relevance is based on models that use human-evaluated data as an input “to identify patterns that will allow [the system] to predict . . . what the human raters would have thought of the ads.” (CX 9019 (Juda, Dep. at 38-39); see also Juda, Tr. 1105).

795. Ad relevance for a particular ad may [REDACTED] (Juda, Tr. 1261).

*(iv) Landing Page Experience*

796. Landing page experience is a “measure that AdWords uses to estimate how relevant and useful [the advertiser’s] website’s landing page will be to people who click in [the advertiser’s] ad.” (RX 716-0061).

797. In the AdWords algorithms, landing page experience is based on [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (CX 9019 (Juda, Dep. at 40); Juda, Tr. 1101).

798. In addition, to determine the landing page experience signal, the algorithms take into account [REDACTED]

[REDACTED] (Juda, Tr. 1102).

799. For landing page experience, the AdWords algorithms also “visit landing pages through our crawl and try and extract information about the content or topics of landing pages ... to compare whether search terms and landing pages have similar topical relevance or not.” (Juda, Tr. 1102).

800. Google considers landing page experience in its algorithms [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] (CX 9019 (Juda, Dep. at 121-122)).

801. The landing page experience for a particular ad may [REDACTED]

[REDACTED] (Juda, Tr. 1261).

(v) *Ad Extensions And Format*

802. Ad extensions are “a type of ad format that show extra information ... about [the advertiser’s] business.” (RX 716-0045). Examples of ad extensions include information about the advertiser’s location, consumer ratings of the advertiser, and links to different parts of the advertiser’s website. (RX 716-0045-46).

803. The AdWords algorithms [REDACTED]

[REDACTED]  
[REDACTED] (CX 9019  
(Juda, Dep. at 41); Juda, Tr. 1113).

(c) *The Auction Outcome: Ad Rank, Ad Position, And Actual CPC*

804. The Google AdWords system [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] (CX 9019  
(Juda, Dep. at 41-42)).

805. For each auction, the AdWords algorithms calculate Ad Rank for each ad that is eligible to be shown in response to the particular user query. (CX 9019 (Juda, Dep. at 42)).

806. The quality signals used to determine CPC and Ad Rank [REDACTED]

[REDACTED] (Juda, Tr. 1260). Each of these signals, [REDACTED]  
[REDACTED] (Juda, Tr. 1260).

807. Ads must have an Ad Rank greater than zero to be eligible to be shown. (CX 9019 (Juda, Dep. at 42)). If there are no ads with an Ad Rank greater than zero, the AdWords system will not show any ads in response to the particular user query. (CX 9019 (Juda, Dep. at 42)).

808. Google requires [REDACTED]

[REDACTED] (Juda, Tr. 1094; CX 9019 (Juda, Dep. at 182)).

(i) *Minimum Bids*

809. The requirement that an ad's Ad Rank be greater than zero means that each advertiser faces a minimum bid to have its ads shown in response to a particular user search. (CX 9019 (Juda, Dep. at 168-169)).

810. The minimum bid is determined on an auction-by-auction basis, and each advertiser may have a different minimum bid. (CX 9019 (Juda, Dep. at 169)). The minimum bid for an advertiser to [REDACTED]

[REDACTED] (Juda, Tr. 1266-1267).

811. In general, the lower the quality of the ad, the higher the minimum bid necessary to qualify to be shown. (CX 9019 (Juda, Dep. at 169)).

812. Google requires a minimum bid to try to ensure a [REDACTED]  
[REDACTED]  
[REDACTED] (Juda, Tr. 1095).

***(ii) Ad Position***

813. Ads are positioned on the search results page based on Ad Rank; the ad with the highest Ad Rank is placed at the top of the page. (Juda, Tr. 1077; RX 716-0001; CX 9019 (Juda, Dep. at 42)).

814. Google will show [REDACTED] above the organic search results. (Juda, Tr. 1080; CX 9019 (Juda, Dep. at 53)).

815. Because AdWords takes into account a number of factors other than the bid amount, advertisers that obtain the top ad positions may not be the highest bidders. (RX 612A, Varian Video, Tr. 9).

***(iii) Actual Cost-Per-Click***

816. The actual amount an advertiser pays for a click, or “actual CPC,” depends on the outcome of the auction process. (RX 716-0026).

817. Even if an ad appears in response to a user search (thus generating an “impression” (RX 502-0001)), the advertiser pays only if the user clicks on its ad. (RX 716-0026).

818. In AdWords, each advertiser’s actual cost-per-click (the amount the advertiser will pay for a click on its ad) is determined by a modified general second price auction. (RX 612A, Varian Video, Tr. 5).

819. For each advertiser, Google's algorithms determine the lowest bid the advertiser could have made to still have an Ad Rank greater than the advertiser whose ad is in the position below. (CX 9019 (Juda, Dep. at 54)).

820. Under the modified general second price auction used by Google, the CPC of the advertiser in the top position [REDACTED] [REDACTED] (CX 9019 (Juda, Dep. at 60, 137-138)).

821. Because of the effects of predicted CTR, ad relevance, landing page quality, ad extensions, and other ad formats, in the AdWords system an advertiser may have a lower actual CPC than advertisers whose ads appear in in lower positions. (RX 612A, Varian Video, Tr. 9-10).

822. An advertiser's CPC for a particular keyword may vary from auction to auction. (CX 9019 (Juda, Dep. at 137)).

*(iv) User Information*

823. Additionally, in Google's paid search advertising system, the ads shown [REDACTED] [REDACTED] (Juda, Tr. 1264; CX 9019 (Juda, Dep. at 136-137)).

824. This variation can occur for a number of reasons, such as [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (Juda, Tr. 1264-1265)

825. The ads shown as well as the number of ads shown [REDACTED] [REDACTED] (Juda, Tr. 1265-1266; CX 9019 (Juda, Dep. at 134-136)).



826. Two consumers who are signed into their Google email accounts (known as “Gmail accounts”) [REDACTED]

[REDACTED] (Juda, Tr. 1266).

**(v) *Whether An Ad Is Shown May Change Over Time***

827. Given the dynamic nature of the AdWords algorithms, the quality score for a particular advertiser with a particular ad [REDACTED]

[REDACTED] (Juda, Tr. 1262).

828. Through the AdWords system, advertisers are provided a quality score for their ads, [REDACTED]

[REDACTED] (Juda Tr. 1261-1262).

829. Because an ad’s quality scores may [REDACTED]

[REDACTED] (Juda, Tr. 1263).

830. Given the dynamic nature of the AdWords algorithms, it is possible [REDACTED]

[REDACTED] (Juda, Tr. 1263).

**(d) *Advertiser Budgets***

831. In the AdWords system, advertisers may set a daily budget. (RX 716-0004, 0025, 0042).

832. When an advertiser’s budget is reached, its “ads will typically stop showing for that day.” (RX 716-0042). The AdWords system may show ads on a given day accruing up to 120% of the daily budgeted costs, but the advertiser’s monthly costs will not exceed its daily budget times the average number of days in a month (30.4). (RX 716-0042).

(e) *The Effect Of Additional Bidders On CPC In A Single Auction Instance*

833. The number of bidders in an auction [REDACTED]

[REDACTED] (CX 9019 (Juda, Dep. at 55)).

834. The addition of an additional bidder for a keyword [REDACTED]

[REDACTED] (CX 9019 (Juda, Dep. at 137-138)).

835. If additional bidders [REDACTED]

[REDACTED] (Juda, Tr. 1204-1205).

836. Given how the AdWords auction works, the addition of an additional bidder who wins an ad position will not [REDACTED]

[REDACTED] (Juda, Tr. 1206-1208, 1211-1212 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)).

837. Given how the AdWords auction works, similarly, the addition of an additional bidder who wins an ad position will not [REDACTED]

[REDACTED] (Juda, Tr. 1206-1208, 1211-1212 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)).

838. The addition of an additional bidder who wins an ad position will [REDACTED]

[REDACTED] (Juda, Tr. 1206-1210, 1211-1212 (explaining hypothetical); see also RXD 26-001-002 (illustrating effect of additional bidder)).

839. Depending on the particular quality scores and relative ad ranks, an additional bidder who wins the top ad position above another advertiser [REDACTED]

[REDACTED] (Juda, Tr. 1213-1215; see also RXD 26-003-004 (illustrating effect of additional bidder winning top position)). In such an instance, Google would make [REDACTED] (Juda, Tr. 1215-1217).

840. Google's data show that the expected click-through rate [REDACTED] [REDACTED] (Juda, Tr. 1216-1218).

**3. The Bing Paid Search Program**

841. Microsoft launched the Bing Network [REDACTED] (RX 704 (Iyer, Decl. ¶ 2)). The Bing Network [REDACTED] [REDACTED] [REDACTED] (RX 704 (Iyer, Decl. ¶ 2)).

842. Microsoft's Bing Network is [REDACTED] [REDACTED] [REDACTED] (RX 704 (Iyer, Decl. ¶ 2)).

843. Beginning in 2010, [REDACTED] [REDACTED] (RX 704 (Iyer, Decl. ¶ 2)).

844. The Bing Network [REDACTED] [REDACTED] [REDACTED] (RX 704 (Iyer, Decl. ¶ 3)).

845. On the Bing Network, [REDACTED] [REDACTED] (RX 704 (Iyer, Decl. ¶ 3)).

846. Today, Microsoft displays [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶ 3)).

847. Microsoft uses [REDACTED]

[REDACTED]

[REDACTED] (RX 704 (Iyer,

Decl. ¶ 8)).

848. Microsoft earns revenue [REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶ 9)). The amount of revenue that Microsoft earns

[REDACTED]

[REDACTED] (RX 704

(Iyer, Decl. ¶ 9)). Generally, an advertiser pays Microsoft [REDACTED]

[REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶ 9)).

849. Bing uses keyword matching similar to that in Google AdWords. (Craven, Tr.

646).

850. In general, a paid search advertisement's rank in response to a user query depends

on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶ 10)).

851. Microsoft takes each advertiser's [REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶

11)). This affects [REDACTED]

[REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶ 11)).

852. In general and within reason, [REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶

11)). Accordingly, a paid search advertisement for a website [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶

11)).

853. Microsoft's algorithm for determining [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶ 12)).

854. In many cases, Microsoft's algorithm [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶ 13)).

855. Microsoft's algorithm for determining [REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶ 14)). The algorithm is

programmed [REDACTED]

[REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶ 14)). Accordingly, [REDACTED]

[REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶ 14)).

856. Because Microsoft’s algorithm for determining [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶ 15)).

**4. *Determining The Effect Of Additional Bidders On Search Engines Or On Search Engine Users Is Incredibly Complex And Requires Analyses Of A Multiplicity Of Factors And Potential Responses***

857. The Chief Economist at Google and the Principle Scientist overseeing the search advertising algorithms at Microsoft each explained that determining the effect of additional bidders, such as Complaint Counsel posit would occur in the absence of the Settlement Agreements at issue in this case, would require a complex analysis of advertiser behavior and the outcomes of each individual auction.

858. The Chief Economist at Google has explained that for Google’s paid search engine advertising program, AdWords, “every ad placed on AdWords is priced differently, and the ultimate amount Google charges for each ad depends on dozens of factors that are unique to each ad placement, unique to each individual advertiser, and dependent on the unique attributes of each of the other advertisers who also wished to place ads on the particular web page at issue.” (RX 701 (Varian, Decl. ¶ 6)).

859. According to Google’s Chief Economist, “[i]n the world of AdWords advertising, any effort to determine what advertisers ‘would have paid’ under a different set of circumstances requires a complex and highly individualized analysis of advertiser behavior for each particular ad that was placed.” (RX 701 (Varian, Decl. ¶ 6)). The need for this highly individualized analysis is due to the fact that “the actual price paid for any particular click on any particular ad depends, in part, on the bidding behavior of every other advertiser participating in the particular auction at issue.” (RX 701 (Varian, Decl. ¶ 16)).

860. Google’s Chief Economist stated that to “determine how a change in inputs . . . would affect the price advertisers would pay per click, we need an accurate prediction of how each of the advertisers in each of the auctions would have behaved differently (if at all) as a result of that new input.” (RX 701 (Varian, Decl. ¶ 16)).

861. The Principal Scientist at Microsoft who oversees Bing’s search advertising auction algorithms explained that an agreement resulting in fewer bidders is [REDACTED]

[REDACTED]

[REDACTED]

(RX 704 (Iyer, Decl. ¶ 20)).

862. To analyze the effects, if any, of an agreement resulting in fewer bidders on Microsoft or its users, Microsoft’s Principal Scientist explained, [REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] (RX 704 (Iyer, Decl. ¶ 21)).

863. To do such an analysis would require [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (RX 704  
(Iyer, Decl. ¶ 22)).

864. Neither Complaint Counsel nor any of its experts has proffered any analyses of the dozens of factors that are unique to each ad placement, unique to each individual advertiser, and dependent on the unique attributes of each of the other advertisers who also wished to place ads on the particular web page at issue.

865. Neither Complaint Counsel nor any of its experts has proffered individualized analyses of advertiser behavior in response to the absence of the Settlement Agreements.

866. Neither Complaint Counsel nor any of its experts has proffered any analyses of data for each user query alleged affected by the Settlement Agreements if those queries were undertaken in the absence of the Settlement Agreements, such as (1) the identities of all potential bidders on keywords associated with the user query; (2) each bidder's bids for each of those keywords; (3) each bidder's campaigns of which those keywords were a part; (4) the quality scores of each bidder's ads and websites; (5) each bidder's daily, weekly, and monthly or yearly



budgets for keywords or campaigns including those keywords; or ( 6) any changes in each bidder's bidding on keywords other than those affected by the Settlement Agreements.

***(a) Advertisers May Take Actions In Response To Additional Ads That Could Decrease CPC And Change The Ads Shown In Response To A Search Query***

867. Any effort to determine the effects, if any, of the Settlement Agreements in this case would be complicated by the fact that advertisers, in the absence of the Settlement Agreements, may take various actions in response to additional ads showing up in response to search queries for the 1-800 Contacts trademarks.

868. An advertiser may take actions in response to additional ads showing up, such as adding ad formatting, that [REDACTED] [REDACTED] (Juda, Tr. 1254-1259; see also RXD 26-005-007 (illustrating testimony)).

869. There are a number of actions advertisers may take in response to additional ads showing up next to theirs that [REDACTED] [REDACTED] (Juda, Tr. 1272-1274).

870. In response to additional ads showing up next to theirs, advertisers could [REDACTED] [REDACTED] (Juda, Tr. 1272-1274).

871. In response to additional ads showing up next to theirs, advertisers could [REDACTED] [REDACTED] [REDACTED] (Juda, Tr. 1272-1274).

872. In response to additional ads showing up next to theirs, advertisers could [REDACTED] [REDACTED] [REDACTED] (Juda, Tr. 1272-1274).

873. In response to additional ads showing up next to theirs, advertisers could [REDACTED]

[REDACTED]

[REDACTED] (Juda, Tr. 1272-1274).

874. These advertiser actions [REDACTED]

[REDACTED] (Juda, Tr. 1274-1275).

875. There are also a number of advertiser-controlled settings in AdWords that

[REDACTED]

(Juda, Tr. 1267-1268).

876. Among the advertiser-controlled settings are: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Juda, Tr. 1267-1270).

877. Advertisers may also [REDACTED] (Juda, Tr. 1267-1270).

Google's algorithms cannot [REDACTED] (Juda, Tr. 1273).

878. Neither Complaint Counsel nor any of its experts proffered any analysis that included consideration of the effects of these potential advertiser actions.

***(b) Any Effort To Determine The Effects, If Any, Of The Settlement Agreements In This Case Would Be Complicated By The Fact That The Algorithms Have Changed Over Time***

879. Any effort to determine the effects, if any, of the Settlement Agreements in this case is complicated by the fact that the algorithms have changed over time.

880. The algorithms for calculating Ad Rank, quality scores, and CPC in Google's AdWords paid search advertising program [REDACTED] (Juda, Tr. 1278).

881. For instance, the inputs for the algorithms [REDACTED]

[REDACTED]  
[REDACTED]  
(Juda, Tr. 1278-1279). In addition, [REDACTED]

[REDACTED] (Juda, Tr. 1279-1280; CX 9019 (Juda, Dep. at 167-168)).

882. How Ad Rank is [REDACTED]

[REDACTED] (Juda, Tr. 1280). Moreover,

Google [REDACTED]

[REDACTED] (Juda, Tr. 1280-1281).

883. Some of the changes to Google's AdWords algorithms have been publicly announced. In December 2005, Google incorporated landing page experience into the algorithms determining quality score. (RX 715-0075).

884. In February 2007, Google announced it would be making changes to the way in which its algorithms determined ads' quality scores. (RX 715-0223-0224).

885. In August 2007, Google changed its algorithms with regard to which ads are placed in the top spots above the organic results. (RX 715-0300). After the change, the algorithm no longer uses actual CPC but instead uses maximum CPC for this determination. (RX 715-0300).

886. In June 2008, Google changed its algorithms to consider landing page load time in determining an ad's quality score. (RX 715-0401-0402).

887. In August 2008, Google announced that it would change its algorithms so that an ad's quality score would be calculated at the time of each search query. (RX 715-0419).

888. In October 2008, Google changed its algorithms so the influence of position on click-through-rate is removed when calculating quality score. (RX 715-0428-0429).

889. In December 2008, Google extended its AdWords program to certain mobile devices. (RX 715-0450).

890. In October 2011, Google changed its algorithms to give greater weight to ad relevance and landing page quality. (RX 715-0947-0948).

891. In October 2013, Google changed its algorithms to consider the effect of ad extensions and other ad formats. (RX 715-1349-1350).

892. Neither Complaint Counsel nor any of its experts proffer any analysis that includes the effects of these changes.

***(c) Determining The Effects Of Additional Bidders Is Complicated By The Fact That The User Interface Has Changed Over Time***

893. Any effort to determine the effects, if any, of the Settlement Agreements in this case is complicated by changes to the user interface for paid search ads over time.

894. The user interface of Google’s paid search ads has changed over time. (See, e.g., Juda, Tr. 1281). For instance, [REDACTED] [REDACTED] (Juda, Tr. 1281). The number of ads shown [REDACTED] [REDACTED] (Juda, Tr. 1281). Now, however, [REDACTED] [REDACTED] (Juda, Tr. 1281-1282).

895. In November 2011, Google began showing ads below (in addition to above and to the side of) the organic search results. (RX 715-0968).

896. In the past, Google displayed paid search ads [REDACTED] [REDACTED] (Juda, Tr. 1282). But in the first part of 2016, Google removed the ads from the right-hand side. (RX 715-1733-4; Juda, Tr. 1282).

897. According to Google, as of May 2016, every year “there are trillions of searches on Google and over half of those searches happen on mobile.” (RX 715-1733).

898. Neither Complaint Counsel nor any of its experts proffer any analysis that includes the effects of these changes.

***C. By Permitting Paid Search Advertisements, Search Engines Displace Organic Results And Shift Clicks From Organic Results To Paid Search Advertisements.***

***1. Paid Search Advertisements Displace Potentially Valuable Organic Links That Complaint Counsel's Experts Have Not Considered.***

899. Search engines, such as Google, are increasingly “allocating less space to organic results on their search page” and allocating more space to paid advertisements. (Clarkson, Tr. 225). This trend is driven by search engines’ “drive to generate more revenue.” (Clarkson, Tr. 225).

900. When a search engine displays additional paid advertisements in the search results, the organic results are pushed further down the results page. (RX 733-0040–41; Athey, Tr. 2082).

901. The organic listings are based on the relevance or usefulness of the website to the user’s search query. (Ghose, Tr. 3909).

902. When organic listings are pushed further down the search results page, they are less accessible to consumers and their value to consumers is thereby decreased. (RX 733-0040-41).

903. Results appearing further down on the search results page have a lower click through rate. (CX 9042 (Evans, Dep. at 175–76)).

904. Consumers incur greater search costs when they must scroll further down the search results page to find the most relevant organic listings. (Ghose, Tr. 3913, 3917).

905. Search costs are heightened on mobile devices, where the visible results are limited by reduced screen size and the consumer must scroll further down the page to see the relevant organic listings.. (RX 733-0038-41; see also Ghose, Tr. 3916-3917).

906. As of 2016, more than 50 percent of searches conducted in the United States were performed on mobile devices. (Ghose, Tr. 3917).

907. Complaint Counsel's expert, Dr. Susan Athey, acknowledges that the display of additional paid search advertisements displaces organic search results. (Athey, Tr. 2082).

908. Complaint Counsel's expert, Dr. Susan Athey, admits that she did not quantify the value to consumers of the organic results that are displaced by the appearance of additional paid search advertisements. (Athey, Tr. 2082-23; see also CX 9043 (Athey, Dep. at 180, 278-281)).

909. Complaint Counsel's expert, Dr. Susan Athey, did not consider the harm to consumers that arises when additional paid advertisements displace organic listings on a search engine results page. (Athey, Tr. 2082-23; see also CX 9043 (Athey, Dep. at 180, 278-281)).

**2. *The Presence Of Additional Paid Search Advertisements Shifts Clicks From Organic Results To Paid Search Advertisements.***

910. [REDACTED]

[REDACTED]

[REDACTED] (Ghose, Tr. 3893-94; RX 733-0025-27).

911. [REDACTED]

[REDACTED] (Ghose, Tr. 3894 [REDACTED])

[REDACTED]

[REDACTED]

912. [REDACTED]

[REDACTED] (RX

733-0025; Ghose, Tr. 3894; RX 716-0026, 68).

913. Several researchers have conducted recent studies demonstrating that, when additional paid advertisements are displayed in response to a trademark search, there is a shift in consumer clicks from the organic links of the trademark holder to the paid advertisements of the trademark holder. (RX 733-0026-27).

914. In a recent working paper, researchers Simonov, Nosko, and Rao found that the main effect of displaying additional paid advertisements in response to a search for a trademark is to shift clicks from the trademark holder’s organic link to the trademark holder’s paid advertisement. (RX 733-0026).

915. Researchers Reiley, Li, and Lewis found in a field experiment that, when a search engine displays additional ads at the top of the results page, users click on the top paid advertisement more frequently and on the organic listings less frequently. (RX 733-0026).

916. Researchers Blake, Nosko, and Tadelis also documented the substitution between organic and paid advertising on search engines. They found, in a natural experiment, that when brand keyword paid search is disabled, “almost all (99.5 percent) of the forgone click traffic . . . was immediately captured by natural search traffic from the platform. . . . That is, substitution between paid and unpaid traffic was nearly complete.” (RX 733-0026).

917. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 733-0026-27; CX 1665-0006).

918. A similar study by Google found that, “[o]n average, for advertisers who appear in the top rank organic slot, 50% of ad clicks are incremental. This means that half of all ad clicks are not replaced by organic clicks when search ads are paused.” This result suggests that the

remaining 50 percent of the clicks on paid links for the top brand are “shifted” from organic to paid results. (RX 733-0027).

919. [REDACTED]

[REDACTED]

[REDACTED] (CX 9043 (Athey, Dep. at 85); Ghose, Tr. 3894-96; RX 733-0025 (Ghose Report)).

**3. *Search Engines Have An Incentive To Display Paid Advertisements Even If They Are Irrelevant And Do Not Receive Clicks.***

920. [REDACTED]

[REDACTED]

[REDACTED] (Ghose, Tr. 3894; RX 733-0027).

921. [REDACTED]

[REDACTED] (RX 733-0025; Ghose, Tr. 3894; ; RX 716-0026, 68).

922. Search engines obtain more revenue when users click on paid advertisements than when users click on organic listings. (RX 733-0025-27; ; RX 716-0026, 68).

923. Shifting clicks from organic links to paid advertisements results in additional revenue for the search engines. (RX 733-0025-27).

924. The search engines have an incentive to display additional advertisements in response to searches for trademark terms even if the additional advertisements are not highly relevant for consumers and consumers do not click on them because the display of additional advertisements causes a shift in clicks from the organic links to the paid advertisements. (RX 733-0027; [REDACTED])



***D. Search Engine Trademark Policies***

***1. History Of Trademark Policies***

***(a) Google Trademark Policies***

925. Prior to 2004, “Google’s U.S. AdWords trademark policy permitted brand owners to restrict the use of their trademark within ad text and as a keyword upon demonstrating protectable rights.” (CX 1148-001). Thus, prior to 2004, in response to a complaint from a trademark owner, Google would prevent ads from appearing in response to searches on the trademark owner’s trademark. (CX 9022 (Charlston, Dep. at 19)).

926. In April 2004, Google changed its U.S. trademark policy to “permit brand owners to restrict use of their trademark within ad text, but not as a keyword.” (CX 1148-001; CX 9022 (Charlston, Dep. at 19-20 (“Beginning in April 2004, we no longer restricted the use of trademarks as keywords, but we would continue to allow trademark owners to restrict the use of their trademark with an ad text.”))).

927. Google acknowledged in its filing with the Securities and Exchange Commission that its April 2004 change in the U.S. trademark policy could subject Google “to more trademark infringement lawsuits.” (RX 140-0028).

928. After it changed its U.S. trademark policy in 2004, Google stated on its website that “Google is not in a position to arbitrate trademark disputes between advertisers and trademark owners.” (RX 159-0004). Google accordingly encouraged “trademark owners to resolve their disputes directly with the advertisers.” (RX 159-0004).

929. In June 2009, Google again changed its U.S. trademark policy such that, subject to a certain exception, Google “will restrict the use of trademark in ad text, reactively, in response to a complaint received from a trademark owner reflecting that they own rights in a term, in connection with a particular goods and services in the United States.” (CX 9022 (Charlston, Dep.

at 16); CX 1148-001). Under the exception, Google “will allow a trademark to appear in ad text where the ad and landing page indicate that the advertiser is a reseller, is providing compatible goods or services, or is providing information about the trademark products or services.”

(CX 9022 (Charlston, Dep. at 16); CX 1148-001).

930. Under Google’s U.S. trademark policy since June 2009, in response to a complaint by a trademark holder, advertisers are not allowed to include the holder’s trademark in the text of their ads. (CX 9022 (Charlston, Dep. at 16)).

931. In response to a complaint by a trademark holder, Google’s U.S. trademark policy since June 2009 prohibits ads using the holder’s trademark “term in a competitive way, including ads with a landing page selling or facilitating the sale of goods or services of a competitor of the trademark owner.” (CX 1149-007).

932. Google’s U.S. trademark policy thereby prohibits [REDACTED]

[REDACTED] (CX 9022 (Charlston, Dep. at 126)).

933. According to Google’s in-house trademark counsel, in response to a trademark holder’s complaint, Google will [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CX 9022 (Charlston, Dep. at 126-27)).

934. To submit a complaint under Google’s U.S. trademark policy, a trademark holder need only submit a Google-provided form to Google. (RX 716-0053-0054).

*(b) Bing Trademark Policies*

935. At the time that Microsoft launched the Bing Network in 2009, Microsoft's terms of service that advertisers agreed to in order to advertise on the Bing Network [REDACTED] [REDACTED] (RX 704 (Iyer, Decl. ¶ 16)). In 2011, Bing [REDACTED] [REDACTED] (RX 704 (Iyer, Decl. ¶ 16)).

936. At the time that Microsoft launched the Bing Network in 2009, Microsoft also [REDACTED] [REDACTED] (RX 704 (Iyer, Decl. ¶ 17)). This [REDACTED] (RX 704 (Iyer, Decl. ¶ 17)).

937. In 2013, Microsoft implemented a [REDACTED] [REDACTED] (RX 704 (Iyer, Decl. ¶ 18)). The [REDACTED] [REDACTED] [REDACTED] (RX 704 (Iyer, Decl. ¶ 18)).

938. Under the [REDACTED] [REDACTED] [REDACTED] [REDACTED] (RX 704 (Iyer, Decl. ¶ 18)). These [REDACTED] [REDACTED] (RX 704 (Iyer, Decl. ¶ 18)).

939. 1-800 Contacts [REDACTED] (RX 704 (Iyer, Decl. ¶ 19)). Accordingly, Microsoft [REDACTED] [REDACTED]

[REDACTED] (RX 704 (Iyer, Decl. ¶ 19)).

2. *Search Engine's Trademark Policies Are Not Socially Optimal*

940. There is no basis to conclude that the search engine's trademark policies are socially optimal.

941. As Respondent's expert, Dr. Murphy, points out, one cannot infer, as a matter of economics, that search engines' policies regarding trademarks are efficient. (RX 739-0035). Providers of advertising services, such as search engines, can benefit from trademark infringement because it can increase the demand for their advertising services by infringers. (RX 739-0035). In addition, the costs of monitoring infringement may be higher for providers of advertising services because they provide services to many different trademark owners. (RX 739-0035).

942. Thus, the optimal level of trademark protection for search engines will typically differ from the optimal level of trademark protection for the companies owning such trademarks. (RX 739-0035).

943. Complaint Counsel's economist, Dr. David Evans, admitted that with respect to trademark protection, search engines are not seeking to maximize the interests of trademark holders; search engines are seeking to maximize profit. (Evans, Tr. 1817).

944. Dr. Evans further admitted that he would not look to the search engines as making the optimal decisions with respect to the enforcement of trademark law. (Evans, Tr. 1817).

945. When asked whether she would be offering an opinion as to whether Google's trademark policy is socially optimal, Complaint Counsel's expert, Dr. Susan Athey, testified at her deposition, "Is it perfectly socially optimal? No." (CX 9043 (Athey, Dep. at 192-193)).

**VII. Trademarks And Paid Search Advertising**

**A. *1-800 Contacts' Trademark Paid Search Policy***

**1. *1-800 Contacts' Marketing Personnel Understood Trademark Search To Be Navigational***

946. A search for 1-800 Contacts' trademark is typically a navigational search (*i.e.*, someone trying to navigate to 1-800 Contacts' website). (Coon, Tr. 2723-24; CX 9017 (Blackwood, Dep. at 54; CX 9031 (Schmidt, Dep. at 96)).

947. 1-800 Contacts did a significant amount of customer research, and collected both qualitative and quantitative data, that showed that when consumers were searching by typing in "1 800 Contacts" they were specifically trying to navigate to the 1-800 Contacts website. (Coon, Tr. 2725; CX 9031 (Schmidt, Dep. at 96)).

948. Data collected by 1-800 Contacts in the course of business showed that 95 percent of people who did a search for "1-800 Contacts" clicked on a link to 1-800 Contacts' website. (CX 9017 (Blackwood, Dep. at 276)).

949. Consumer surveys showed that customers typed in a search on Google for "1 800 Contacts" and variations when they wanted to navigate to the 1-800 Contacts website. (CX 9031 (Schmidt, Dep. at 96)).

950. A search for 1-800 Contacts' trademark is no different than typing 1-800 Contacts into a telephone, because in both circumstances the person is clearly trying to reach to 1-800 Contacts. (Coon, Tr. 2723-24).

951. The consumers who come to 1-800 Contacts' website from a search for 1-800 Contacts' trademark behave similarly to those who type 1-800 Contacts' URL directly into their internet browser's navigational bar. (Coon, Tr. 2725-26).

952. Conversely, traffic from a search for 1-800 Contacts' trademark and other direct traffic to 1-800 Contacts' website behave totally different than other types of traffic, like non-trademark search, to 1-800 Contacts' website. (Coon, Tr. 2726).

953. Traffic from a search for 1-800 Contacts' trademark and other direct traffic to 1-800 Contacts' website is driven by 1-800 Contacts' television advertising, as was demonstrated by tests that 1-800 Contacts conducted in specific geographic markets. (Coon, Tr. 2725-26).

954. When internet browsers combined the search box with the URL navigation box, many consumers trying to navigate directly to 1-800 Contacts' website by typing in its URL would be automatically directed to an internet search results page for "1-800 Contacts." (CX 9029 (Bethers, Dep. at 65-66)).

955. 1-800 Contacts views customers who navigate to its website from an internet search for 1-800 Contacts' trademark as "direct" customers. (CX 9029 (Bethers, Dep. at 14, 18-19)).

956. Testimony by 1-800 Contacts personnel confirms that customers who navigate to its website from an internet search for 1-800 Contacts' trademark are direct customers, because the conversion rates are more similar to customers who navigated to 1-800 Contacts' website through bookmark or URL than customers who navigated to 1-800 Contacts' website by a non-trademark search. (CX 9029 (Bethers, Dep. at 14, 18-19); CX 9031 (Schmidt, Dep. at 97-98); Coon, Tr. 2725-26; Craven, Tr. 680).

957. The conversion rates are significant because they give insight into the type of consumer who was conducting trademark paid search. (Craven, Tr. 681).

958. 1-800 Contacts targeted its ad copy to different value propositions based on the type of search conducted by the customer and found that trademark keywords correspond most closely to credibility and convenience. (RX 167; CX 9031 (Schmidt, Dep. at 123-124)).

959. Price is a lesser consideration than credibility and convenience for those customers searching for a trademark term like “1-800 Contacts.” (CX 9031 (Schmidt, Dep. at 112-123)).

**2. *Customers Know How To Comparison Shop And Identify Alternatives***

960. Contact lens consumers are aware of many ways to access comparative information about contact lens retailers, including by non-navigational searches. (Schmidt, Tr. 2924). In a consumer survey conducted in 2014, less than 5 percent of consumers identified “unaware of alternatives” as a factor influencing the location of their most recent contact lens purchase. (RX 1128-0121).

961. 1-800 Contacts understood from consumer surveys that consumers knew how to find other contact lens retailers on the Internet. (Bethers, Tr. 3708).

962. Clint Schmidt assisted in preparing consumer research for 1-800 Contacts, including a February 2005 online qualitative summary. (Schmidt, Tr. 2917-21; RX 781).

963. The consumer surveys conducted or supervised by Clint Schmidt while he was at 1-800 Contacts showed that when consumers wanted to comparison shop, they knew exactly how to do so by using generic search terms like “contact lenses” or “prices on contact lenses.” They did not comparison shop by searching on specific trademark terms associated with a particular retailer, such as 1-800 Contacts. (CX 9031 (Schmidt, Dep. at 98, 102-103)).

964. Complaint Counsel’s expert witnesses conceded that consumers are aware of many different ways to comparison shop. CX 8014 (Tushnet Rep.) ¶ 46 (citing research for the proposition that consumers are well aware of different tools that allow them to compare their purchase options); Tushnet, Tr. 4501-04; Athey, Tr. 938-39).

965. Prof. Tushnet and Dr. Athey each testified that consumers routinely use the Internet to comparison shop, including by reference to third party shopping sites where consumers can compare their purchase items. (Tushnet, Tr. 4503-04; Athey, Tr. 939).

966. Among the comparison shopping tools available to consumers, according to Prof. Tushnet, are Product Listings, or PLAs. (Tushnet, Tr. 4504).

967. 1-800 Contacts consistently found in consumer research that consumers would use generic search terms like “contacts,” “contact lens,” and “contact lenses” in order to find an online retailer of contact lenses. (CX 9029 (Bethers, Dep. at 19); Schmidt, Tr. 2924 (identifying generic terms such as “contact,” “contact lens,” and “discount eye contacts” as best ways for consumers to find comparative information online); CX 9001 (Bethers, IHT at 115)).

968. The most popular internet searches related to contact lenses are generic terms, such as “contact lenses” and “contact lens.” (CX 9001 (Bethers, IHT at 115)).

969. 1-800 Contacts found in consumer surveys that consumers who were interested in shopping for contact lenses online, but who did not know which retailer they were going to purchase from, used generic search terms like “contacts,” “contact lens,” and “contact lenses,” or “discount contacts.” (Bethers, Tr. 3709-10; CX 9029 (Bethers, Dep. at 16)).

### ***3. Paid Search Strategy And Budget***

970. A goal when using paid search advertising was to acquire as many customers as possible, but efficiently and within a given budget. (Craven, Tr. 509).

971. 1-800 Contacts’ paid search marketing team determined its bid amounts for particular keywords based on the past performance of key metrics such as customer acquisition cost and conversion rate. (Craven, Tr. 670-71; CX 9002 (Craven, IHT at 76-78)).

972. 1-800 Contacts’ trademark terms are an efficient allocation of paid search marketing spend because trademark terms are navigational in quality and result in significantly higher click-through and conversion rates for 1-800 Contacts than other terms. (CX 9002 (Craven, IHT at 144); Craven, Tr. 672; CX 9031 (Schmidt, Dep. at 126)).



973. For example, cost per conversion for 1-800 Contacts' trademark terms was considerably lower for 1-800 Contacts than the Big 3 generic terms. (Craven, Tr. 676; CX 9020 (Craven, Dep. at 99)).

974. 1-800 Contacts designed different ad copy for its trademarked keyword campaigns than its generic or product keyword campaigns because users searching specifically for 1-800 Contacts made up a different class of consumers. (CX 9002 (Craven, IHT at 149)).

975. 1-800 Contacts had no interest in bidding on any of its competitor's trademarked terms because such terms were extremely inefficient given their cost compared to the sales they generated, and the money could be better allocated to other categories of keywords. (CX 9031 (Schmidt, Dep. at 126-27)).

976. On generic terms, 1-800 Contacts did not always target the top position since the added conversions from that position did not always justify the increased cost. (CX 9002 (Craven, IHT at 88-89)).

977. During the 2004-05 period, the budget for online advertising was managed according to "cost efficiency," where highest value keywords received priority in the allocation of marketing funds. (CX 9031 (Schmidt, Dep. at 125-127)).

978. The budgets for online paid search advertising were "fixed," and the paid search marketing team received a set budget annually from management, and it only had discretion to make budgetary decisions within that set amount. (CX 9031 (Schmidt, Dep. at 127-28); Craven, Tr. 669 ("Q: Okay. And did you set that budget? A: I don't think it was me who set it. I think it was given to me.")).

979. Therefore, an increase in trademark search cost would not have had an impact on the overall spend or allocation of marketing funds because an increase in search costs on some

terms would mean less money to allocate to the rest of the keywords in that advertising campaign. (CX 9031 (Schmidt, Dep. at 127-28); Craven, Tr. 670).

980. Many factors contribute to the cost per click or cost per conversion that 1-800 Contacts ultimately pays to the search engines for searches on its trademark terms. (Craven, Tr. 561, 563, 574).

981. Many factors contribute to the click-through rate that 1-800 Contacts ultimately achieves on its trademark terms. (Craven, Tr. 572, 575; CX 9020 (Craven, Dep. at 54-55)).

982. The evidence does not suggest that an increase in the number of competitors bidding on 1-800 Contacts' trademarks would necessarily increase 1-800 Contacts' costs per click, or similarly that a decrease in the number of competitors bidding on 1-800 Contacts' trademarks necessarily contributed to reduced costs. (Craven, Tr. 548, 574).

983. The evidence does not suggest that an increase in the number of competitors placing advertisements in response to searches for 1-800 Contacts' trademarks would necessarily decrease the click-through rate, or similarly, that a decrease in the number of competitors placing advertisements in response to searches for 1-800 Contacts' trademarks would necessarily increase the click-through rate. (Craven, Tr. 567-68, 575; CX 9020 (Craven, Dep. at 55)).

984. There were times when Walmart actively advertised on 1-800 Contacts' trademark with no material impact on 1-800 Contacts' cost per click or 1-800 Contacts' cost to acquire customers. (Bethers, Tr. 3771).

***B. Business Concerns With Unauthorized Use Of Trademarks In Paid Search***

***1. 1-800 Contacts Did Not Use Other Company's Trademarks In Paid Search***

985. 1-800 Contacts' policy is (and has been) not to use other companies' trademark terms as keywords to trigger Internet search advertisements. (CX 9031 (Schmidt, Dep. at 57); CX 9001 (Bethers, IHT at 104)).

986. 1-800 Contacts adopted and maintained this policy before any of the settlement agreements were put in place. (CX 9031 (Schmidt, Dep. at 58)).

987. There were three key reasons behind the policy of 1-800 Contacts to not bid on competitor trademark terms: (1) the risk of consumer confusion, since trademark searches are navigational and it was antithetical to the 1-800 Contacts brand to cause confusion; (2) it was an inefficient use of funds to bid on navigational search terms; and (3) it seemed improper to make an unauthorized use of other companies' trademarks. (CX 9031 (Schmidt, Dep. at 57-58)).

988. Since trademark searches are navigational in nature, it is inefficient for an advertiser to bid on a third party's trademark because consumers visiting that advertiser's website after conducting a trademark search and clicking on the advertiser's link will likely not stay long on the website or make a purchase. (Schmidt, Tr. 2908-09).

989. 1-800 Contacts also took affirmative steps to prevent its advertisements from triggering as pop-up advertisements over the websites of other contact lens retailers, including by preventing affiliates from participating in certain advertising practices. (CX 9013 (Aston, Dep. at 210-212)).

990. 1-800 Contacts also implemented negative keywords for the trademark terms of other contact lens retailers to avoid displaying advertisements in response to searches for those

trademarks. By 2004, 1-800 Contacts had implemented negative keywords for Vision Direct, Coastal Contacts, and a number of other competitors. (CX 9031 (Schmidt, Dep. at 58)).

991. 1-800 Contacts found that implementing negative keywords is and was a straightforward exercise and easy to do. (CX 9031 (Schmidt, Dep. at 60)).

**2. *1-800 Contacts Opposed The Unauthorized Use Of Its Trademark In Paid Search Advertising***

992. With respect to sponsored ads by other companies that appeared in response to an internet search for 1-800 Contacts' trademarks, 1-800 Contacts had three main business concerns: (1) consumers would be confused or misdirected; (2) the ads could dilute the value of 1-800 Contacts' brand and investments in broadscale advertising; and (3) other online retailers would be free-riding on the investments that 1-800 Contacts made in broadscale advertising. (Bethers, Tr. 3688-91; Coon, Tr. 2726-27).

993. First, with respect to sponsored ads by other companies that appeared in response to an internet search for 1-800 Contacts' trademarks, 1-800 Contacts had great concern that confusion and misdirection among consumers would impact its business. (Bethers, Tr. 3691; CX 9029 (Bethers, Dep. at 27, 29, 32); CX 9001 (Bethers, IHT at 105-06); Coon, Tr. 2727-29 (citing concerns about consumers being frustrated, confused, and misdirected)).

994. 1-800 Contacts also had evidence that customer confusion resulted from the placement of paid search advertisements that were triggered by a search query for another company's trademark term. (CX 9031 (Schmidt, Dep. at 14-15 ("And we had pretty good qualitative and quantitative evidence that these third parties ... were creating confusion for consumers"))). Such confusion was a pervasive issue for 1-800 Contacts and many other companies with an online presence.

995. 1-800 Contacts was hearing from consumers who were confused and thought they had ordered from 1-800 Contacts when they in fact had not done so. (Coon, Tr. 2727-29, 2736).

996. 1-800 Contacts believed a source of confusion from sponsored ads by other companies appearing in response to a search for 1-800 Contacts' trademark was that it was potentially confusing for consumers to see competitor's advertisements appear in response to searches for 1-800 Contacts. (CX 9031 (Schmidt, Dep. at 105-06); Coon, Tr. 2731-38).

Marketing professionals understood 1-800 Contacts' trademark terms, when used as a search query, to be navigational in nature, and to be reflective of the searcher's intent to find her way to 1-800 Contacts. (CX 9031 (Schmidt, Dep. at 106)).

997. Due to the navigational quality of a search for 1-800 Contacts, there was a concern that consumers trying to navigate to 1-800 Contacts' website by searching on its trademarked name were getting confused, being diverted, or finding it more difficult to order from 1-800 Contacts as the result of the triggering of competitor advertisements in response to such searches. (CX 9031 (Schmidt, Dep. at 112); Coon, Tr. 2727-29).

998. With respect to sponsored ads by other companies that appeared in response to an internet search for 1-800 Contacts' trademarks, 1-800 Contacts was also concerned that consumers searching the internet often do not read carefully and just click on the first link. (CX 9027 (Larson, Dep. at 87)).

999. 1-800 Contacts' search marketing professionals shared the concern that rival advertisements may cause confusion because of misleading ad copy. (CX 9020 (Craven, Dep. at 93)).

1000. 1-800 Contacts would never advertise using misleading statements about savings offers such as "Save up to 70%" since the company would not participate in non-truthful advertising. (CX 9002 (Craven, IHT at 127-28); CX 9020 (Craven, Dep. at 93-94)).

1001. 1-800 Contacts was concerned that competitors were using the 1-800 Contacts' trademark to trick people into going to their website. (Coon, Tr. 2731-32).

1002. Second, with respect to sponsored ads by other companies that appeared in response to an internet search for 1-800 Contacts' trademarks, 1-800 Contacts thought those ads would dilute the value of its brand and the message that it was trying to advertise to consumers. (Bethers, Tr. 3689; CX 9029 (Bethers, Dep. at 27 & 29)).

1003. For example, Jonathan Coon was concerned about 1-800 Contacts being associated with competitors who were engaged in practices that were totally the opposite of 1-800 Contacts' philosophy (e.g., bad service, bad prescription verification practices, fake pricing). (Coon, Tr. 2727, 2729).

1004. Third, 1-800 Contacts invested millions of dollars in TV, radio, direct mail, and other advertising to build brand awareness and direct contact lens users towards the 1-800 Contacts website, and one concern of the company was online competitors who were not making the same investments in advertising necessary to attract customers were free-riding off that investment by paying search engines to appear when customers tried to navigate to 1-800 Contacts. (CX 9013 (Aston, Dep. at 147); Coon, Tr. 2729; Bethers, Tr. 3690; CX 9001 (Bethers, IHT at 125-27)).

1005. 1-800 Contacts believes that its investments in broadscale advertising would decrease if other companies' sponsored ads appeared in response to an internet search for 1-800 Contacts' trademarks. (CX 9001 (Bethers, IHT at 149); CX 9004 (Coon, IHT at 152, 178-79, 182)).

1006. 1-800 Contacts' entire business model centered on removing friction and making it simpler for customers to purchase contact lenses. (Coon, Tr. 2738).

1007. In general, 1-800 Contacts was thus concerned that such ads were interfering with 1-800 Contacts' efforts to remove friction and make it simple, easy and quick for consumers to reach 1-800 Contacts by causing consumers to become frustrated, confused, and misdirected when they were just trying to reach the 1-800 Contacts website. (Coon, Tr. 2627-29, 2738).

1008. 1-800 Contacts was typically the first place that consumers would go other than their eye doctor. (Coon, Tr. 2738). 1-800 Contacts was understandably troubled that if somebody's very first experience online was the appearance of misleading, confusing, and irrelevant advertisements when they were trying to navigate to 1-800 Contacts, it would create a high friction experience and lead those consumers to go back to their eye doctor for contact lenses. (Coon, Tr. 2738-39)

1009. 1-800 Contacts believed that anything that created friction for the customer, or made it difficult for the customer to just do business with 1-800 Contacts when that is what they wanted to do, was a problem for 1-800 Contacts. (Coon, Tr. 2739).

1010. Concerns about consumers being confused by competitor ads appearing in response to searches for 1-800 Contacts' trademarks became a topic at 1-800 Contacts' management team meetings. (Coon, Tr. 2736-37).

1011. 1-800 Contacts informed its Board of Directors about the concerns it had with competitors using the 1-800 Contacts trademark to generate advertisements in response to navigational searches. (Coon, Tr. 2730).

1012. 1-800 Contacts conveyed to its Board of Directors that expansion of trademark triggered ads by other competitors would further reduce the value of its trademarks. (Coon, Tr. 2731).

1013. 1-800 Contacts' presentation to its Board of Directors was meant to convey its concern that the practice of competitors running ads based on 1-800 Contacts' trademark was undermining the investment it was making in building a brand. (Coon, Tr. 2731).

### **VIII. 1-800 Contacts' Trademark Litigation**

#### **A. *Early History And The Vision Direct Settlement***

1014. In the early 2000s there were dozens of new entrants into the online contact lens retail space. (CX 8006 (Evans Rep.) ¶¶ 85-89; CX 8007-105 (Athey Rep.)).

1015. Concerns that unbounded uses of trademarks in online advertising violated the intellectual property laws and eroded the goodwill of established brands resulted in litigation over various methods of internet advertising starting in the late 1990's. *See, e.g., Brookfield Commns, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1050-51 (9th Cir. 1999) (use of marks in HTML codes); *OBH, Inc. v. Spotlight Magazine, Inc.*, 86 F. Supp. 2d 176, 185 (Feb. 28, 2000) (finding likelihood of success on the merits satisfied in Lanham Act claim for use of registered trademark in domain name); *Bihari v. Gross*, 119 F. Supp. 2d 309, 319 (S.D.N.Y. 2000) (discussing use of marks in metatags); *1-800 Contacts v. WhenU.com and Vision Direct, Inc.*, 309 F. Supp. 2d 467 (S.D.N.Y. 2003) (addressing "pop-up" advertisements); *Google v. American Blind & Wallpaper Factory, Inc.*, No. 03-05340, 2005 WL 832398 (N.D. Cal. Mar. 30, 2005) (denying motion to dismiss for potentially actionable "use" of a trademark in keyword search advertising).

1016. In 2002, 1-800 Contacts brought a trademark infringement claim against Vision Direct, Inc. ("Vision Direct"), another contact lens retailer, and the advertising software company WhenU, alleging that pop-up advertisements for Vision Direct would appear when consumers attempted to access 1-800 Contacts' website. (CX 1614 (Oct. 9, 2002 Complaint against Vision



Direct)); *1-800 Contacts v. WhenU.com and Vision Direct, Inc.*, 309 F. Supp. 2d 467 (S.D.N.Y. 2003).

1017. 1-800 Contacts had previously concluded another settlement agreement in 2002 with Arlington Contact Lens Service (“ACLens”) restricting a similar set of practices related to the appearance of pop-up advertisements when a user attempted to navigate to the other company’s web-page. (CX 3; Clarkson, Tr. 322 (“Q: Take a look at [CX 3] and see if it refreshes your recollection that you did sign an agreement back in 2002. A: It does. Q: And generally speaking, did ACLens agree not to cause an advertisement to be displayed over or on a website owned by 1-800 Contacts? A: Correct.”)).

1018. In 2003, the District Court enjoined the defendants, Vision Direct and WhenU, from causing such advertisements to be displayed, *1-800 Contacts*, 309 F. Supp. 2d at 498-508.

1019. [Intentionally Not Used].

1020. Following entry of the injunction against WhenU and Vision Direct, 1-800 Contacts’ counsel wrote to Vision Direct regarding the appearance of Vision Direct’s paid search advertisements in response to searches for 1-800 Contacts’ trademark. (RX 100 (January 16, 2004 letter to Vision Direct)).

1021. Vision Direct indicated it would notify its affiliates to cease their activities, but also advised that 1-800 Contacts could file a trademark complaint with Google requesting that the search engine take down advertising on 1-800 Contacts’ trademark. (RX 796).

1022. 1-800 Contacts attempted to resolve the trademark dispute by filing a complaint with Google. (Schmidt, Tr. 2896; CX 1054; CX 1397; RX 159, RX 796 CX 1396).

1023. Other contact lens retailers such as Vision Direct and ACLens also attempted to prevent the unauthorized use of their trademarks by “ask[ing] Google to not allow others to advertise on it.” (Clarkson, Tr. 327-329; RX 1188 (Mar. 18-19, 2003 email to Peter Clarkson,

CEO of ACLens, from Google alerting them that Vision Direct has requested that Google remove Vision Direct's trademarks and all variations of the term Vision Direct from ACLens' keyword list); RX 1191 (Apr. 18, 2003 email from Clarkson to Google asking for Google to restrict other advertisers from using "AC Lens" as a keyword trigger)).

1024. In April 2004, Google modified its policies to permit advertisers to purchase each other's trademarks as keywords. (CX 1148; CX 9022 (Charlston, Dep. at 19-20); (Schmidt, Tr. 2898-2900)).

1025. In announcing the policy change, Google indicated it would no longer resolve disputes over trademark use and encouraged advertisers to work their trademark disputes out amongst themselves. (Schmidt, Tr. 2948-49; RX 159; CX 9013 (Aston, Dep. at 168-170); CX 9031 (Schmidt, Dep. at 34 (Google "would no longer be interceding" in grievances between trademark owners and advertisers))).

1026. Google made the same representations to other companies regarding trademark rules on AdWords. (CX 9031 (Schmidt, Dep. at 21-23 (describing experience at Half.com), 34 ("They had a very clear set of three messages that they were conveying to all of their advertisers, including 1-800 Contacts")); CX 9013 (Aston, Dep. at 174)).

1027. 1-800 Contacts met with Google representatives to discuss the issue in April of 2004. (Schmidt Tr. 2904-05; CX 9013 (Aston, Dep. at 32-35)). At this meeting, Google representatives stated to 1-800 Contacts that while Google would no longer resolve trademark disputes directly, it offered negative keywords as a tool to implement on the AdWords platform that would be effective at arresting future infringement. (Schmidt Tr. 2900, 2904-05; CX 9031 (Schmidt, Dep. at 33-34 ("Google would no longer be interceding in these grievances. The second was that the responsibility to protect trademarks or to settle any grievances around trademark terms would no[w] be the responsibility of the trademark holder. And the third piece was that,

you know, making sure that we knew about the negative keyword tools that were available to advertisers to enforce any of those grievances.”))).

1028. Google representatives specifically suggested that 1-800 Contacts resolve its disputes directly with its competitors by telling them to implement 1-800’s trademarks as negative keywords. (CX 9031 (Schmidt, Dep. at 34-35); CX 9013 (Aston, Dep. at 170, 173)).

1029. Google’s statements to 1-800 Contacts in 2004 confirmed the belief held by 1-800 Contacts’ marketing personnel that negative keywords were an effective tool that Google provided to resolve trademark disputes. (Schmidt, Tr. 2905-2906).

1030. After the discussions with Google, 1-800 Contacts and Vision Direct began negotiating to resolve their trademark dispute and reached the first settlement agreement challenged in this case. (CX 58 (May 24, 2004 settlement negotiation emails exchanged between Alesia Pinney for drugstore.com and Joe Zeidner for 1-800 Contacts); CX 311 (June 2004 Vision Direct Settlement Agreement)).

1031. Google also disclosed that its 2004 policy change created a material litigation risk over the prospect that trademark owners would commence litigation over the unauthorized use of trademarks in its search advertising platform. (Hogan, Tr. 3250).

***B. 1-800 Contacts’ Trademark Monitoring Efforts***

1032. Following the Google policy change, trademark owners began to bring infringement suits based on the sale and use of trademarks as keywords in paid search advertising, starting around 2004. (Hogan, Tr. 3249; RX 734 (Hogan Rep.) ¶ 97; *see also Playboy Enters., Inc. v. Netscape Commc’ns*, 354 F.3d 1020 (9th Cir. 2004); *Gov’t Emps. Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700 (E.D. Va. 2004)).

1033. After signing the first two pop-up advertising settlements with Coastal Contacts and Vision Direct, 1-800 Contacts and its outside counsel also began an effort to uncover others’

unauthorized use of its trademark in paid search advertising. (CX 9021 (Pratt, Dep. at 25-30, 140-141); CX 9040 (Miller, Dep. at 128-129)).

1034. Trademark owners are often advised to have marketplace intelligence to determine how their marks are being used and to prepare appropriate steps to enforce their rights. (Hogan, Tr. 3265-66 (“trademark lawyers often advise clients to have marketplace intelligence and take steps to determine how their marks are being used and to take appropriate steps to remedy those uses in they appear like they would be problematic or could diminish ... the trademark owner’s ability to use the mark to connote one specific source of goods or services.”)).

1035. 1-800 Contacts internal marketing personnel monitored rivals’ advertisements that were showing up in response to searches for 1-800 Contacts key trademark terms and provided that information to the legal team in trademark monitoring reports. (Craven, Tr. 685-86; CX 9002 (Craven, IHT at 121, 128-29); CX 9020 (Craven, Dep. at 45); Pratt, Tr. 2513 (“I received reports, periodic reports, from my client as they monitored those results. They monitored – they did searches for their trademarks themselves on Google and other search engines. They kept track of who was coming up in response to those searches.”)).

1036. It was the responsibility of the legal team and outside counsel, not the marketing team, to determine whether and when the appearance of competitor advertisements in response to searches for 1-800 Contacts’ trademarks constituted trademark infringement or was otherwise unlawful. (CX 9031 (Schmidt, Dep. at 105); CX 9002 (Craven, IHT at 128-29)).

1037. Respondent’s outside counsel, chiefly Mr. Bryan Pratt and Mr. Mark Miller, reviewed these reports to see the results that would come up in response to searches for 1-800 Contacts and variations and in order to provide legal guidance to 1-800 Contacts by evaluating potential infringement, potential misappropriation of goodwill. (CX 9021 (Pratt, Dep. at 20-21)).

1038. Mr. Pratt and Mr. Miller also conducted and reviewed Keyword Spy and Brand Verity Reports to investigate unauthorized uses of the trademark. (CX 9021 (Pratt Dep. at 27-30 (“Q: Why did you review the report? A: To – to evaluate the information provided by Keyword Spy regarding keywords used by – by advertisers. Q: Why did you want to evaluate the information provided by Keyword Spy? A: As a – as a data point to understand, hopefully get a glimpse on what was happening and why search results were coming up”), 140-141; CX 9040 (Miller, Dep. at 123 (“Q: Who would have performed those prior searches? ... A: Could have come from trademark monitoring reports that 1-800 Contacts performed on – as part of their normal course of business. It could have been something we got out of a Keyword Spy report, BrandVerity report. We used a bunch of different tools to evaluate use of the trademark as a triggering keyword or search term”), 128-129 (describing the operation of Keyword Spy and Brand Verity); Pratt, Tr. 2557; CX 9020 (Craven, Dep. at 62-63)).

1039. Mr. Pratt and Mr. Miller also typed in their own search queries for 1-800 Contacts’ trademarks and confusingly similar variations to see which advertisements were displayed in response. (CX 9021 (Pratt, Dep. at 25-26); Pratt, Tr. 2513 (“I also conducted my own searches”)).

1040. Next, Respondent, Mr. Pratt, and/or Mr. Miller would conduct an analysis to determine whether the advertisements that appeared in response to searches for 1-800 Contacts’ trademark had indicia of an infringing use, taking into account the factors and context that courts had identified as relevant to that determination. (CX 9040 (Miller, Dep. at 19, 129, 132 (“There’s a lot of factors that—outside of just looking at a search results page that you take into account when you’re evaluating potential infringement. And then if you have the basis to argue there’s a likelihood of confusion or we’ve got a good faith basis to allege trademark infringement here, then you’ve got a claim. And then discovery will prove what kind of evidence you have.”)), 133

(“Well, we would always evaluate the case before we made the allegations or filed the complaint, absolutely”); CX 9021 (Pratt, Dep. at 78-79, 131-132); RX 734 (Hogan Report) ¶ 38 n. 60).

1041. Such factors considered by Respondent’s counsel before asserting a trademark infringement claim included the frequency of appearances, placement on the page and nature of the search, (CX 9021 (Pratt, Dep. at 129-130)); the nature of the market, the nature of the parties, how strong the trademark is, consumer awareness of the brands, (CX 9040 (Miller, Dep. at 132)); depending on who that consumer is, their experience with the internet, their past history purchasing contact lenses online, the frequency in which they use the Internet, and their familiarity with the Google Adwords process; (CX 9021 (Pratt, Dep. at 84)); and product advertised, whether it was a product or retailer name, the text of the advertisements, and the dynamics of the search engine results page as a whole. (CX 9021 (Pratt, Dep. at 86)).

1042. Each factor is just one data point considered in the infringement analysis and taken together they are not exhaustive or exclusive. (CX 9040 (Miller, Dep. at 131)).

1043. 1-800 Contacts’ outside counsel noted how the trademark infringement factors operated in 1-800 Contacts’ favor in relation to advertisements placed by allegedly lesser known, lower quality competitors advertising against its trademark. (CX 9021 (Pratt, Dep. at 134-35; 78-79 (“there are a number of reasons that I believe the LensWorld.com ad could give rise to confusion. A couple of those include – I mean, could give confusion to an ordinary consumer based on the name recognition [of 1-800 Contacts] and the lack of name recognition for LensWorld”))).

1044. Frequency of appearances in the infringement analysis refers to the rate at which another retailer’s advertisements appeared in response to searches for 1-800 Contacts’ most popular trademark terms, including searches with misspellings of the trademark. A higher

frequency of advertisements suggested a higher likelihood that consumers would infer an affiliation between 1-800 Contacts and the other retailer. (CX 9040 (Miller, Dep. at 130)).

1045. Placement on the page in the infringement analysis refers to where the rival advertisements appear on the search engine results page. Consumers may assume that the higher the placement of the advertising content, the more relevant that content is to the search term entered which can lead to confusion about the connection between the search term and the product. (CX 9040 (Miller, Dep. at 131)); *accord Rescuecom*, 562 F.3d at 131 (“This is particularly so, Rescuecom alleges, when the advertiser’s link appears in a horizontal band at the top of the list of search results in a manner which makes it appear to be the most relevant search result and not an advertisement”).

1046. The way Google and other search engines displayed ads that appeared in response to searches for 1-800 Contacts could cause a user to consider that the advertiser’s “sponsored” link had an affiliation with, or was “sponsored by,” the search term, 1-800 Contacts. (CX 9021 (Pratt, Dep. at 79 (“The use of the word ‘sponsored’ could give rise to confusion as to who sponsors it, or if there’s some sponsorship or affiliation in relation to the search term.”)); CX 9031 (Schmidt, Dep. at 110 (“it was easy for a person who was performing such a search to conclude that any one of the results that appeared in these sponsored ad section was put there by the company that they were intending to navigate to, which in this case was 1-800 Contacts.”)); CX 9033 (Mohan, Dep. at 103-105 (a user who does not have a search engine marketing background could “mistakenly click on” a LensDirect ad triggered by a search for 1-800 Contacts))).

1047. Many of 1-800 Contacts’ online competitors placed advertisements with deceptive or confusing ad copy that did not identify the retailer placing the advertisement, did not compare the product to 1-800 Contacts, and included unconfirmed and misleading savings claims. (CX 9021 (Pratt, Dep. at 151-152 (describing possible confusing aspects of 70% off claims in the

text of ShipMyContacts.com advertisements)); RX 72 (Complaint against Memorial Eye identifying several advertisements with the URL ShipMyContacts.com but titled “Discount Contact Lenses” with non-descript text offering “70% off”); CX 1318-005 (cease and desist letter to Memorial Eye showing an advertisement with the URL ShipMyContacts.com and same confusing text and title); CX 654 (“70% off is everywhere”).

1048. 1-800 Contacts observed that rival contact lens retailers designed the labeling and phrasing of their advertisements so as to make consumers believe that they would land on 1-800 Contacts when they selected the link for another company. (CX 9031 (Schmidt, Dep. at 108)).

1049. Many of the settling parties conducted business with generic names that were variations of the terms “contacts” and “lenses,” which suggested a connection or affiliation with 1-800 Contacts’ well-known trademark. (CX 9021 (Pratt, Dep. at 86 (noting that generic competitor names suggest “a sponsorship or affiliation between th[em] and 1-800 Contacts,” and could easily be mistaken for “a link to a sub-page of 1-800 Contacts”)); CX 9040 (Miller, Dep. at 130 (“If it’s like ShipMyContacts.com, consumers could think if they’re always coming up when I search for 1-800 Contacts, maybe they’re a fulfillment center. Maybe they’ve got some agreement with them. Maybe they’ve got some affiliation.”))).

1050. Multiple distinct retailers would use each other’s trade names or other nondescript titles for their advertisements such that multiple advertisements in the same search engine results page bore identical titles. (CX 1255-032 (Motion for Entry of Default Judgment against LensWorld attaching screenshot with advertisements for ShipMyContacts.com, LensWorld.com, and ContactLens.com all titled “Discount Contact Lenses”)).

1051. A user specifically trying to navigate to “1-800 Contacts” or a variant is more susceptible to confusion as to the sponsorship of the links that appear in a prominent position on the search engine results page than a consumer conducting a comparative or informational query.



(CX 9040 (Miller, Dep. at 19-20, 117-118); CX 9021 (Pratt, Dep. at 131-132 (“And the field is 1-800 Contacts, so I believe that it would be easy for someone to consider that you are searching for links that are sponsored by 1-800 Contacts, because that’s what’s in the field when you’re searching for sponsored links”))).

1052. Further, 1-800 Contacts alleged that some of its rivals placed advertisements that used the 1-800 Contacts name or a variation deceptively in the text of the advertisement. (CX 1513-002 (“Additionally, a number of your sponsored ads include titles and/or text, such as “1-800-Discount Contacts,” that may be confusingly similar to the above-mentioned federally registered trademarks”); CX 1125-007 (screenshots contained in the complaint against Lens.com showing advertisement for “JustLenses.com” using “1800Contacts” as its title); CX 78 (Apr. 9, 2007 email from Brandon Dansie to Bryan Pratt attaching screenshot with LensWorld, owned by Vision Direct, advertising as “1 800 Contacts”)).

1053. Further, 1-800 Contacts alleged that some of the settling parties made unauthorized use of the 1-800 Contacts trademarks both as keywords in paid search advertising and on their websites and advertising materials. (CX 1617 (Complaint against EZContactsUSA); Pratt, Tr. 2538 (“So as I recall, EZContacts also on their website had included copied sections that were lifted directly from 1-800 Contacts’ website. Those sections included 1-800 Contacts’ trademarks”)).

1054. Consistent with trademark practice, 1-800 Contacts would assert its trademark rights prior to obtaining actual evidence of confusion, and then identify actual confusion evidence during discovery. (CX 9040 (Miller Dep.) at 156 -57 (“Nobody files a trademark claim only after they’ve proven that it’s a slam dunk, guaranteed to win, and they’ve got a judgment type of claim. When you assert a trademark claim you believe somebody is misusing your trademark rights, and you do your analysis and figure out you’ve got a claim...I would assert a trademark claim without

having actual confusion evidence as everybody around the country does all the time”)); RX 734 (Hogan Report) ¶ 134).

1055. In the years between 2005 and 2010, 1-800 Contacts sent cease-and-desist letters to multiple online contact lens retailers whose advertisements appeared in response to a search for 1-800 Contacts’ trademarks. (Pratt, Tr. 2498, 2500 (discussing letters sent to Lens.com), 2526-2529 (discussing letters sent to Memorial Eye), 2553 (discussing letters sent to Lensfast); CX 9040 (Miller, Dep. at 150-152 (discussing letter sent to Contact Lens King)); CX 1472 (May 12, 2009 Cease & Desist Letter to Contact Lens King); CX 9040 (Miller, Dep. at 217-220 (discussing letters to LensDiscounters.com regarding alleged trademark infringement for keyword advertising practices)); CX 1235 (Sep. 20, 2005 LensDiscounters.com Cease & Desist Letter); CX 1751 (Sep. 13, 2005 Cease & Desist Letter to Memorial Eye); CX 1754 (Sep. 12, 2007 Cease & Desist Letter to Memorial Eye); CX 1318 (Feb. 27, 2008 Cease & Desist Letter to Memorial Eye); CX 1513 (Sep. 20, 2005 Cease & Desist Letter to Lens.com); CX 1229 (May 12, 2009 Letter to LensDiscounters.com); RX 53 (Feb. 2, 2010 Cease & Desist Letter to ACLens); RX 1010 (Sep. 12, 2007 Letter to Lensfast); RX 1011 (Mar. 14, 2008 Letter to Lensfast); CX 494 (May 11, 2010 email to Walgreens with notice of alleged infringement); CX 1313 (May 12, 2009 letter to IWantContacts.com).

1056. After 2009, 1-800 Contacts began occasionally including a filed Complaint with the demand letter to preserve jurisdiction and avoid the other party filing their own declaratory judgment action outside Utah in response to the demand letter. (CX 9040 (Miller, Dep. at 114)).

1057. In the cease and desist correspondence, 1-800 Contacts notified the alleged infringers of 1-800 Contacts’ trademark rights, the goodwill that 1-800 Contacts had invested in its brand, and its concern that the unauthorized use of its trademarks to generate sponsored advertisements in response to searches specifically for 1-800 Contacts could cause a likelihood of

confusion and trademark dilution. (Pratt, Tr. 2500; CX 1513 (Sep. 1, 2005 letter to Lens.com); CX 1754 (Sep. 12, 2007 letter to Memorial Eye); RX 1010 (Sep. 12, 2007 letter to Lensfast)).

1058. 1-800 Contacts specifically advised other parties that their purchase or use of the 1-800 Contacts trademark in paid search advertising could cause initial interest confusion. (Pratt, Tr. 2582-83 (“much of it is detailed in the letter, that 1-800 Contacts had a strong mark, that they had goodwill in the mark, that the Lens.com advertisements were coming up in response to searches for those trademark keywords, that there was a likelihood of initial interest confusion by a consumer, that there was a potential ... injury to the strength of 1-800 Contacts’ trademarks by dilution”); CX 1315 (Sep. 1, 2005 letter to Lens.com); RX 67 (Sep. 23, 2005 LensDiscounters.com demand letter); CX 638 (Tram Data demand letter); CX 9040 (Miller, Dep. at 121-122 (“Well, I think the basis, you know, I state it in this letter. I state it in the complaint we filed. And the basis is they were using their search engine advertising in a way that triggered their sponsored links in response to searches for the 1-800 Contacts trademark. And, you know, that can create a likelihood of confusion and lead to trademark infringement”))).

1059. 1-800 Contacts also alleged that Lens.com or its affiliates used its trademark both as a keyword and in the text of its advertisements. (CX 1513-002; CX 1125).

1060. 1-800 Contacts also alleged that EZContactsUSA “on their website had included copied sections that were lifted directly from 1-800 Contacts’ website. Those sections included 1-800 Contacts’ trademarks” (Pratt, Tr. 2538; CX 1617 (EZ Contacts USA Complaint)).

1061. 1-800 Contacts also alleged that ACLens’ affiliates used the 1-800 Contacts trademark in various ways in paid search advertising, practices ACLens repudiated. (RX 23 (email exchange between Robert Drumm at ACLens and Bryan Pratt); Clarkson, Tr. 330).

1062. 1-800 Contacts’ counsel followed up with the alleged infringers in written and oral correspondence regarding the continued appearance of their advertisements in response to

searches for 1-800 Contacts trademark terms over several years. (CX 591; CX 1318; Pratt, Tr. 2510-2513, 2529).

1063. For example, Mr. Pratt wrote to Lens.com in 2005 regarding the appearance of sponsored links in response to searches specifically for 1-800 Contacts trademarks. (CX 1513) Mr. DeGidio, counsel for Lens.com, responded via email and stated that he had “identified what was causing [Lens.com’s] sponsored ads to come up and removed them.” (Pratt, Tr. 2511; CX 591).

1064. Mr. DeGidio stated he would instruct Lens.com’s affiliates to cease the activities complained of, namely, the appearance of their advertisements in response to searches for 1-800 Contacts trademarks. (CX 591; Pratt, Tr. 2512).

1065. The appearance of the Lens.com advertisements that 1-800 Contacts believed to be infringing receded for several years, and then resurfaced in 2007. (Pratt, Tr. 2513 (“Q: When did those next communications occur? A: I believe they occurred in 2007. Q: “And what was the occasion for those communications? A: So, again, Lens.com’s sponsored advertisements were coming up in response to searches for 1-800 Contacts’ federally registered trademarks”)).

1066. After the last communication from Mr. Pratt to Dr. DeGidio in April 2007, Mr. DeGidio did not respond. (CX 591 (chain of emails ending in April 2007 between Bryan Pratt and Tony DeGideo); Pratt, Tr. 2514 (“I didn’t receive any further communication from him”)).

1067. Likewise, Mr. Pratt contacted Memorial Eye first in September 2007 regarding the appearance of advertisements in response to searches for 1-800 Contacts trademarks. (CX 1754). 1-800 Contacts received no response. (Pratt, Tr. 2527).

1068. The frequency of advertisements for ShipMyContacts.com initially decreased after 1-800 Contacts’ cease and desist letter, but then “ramped back up” in early 2008. (Pratt, Tr. 2528).

1069. Mr. Pratt then wrote a second letter in February 2008 identifying the same issue. (CX 1318). Memorial Eye responded by stating that they “refused to make modifications to their practices.” (Pratt, Tr. 2530).

***C. 1-800 Contacts’ Trademark Lawsuits In The Context Of The Development Of Keyword Advertising Law***

1070. 1-800 Contacts ultimately filed complaints in the District of Utah against each of the settling parties asserting claims for trademark infringement under 15 U.S.C. § 1114, in addition to federal unfair competition (15 U.S.C. § 1125(a)), state and common law unfair competition (Utah Code Ann. § 13-5-1 *et seq.*), misappropriation, and unjust enrichment. (RX 72 (Complaint against Memorial Eye); CX 1617 (Complaint against EZContactsUSA); CX 1615 (Complaint against Coastal Contacts); CX 1618 (Complaint against Lensfast); CX 1620 (Complaint against Walgreens); CX 1621 (Complaint against Web Eye Care); CX 1623 (Letter from Mark Miller to ACLens attaching Complaint); RX 1821 (Standard Optical Complaint); RX 1822 (Empire Vision Complaint); CX 452 (Letter to Lenses for Less attaching Complaint); CX 448 (Letter to Contact Lens King attaching Complaint); CX 638 (Complaint against Tram Data); CX 9021 (Pratt, Dep. at 163-164 (“Q: Okay. And what are the legal theories of liability that are alleged in this complaint based upon the facts as alleged? A: So asserted in this complaint is federal trademark infringement, violation of the Lanham Act in the first count. The second count is federal unfair competition, false designation of origin, and passing off or false advertising. There’s a third count of common law unfair competition, misappropriation, and trademark infringement, which is also included in that common law trademark infringement. And then lastly, the unfair enrichment claim.”))).

1071. In litigation involving keyword search advertising it was common to include claims for trademark infringement, false advertising, unfair competition, and trademark dilution, among

others. (Hogan, Tr. 3251-52, 3329 (“1-800 Contacts’ position was typical of the kinds of claims that were asserted over the use of trademarks in keyword search advertising programs”); RX 734-0058-59, 0075-76).

1072. The failure to police third-party use of a trademark could lead to a finding by a court that the mark is no longer enforceable. (Hogan, Tr. 3265 (“a court could find that a mark is not enforceable because there is extensive third-party use. In a specific case, a court could find that because the plaintiff did not take steps with respect to the specific practice or use at issue by the defendant that the defense of laches, the equitable defense, is – is – creates a defense to a trademark infringement claim”)).

1073. 1-800 Contacts was hardly alone in protecting its trademark in this way; numerous trademark owners monitored search results for their trademarks on search engines and filed trademark infringement lawsuits based on paid search advertising in this period. (RX 734 (Hogan Report) ¶¶ 127-134; RX 926 (listing cases regarding “purchase of another party’s trademark as a keyword for internet advertising”)).

1074. For example, other trademark owners in this space understood the use of trademarks as keywords in paid search advertising as infringement of their trademark rights as well. CX 828 (“Tram Data is aware that 1-800 Contacts has, since at least as early as June 2009 ... been purchasing sponsored advertisements from search engines including Bing, Yahoo, and Google (see evidence attached as Exhibit A), and these advertisements are triggered by keywords that incorporate or are variants of the mark REPLACE MY CONTACTS, which is a registered trademark of Tram Data (see registration certificate attached as Exhibit B). Tram Data is fully prepared to file a counterclaim against 1-800 Contacts to seek redress for this infringement.”); CX 9021 (Pratt, Dep. at 171-75); CX 9031 (Schmidt, Dep. at 61-64 (discussing the efforts by U.S. Shoe to protect its proprietary trademarks by demanding that 1-800 Contacts stop “trademark

infringement” by “removing ALL sponsored advertisements [it has] purchased through Google, Overture, and any and all other search engines which are triggered by the LensCrafters trademark”))).

1075. Other trademark owners also contemplated taking legal action against alleged infringers placing advertisements in response to searches for their trademark and brand names. (RX 1192 (Draft letter from Robert Drumm at ACLens to Lensfast, alleging that Lensfast was infringing on ACLens’ trademarks by placing advertisements for Lensfast in response to searches for ACLens’ trademark terms); Clarkson, Tr. 336-37 (“Q: Is [RX 1192] a draft letter from Mr. Drumm to Lensfast, another online retailer of contacts? A: Yes. Q: And does it complain about Lensfast’s use on paid search of AC Lens’ name and trademark? A: Yes.”); CX 9031 (Schmidt, Dep. at 64) (U.S. Shoe sent cease and desist letters alleging the placement of paid search advertising in response to a search for its trademarks constituted trademark infringement))).

1076. Moreover, these disputes arose in a dynamic legal landscape where challenges to online advertising practices were common and the legality of keyword search advertising remained unsettled. (RX 734 (Hogan Report) ¶¶ 96-108).

1077. In the initial years of paid search advertising litigation, between 2004 and 2009, whether courts would recognize such claims for trademark infringement by plaintiffs such as 1-800 Contacts remained uncertain. (RX 734 (Hogan Report) ¶¶ 98-99).

1078. In 2005, the Second Circuit reached the conclusion that “internal” use of trademarks in pop-up advertising software did not constitute a “use in commerce” for the purposes of trademark infringement. *1-800 Contacts, Inc. v. WhenU.com*, 414 F.3d 400 (2d Cir. 2000).

1079. Defendants, relying on the underlying reasoning of the *WhenU* decision, argued that the use, purchase, or sale of keywords to trigger the appearance of paid advertisements in response to trademark searches did not constitute “use” within the meaning of the Lanham Act.

Some courts credited this defense, but most courts rejected the argument and found that the unauthorized purchase of keywords for paid advertising in response to trademark searches qualified as a commercial use, rather than a strictly “internal” one. (RX 743 (Hogan Rep.) ¶ 99; *Compare Merck & Co v. Mediplan Health Consulting, Inc.*, 425 F. Supp. 2d 402, 415 (S.D.N.Y. 2006) (not a use in commerce) *with Edina Realty, Inc. v. TheMLSOnline.com*, No. CIV. 04-4371JRTFLN, 2006 WL 737064, at \*3 (D. Minn. 2006) (use of keywords to trigger advertisements in response to trademark searches constitutes a use in commerce)).

1080. In one notable case, Rescuecom sued Google over the display of allegedly confusing paid search advertising by rivals in response to searches for Rescuecom’s trademark. The district court initially held that Google’s sale of Rescuecom’s mark and display of advertising in response to a search for that mark did not give rise to a triable issue of fact because Google’s activities did not meet the threshold “use in commerce” requirement as a matter of law. *Rescuecom Corp. v. Google, Inc.*, 456 F. Supp. 2d 393 (N.D.N.Y. 2006), *rev’d* 562 F.3d 123 (2d Cir. 2009).

1081. Prof. Tushnet, along with other trademark and advertising law professors such as Eric Goldman, signed and submitted an *amicus* brief in support of Google’s position in the *Rescuecom* case, arguing that trademark law should be interpreted narrowly to exclude claims against search engines based on the sale or use of keywords. (Tushnet, Tr. 4515-4518); *Rescuecom, Inc. v. Google, Inc.*, No. 06-4881-cv, Brief of *Amici Curiae* Intellectual Property Law Faculty in Support of Affirmance, at 8, 12-13, 15 (2d Cir. Feb. 27, 2007).

1082. The Second Circuit rejected the arguments submitted by Google and the amici. (Tushnet, Tr. 4520-24; *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 129-30 (2d Cir. 2009). The Court stated that if it “were to adopt Google and its amici’s argument, the operators of search engines would be free to use trademarks in ways designed to deceive and cause consumer



confusion,” a practice “neither within the intention nor the letter of the Lanham Act.” (Tushnet, Tr. 4520-21); *Rescuecom Corp.*, 562 F.3d at 130.

1083. The Court held that the sale and display of trademarks as keywords in a paid search advertising campaign established a use in commerce. *Rescuecom Corp.*, 562 F.3d at 131-31.

Courts have also held that the display of advertisements in response to a search for a competitor’s trademark also constituted a use in commerce under the Lanham Act. (CX 9044 (Tushnet, Dep. at 59)); *Network Automation, Inc. v. Advanced Sys. Concept, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011).

1084. The use in commerce question is now “basically settled with respect to keyword advertising.” (CX 9044 (Tushnet, Dep. at 59-60); RX 743, ¶ 100 (“The circuits are now in agreement that keyword advertising programs constitute “use in commerce” because search engines make trademarks available for purchase and display them in search results”)).

1085. However, no American court has held one way or the other on whether the appearance of a sponsored link in response to a trademark search due to broad matching on the purchase of a generic term constitutes a use in commerce. (Hogan, Tr. 3476, 3478, 3480). This issue awaits further judicial consideration in the years to come.

1086. Once it was decided that the purchase of another’s trademark term as a keyword for purposes of triggering paid advertising was a use in commerce, a threshold defense was eliminated and the focus of paid search advertising cases shifted to the issue of whether the unauthorized use was likely to cause confusion among consumers. (Hogan, Tr. 3256).

1087. The multi-factor likelihood of confusion tests vary between the circuits, but they are considered intensely fact-intensive and not proper for resolution on a motion to dismiss. (Hogan, Tr. 3258; CX 9044 (Tushnet, Dep. at 96-97)).

1088. Trademark litigators consider multiple factors including the strength of the plaintiff's mark, the similarity of the marks, the nature of the advertising at issue, the sophistication of the consumers, the intent of the defendant in using the mark, and the existence of actual confusion, among others. (RX 743 (Hogan Rep.) ¶¶ 101-103).

1089. The traditional tests are applied flexibly in the keyword advertising context, with no one factor considered determinative. *See Network Automation*, 638 F.3d at 1154; *Checkpoint Systems, Inc. v. Check Point Software Techs.*, 269 F.3d 270, 280 (3d Cir. 2001) (no single factor is “determinative”).

1090. In practice, district courts today balance the various factors recognized in their circuit in evaluating the likelihood of confusion in a case involving a keyword advertising claim. *Edible Arrangements, LLC v. Provide Commerce, Inc.*, No. 3:14-CV-00250, 2016 WL 4074121, \*6 (D. Conn. July 29, 2016); *SanMedica International, LLC v. Amazon.com, Inc.*, Case No. 2:13-cv-00169-DN, 2016 WL 527055 (D. Utah Jan. 20, 2016).

1091. Complaint Counsel propose a novel single-factor test to supplant the multi-factor likelihood of confusion analysis established by the courts, namely, whether the trademark appears in the text of a sponsored link triggered by a trademark search. (CX 8014 (Tushnet Rep.) ¶ 32 (“use of the plaintiff's trademark in advertising text, not in keyword searches, is the proper context in which consumer confusion may arise”)).

1092. However, Complaint Counsel and their expert witness, Prof. Tushnet, have been unable to identify a single case that made that specific holding. (CX 9044 (Tushnet, Dep. at 96 (“Q: When you say the ad text is the key question, do you mean that there's a rule that if the ad text does not contain the trademark term, there's no likelihood of confusion? A: ... I would not want to say that there was never any way you could do it. But I would say that distinguishing labeling is the general rule.”), 129-130 (“Q: Does either one of them hold that it is a rule of law

that you can't have a trademark infringement claim [without the name in the sponsored link]? ...

A: Well, again, as I said, I can imagine a case, say, where you – where you say in the ad, you know, “Yes, this is the football team you’re looking for” without using a team’s actual name. That conveys a misrepresentation, so I don’t think those cases say that that is clearly non-infringing, nor do I think they should.”).

1093. Indeed, Prof. Tushnet conceded at her deposition that the *Rosetta Stone* case, a leading keyword advertising case, did not “frame the question” of trademark infringement as whether the trademark appeared in the text of the advertisement. (CX 9044 (Tushnet, Dep. at 101)).

1094. Prof. Tushnet stated that she could imagine scenarios where the advertisements would be confusing without use of the Plaintiff’s trademark in the text of the advertisement. (CX 9044 (Tushnet, Dep. at 96)).

1095. Further, Prof. Tushnet conceded that courts have specifically denied motions to dismiss in circumstances where the Defendant had displayed sponsored links in response to a search for the Plaintiff’s trademark, but did not use the trademark in the text of the advertisement itself. (CX 9044 (Tushnet, Dep. at 132-133)).

1096. Courts consider survey evidence as evidence of actual confusion in keyword advertising cases. (CX 9044 (Tushnet, Dep. at 100)).

1097. However, a survey is not required for a plaintiff to prevail on a trademark infringement or trademark dilution claim. (CX 9044 (Tushnet, Dep. at 118)).

1098. Most trademark infringement cases do not involve consumer surveys. (CX 9044 (Tushnet, Dep. at 112)).

1099. “In search engine advertising cases, courts have ... generally focused on the species of confusion known as initial interest confusion, which can be a form of sponsorship or source

confusion.” (Hogan, Tr. 3359; CX 9044 (Tushnet, Dep. at 101 (“There are cases adopting the concept of initial interest confusion as part of actionable confusion”), 109 (“Q: Professor, does the Blue Nile case we talked about just before the break say that initial interest confusion is not actionable as a matter of law? A: No, it does not”)); *See Network Automation*, 638 F.3d at 1148 (“We begin by examining the *Sleekcraft* factors that are most relevant to the determination whether the use is likely to cause initial interest confusion.”))

1100. Prof. Tushnet, along with other law professors, submitted an amicus brief in the *Multi Time Machine v. Amazon* case arguing that initial interest confusion should not apply to keyword advertising cases. (CX 8014 (Tushnet Rep.) ¶ 5).

1101. The Ninth Circuit, rehearing the case after a preliminary ruling in favor of the plaintiff, rejected the arguments offered by amici, including Prof. Tushnet, and reaffirmed the applicability of the doctrine of initial interest confusion in keyword advertising cases. *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 936 n. 2 (2015).

1102. The resolution of the use in commerce question changed the risk calculus regarding whether it was advisable to select keywords that triggered the appearance of advertisements in response to a competitor’s trademark. (Hogan, Tr. 3253).

1103. The fact-specific nature of the trademark confusion inquiry and necessity of a full trial on the merits of each claim increased the incentives of accused infringers to settle. (Hogan, Tr. 3261).

1104. As it became clear that paid search advertising was actionable after *Rescuecom* and that the result of a fact-intensive likelihood of confusion analysis created legal uncertainty, 1-800 Contacts settled with nine retailers between the fall of 2009 and January 2011. (CX 316; CX 317; CX 318; CX 319; CX 320; CX 321; CX 322; CX 323; CX 324; CX 325).

1105. For example, ACLens settled within a month after its lawyers explained that the result was “uncertain,” and that ACLens “may well lose” the case. (CX 9039 (Clarkson, Dep. at 86-87, 114); CX 9003 (Clarkson, IHT at 108-109; Clarkson, Tr. 339 (“He said, to my recollection, that the outcome was uncertain, that we may win or we may lose, but that either way it would be very expensive to fight it”)). The President of ACLens testified it was “unclear ... what the legal situation was relative to advertising on other companies’ trademarks.” (Clarkson, Tr. 325).

1106. [REDACTED] also settled within a month of 1-800 Contacts’ filing of a lawsuit in August 2010, *see* RX 1032, reasoning that keyword advertising on trademark terms “is likely not allowed . . . . not legal.” (CX 9014 [REDACTED] at 204-205, 47-49; CX 9000 [REDACTED] at 93-94)).

1107. Multiple federal judges have also ordered that other contact lens retailers refrain from purchasing 1-800 Contacts trademarks as keywords in paid search advertising and implement negative keywords for 1-800 Contacts’ trademark terms. (Pratt, Tr. 2558-59, 2640; CX 144; CX 162).

1108. After 1-800 Contacts sued LensWorld for trademark infringement over the appearance of paid search advertising in response to searches for 1-800 Contacts trademark terms, a federal judge granted 1-800 Contacts a default judgment in 2008 requiring LensWorld to implement negative keywords for 1-800 Contacts’ trademark terms. (CX 1733 (Complaint against LensWorld); CX 1255 (Motion for entry of Default Judgment against LensWorld); CX 162 (Order of Default Judgment, *1-800 Contacts, Inc. v. LensWorld, Inc.*, Case No. 2:08-cv-015-SA (D. Utah. Sep. 9, 2008)); Pratt, Tr. 2557-59).

1109. A federal judge in the Southern District of New York ordered Vision Direct to implement negative keywords for 1-800 Contacts’ trademark terms subject to a stipulated permanent injunction in 2009. (Pratt, Tr. 2640; CX 314; CX 144).

***D. Memorial Eye And Lens.com Litigations***

1110. Two parties, Memorial Eye and Lens.com, pursued litigation instead of settlement between 2007 and 2013. (RX 72; CX 1125); *I-800 Contacts, Inc. v. Memorial Eye, P.A.*, No. 2:08-CV-938 TS, 2010 WL 988524 (D. Utah Mar. 15, 2010); *I-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1242 (10th Cir. 2013).

1111. In the Lens.com case, 1-800 Contacts retained Rader Fishman & Grauer LLP to represent them in the litigation before the District of Utah. (CX 1125 (Lens.com Complaint filed in August 2007); Pratt, Tr. 2520-21).

1112. Discovery was conducted in the Lens.com case, which included numerous depositions, document requests, expert reports, and surveys. (Pratt, Tr. 2521).

1113. Lens.com was sanctioned for discovery abuses, and only produced certain evidence that showed actual confusion on the eve of summary judgment. (CX 9021 (Pratt, Dep. at 128)); *I-800 Contacts, Inc.*, 722 F.3d at 1245. At that hearing, this evidence of actual confusion was not introduced. (CX 9021 (Pratt, Dep. at 128)).

1114. This evidence of actual confusion consisted of records from a Lens.com call center agent who noted that a customer had called to request to cancel their order because they had purchased from Lens.com erroneously believing Lens.com to be 1-800 Contacts. (CX 9021 (Pratt, Dep. at 128)).

1115. Shortly after the summary judgment hearing, Bryan Pratt, one of the litigators for 1-800 Contacts, left Rader Fishman. (Pratt, Tr. 2522).

1116. 1-800 Contacts also terminated Rader Fishman after the summary judgment stage of the case and retained Holland & Hart LLP to handle the appeal. (Pratt, Tr. 2523).

1117. The district court dismissed 1-800 Contacts' infringement claim in 2010 on the ground that, "as a matter of law," such a "keyword use can generate a likelihood of confusion only

in combination with the specific language of the resulting impressions.” *I-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1242 (10th Cir. 2013).

1118. However, the Tenth Circuit, reviewing *de novo*, declined to adopt the reasoning of the district court. It expressly reserved decision on that issue, and instead explained that the existence of initial interest confusion turns on multiple factors that “depend very much on context.” *I-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1243-44 (10th Cir. 2013) (noting “the danger of applying the factors mechanically without attention to context.”)

1119. The Tenth Circuit acknowledged that users who clicked on a Lens.com advertisement displayed in response to a search for 1-800 Contacts’ trademark “may have been confused into thinking that Lens.com was affiliated with 1-800.” *I-800 Contacts, Inc. v. Lens.com*, 722 F.3d 1229, 1244 (10th Cir. 2013). But the Court found that, in 2005-2007, the low incidence of such confusion based on the record in that case “cannot support an inference that Lens.com’s keyword activity was likely to lure consumers away from 1-800.” *I-800 Contacts*, 722 F.3d at 1244.

1120. The Tenth Circuit also held that 1-800 Contacts “presented enough evidence to support a claim of contributory infringement” as to advertisements presented by Lens.com’s affiliates, where the evidence showed a greater number of consumers were affected. *I-800 Contacts*, 722 F.3d at 1255; *see also Lens.com, Inc. v. I-800 Contacts, Inc.*, Case No. 2:12CV00352 DS, 2014 WL 12596493, \*1 (D. Utah Mar. 3, 2014) (noting the Tenth Circuit’s partial reversal of the district court’s summary judgment ruling as to the contributory infringement claims).

1121. The result in *Lens.com* was “fact-specific” and does not preclude Respondent from proving that other competitors’ use of 1-800 Contacts’ trademark could have caused, or was likely

to cause, confusion. Order Denying Complaint Counsel’s Motion to Bar Testimony And Argument (Feb. 21, 2017) at 3-4.

1122. More recent cases applying the *Lens.com* initial interest confusion analysis to keyword advertising cases have relied on click-through rate data to support the inference that consumers were “lured” by an advertisement triggered by a trademark search. (CX 9044 (Tushnet, Dep. at 111)); *SanMedica International v. Amazon.com, Inc.*, No. 2:13-cv-00169-DN, 2015 WL 1786104, \*7-8 (D. Utah Apr. 15, 2015) (“*1-800 Contacts* is instructive in the particular circumstances of this case. *1-800 Contacts* dealt with initial-interest confusion”).

1123. 1-800 Contacts also included a breach of contract claim in its motion for summary judgment in the *Lens.com* case. (Pratt, Tr. 2516 (“we filed a breach of contract claim”).

1124. 1-800 Contacts alleged as the basis for its breach of contract claim an agreement between Anthony DeGidio and Bryan Pratt. (Pratt, Tr. 2518 (“I alleged that there was an agreement between Anthony DeGidio and I”). Mr. Pratt submitted a declaration in which he outlined the facts of the alleged agreement. (CX 1184; (Pratt, Tr. 2572-73)).

1125. Anthony DeGidio submitted his own declaration, alleging that there was no agreement. *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151, 1191 (D. Utah. 2010), *rev’d in part*, 722 F.3d 1229. The district court did not credit 1-800 Contacts’ argument and found that there was no agreement between *Lens.com* and 1-800 Contacts. (Pratt, Tr. 2519); *1-800 Contacts*, 755 F. Supp. 2d at 1189.

1126. There is no agreement between *Lens.com* and 1-800 Contacts regarding paid search advertising, and *Lens.com* is not prohibited or restrained from purchasing keywords that trigger advertisements in response to searches for 1-800 Contacts trademark. (Pratt, Tr. 2520 (“Q: Other than the agreement that was referred to in the complaint, that was alleged in the complaint, between you and Mr. DeGidio, are you aware of any other agreement between 1-800 Contacts and



Lens.com relating to paid search advertising? A: I am not.”), 2576 (“Q: My question is, sitting here today, yes or no, is it the case that there was an agreement between Lens.com and 1-800 Contacts that was memorialized in writing on September 22, 2005? A: Sitting here today, I don’t believe that there was”); Bethers, Tr. 3693-94 (“Q: Is there any agreement in place today between 1-800 Contacts and Lens.com with respect to paid advertising? A: There is no agreement and has not been an agreement with Lens.com”)).

1127. Lens.com does not purchase 1-800 Contacts or any other competitors’ trademarks in search advertising auctions as a general practice because such purchases do not result in conversions and are therefore inefficient allocations of advertising expenditure. (CX 1673 (April 28, 2008 deposition of Cary Samourkachian in the *1-800 Contacts v. Lens.com* case, at 171 (“we’re not in the business of purchasing our competitor’s trademarks”), 175 (“our intent is not to be bidding on [1-800’s] trademark or show up on their trademark”), 182 (“Traffic that is coming from these [trademark] terms are not going to convert to us, because they’re looking for your client, not us.”)).

1128. In the Memorial Eye case, after 1-800 Contacts filed its Complaint, *see* RX 72, Anthony Hong, counsel for Memorial Eye, initially engaged in settlement discussions with counsel for 1-800 Contacts. (Pratt, Tr. 2530 (“So as I recall...their counsel contacted us to talk about potential settlement of the Complaint”)).

1129. 1-800 Contacts proposed terms for a settlement, including the requirement that Memorial Eye implement negative keywords for 1-800 Contacts trademark terms. (RX 926-0003; Pratt, Tr. 2531).

1130. Memorial Eye’s counsel, Anthony Hong, stated that under the Second Circuit precedent of *1-800 Contacts v. WhenU*, the purchase of keywords to trigger advertisements in response to trademark terms did not constitute a use in commerce. (RX 926-0002).

1131. Mr. Pratt responded to Mr. Hong with citations to case law where the courts had found the purchase of keywords to trigger paid search advertising to constitute a use in commerce under the Lanham Act. RX 926-0001. He also stated that he was aware of other examples of competitors agreeing to respect each other's trademark rights by not placing advertisements in response to searches for each other's trademark terms. (RX 926-0001).

1132. Memorial Eye did not settle the case in 2009, but instead filed an answer and counterclaims. (Pratt, Tr. 2535). This included a counterclaim alleging sham litigation. (Pratt, Tr. 2535). The district court dismissed the counterclaims and the case proceeded to discovery. (Pratt, Tr. 2535 (1-800 Contacts "filed a motion to dismiss the counterclaims, that there was a hearing where the – where the judge dismissed the counterclaims for sham litigation, and then discovery continued.")); *1-800 Contacts, Inc. v. Memorial Eye, P.A.*, No. 2:08-CV-983 TS, 2010 WL 988524, \*6 (D. Utah Mar. 15, 2010).

1133. Discovery uncovered evidence of actual confusion. (CX 9024 (Holbrook Dep. at 51; [REDACTED])

1134. [REDACTED]  
[REDACTED] (Holbrook, Tr. 2000-2001).

1135. [REDACTED]  
[REDACTED] (Holbrook, Tr. 2002).

1136. [REDACTED]  
[REDACTED] (Holbrook, Tr. 2005-06  
[REDACTED]  
[REDACTED]

1137. [REDACTED]

[REDACTED]

[REDACTED] (RX 1777; Holbrook, Tr. 2006-07).

1138. [REDACTED]

[REDACTED]

[REDACTED] (RX 1774; Holbrook, Tr. 2007-08).

1139. [REDACTED]

[REDACTED]

[REDACTED] (RX 1776; Holbrook, Tr. 2009). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Holbrook, Tr. 2009).

1140. [REDACTED]

[REDACTED]

[REDACTED] (RX 1775; Holbrook, Tr. 2010-11). [REDACTED]

[REDACTED]

1141. [REDACTED]

[REDACTED] (RX 1772). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 1772 [REDACTED] (Holbrook, Tr. 2013).

[REDACTED]

[REDACTED] (RX 1772; Holbrook

Tr. 2013).

1142. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 850; Holbrook, Tr. 2015).

1143. [REDACTED]

[REDACTED]

[REDACTED] RX 850. [REDACTED]

[REDACTED]

[REDACTED] CX 9024 (Holbrook, Dep. at 213-216).

1144. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CX 9024 (Holbrook, Dep. at 213-14).

1145. [REDACTED]

[REDACTED]

[REDACTED] (Holbrook, Tr. 2001-2015).

1146. Complaint Counsel's expert trademark law witness concedes that an individual who clicks on a rival advertisements and starts the ordering process but aborts when he or she realizes he or she is in the wrong place prior to making a purchase was actually confused. (CX 9044 (Tushnet, Dep. at 118-19)).

1147. Complaint Counsel's expert trademark law witness further concedes that an individual who clicks on a rival advertisements and completes an order and then realizes they had

not purchased from the company they intended to purchase from was actually confused. (CX 9044 (Tushnet, Dep. at 119-20)).

1148. The parties ultimately agreed to stay the case pending the outcome of the Lens.com Tenth Circuit appeal. (Pratt, Tr. 2535).

1149. The Lens.com decision created “a lot of legal uncertainty” regarding the scope of trademark rights with respect to paid search advertising. CX 9024 (Holbrook, Dep. at 63).

1150. After the Lens.com case was decided in 2013, Memorial Eye agreed to settle the case on terms comparable to previous settlement agreements rather than proceed with a protracted litigation over unsettled law. (Pratt, Tr. 2535; Holbrook, Tr. 1942 (“we knew that the Lens.com/1-800 Contacts case was still going on and they had spent \$2 million. We knew that the broad matching issue had not firmly been put to rest by the court”)); [REDACTED] [REDACTED] CX 9024 (Holbrook Dep. at 63)).

1151. Ultimately, courts in both Memorial Eye and Lens.com expressly held that 1-800 Contacts’ trademark enforcement efforts were *bona fide*. See *1-800 Contacts, Inc. v. Memorial Eye, P.A.*, No. 2:08-CV-983 TS, 2010 WL 988524, \*6 (D. Utah Mar. 15, 2010) (“In the case currently facing the Court, Plaintiff has alleged that Defendant purchased some keywords related to Plaintiff’s website and or trademark. Therefore, according to *Rescuecom*, the allegations in Plaintiff’s Complaint plead a use in commerce. Moreover, the Tenth Circuit has held that the purchase of another’s trademark through a search engine for the purpose of diverting internet traffic and using goodwill associated with that trademark, as alleged here, violates the Lanham Act. Consequently, the Court finds that Plaintiff’s claim is not baseless and, it is therefore, protected by *Noerr-Pennington* immunity”); *Lens.com, Inc. v. 1-800 Contacts, Inc.*, No. 2:12CV00352 DS, 2014 WL 12596493, at \*1 (D. Utah Mar. 3, 2014) (“Because the district court and the Tenth Circuit agree that the underlying action was not baseless, this court agrees that

Lens.com's claims, all of which center on the proposition that 1-80 engaged in sham litigation, should be dismissed with prejudice").

1152. Complaint Counsel also concedes that 1-800 Contacts' trademark enforcement efforts were *bona fide*. (RX 680-0013 (Response to Interrogatory No. 6); RX 678-0007-08 (Response to Interrogatory Nos. 9 ("Complaint Counsel does not contend that the lawsuit, *I-800 Contacts, Inc. v. Memorial Eye, P.A.*, was sham litigation"), 10 ("Complaint Counsel does not contend that the lawsuit, *I-800 Contacts, Inc. v. Lens.com*, was Sham Litigation")))).

1153. [Intentionally Not Used].

## **IX. 1-800 Contacts' Trademark Settlement Agreements**

### ***A. The Settlement Agreements Are Narrowly Tailored***

1154. During the time period 2004 through 2013, 1-800 Contacts entered into settlement agreements with thirteen other contact lens retailers to resolve trademark litigation. (CX 311 (2004 Vision Direct Settlement Agreement), CX 314 (2009 Vision Direct Settlement Agreement), CX 310 (Coastal Contacts), CX 313 (Provision Supply d/b/a EZContactsUSA), CX 315 (Lensfast), CX 316 (Empire Vision d/b/a Visionworks), CX 317 (Arlington Contact Lens Service), CX 320 (Lenses for Less), CX 321 (Tram Data d/b/a ReplaceMyContacts.com), CX 322 (Walgreens), CX 323 (Contact Lens King), CX 324 (Web Eye Care), CX 325 (Standard Optical Company), CX 326 (Memorial Eye d/b/a ShipMyContacts.com)).

1155. These settlements each included a "Release" of "any and all liability, claims, counterclaims, demands, debts, charges, liens and causes of action" arising from the various claims asserted in the litigations. (CX 311 (Vision Direct Settlement) § 1; CX 317 (ACLens Settlement) § 1).

1156. The settlement agreement with Standard Optical Company had a two year term and is no longer in force as of 2013. (CX 325-001 ("TERM: The term of this Agreement shall be for

a period of two (2) years from the Effective Date,” February 4, 2011); CX 9040 (Miller, Dep. at 111)).

1157. The settlement agreement provisions at issue are “narrowly tailored” to address the scope of the parties’ trademark rights as set forth in the claims alleged in the complaints. (CX 9040 (Miller, Dep. at 117-18); RX 253-002 (“I can’t see any unfairness in the narrowly tailored, bi-lateral agreement.”); Hogan, Tr. 3275 (“these are, in the context of trademark settlement agreements, especially limited settlement agreements”), 3278-79).

1158. The settlement agreements do not affect areas of advertising other than online paid search engine advertising. Among the areas of advertising that are not affected by the settlement agreements are television advertising, radio advertising, banner advertising, display advertising, third party price comparison shopping, and organic search results. (Hogan, Tr. 3276; RX 939 (1-800 Contacts outside counsel stating to another party that the settlement agreements did not impact third party comparison shopping sites); Aloviz, Tr. 1031-32 (the 1-800 Contacts cease and desist letter and proposed settlement did not raise an issue with LensDirect’s “social media advertising,” “video advertising,” “affiliate marketing,” “email advertising campaigns,” “banner advertisements,” or generic searches)).

1159. Moreover, within the category of search engine advertising, the settlements affected at most paid advertising in response to several dozen trademark-related search terms out of thousands of internet searches related to contact lenses. (RX 739 (Murphy Rep.) ¶ 121 (“The paid search advertising restricted by the settlements represented a small share of retailers’ impressions”); RX 733 (Ghose Rep.) ¶¶ 141-143 (searches for 1-800 Contacts and variations account for a fraction of the Athey comScore dataset and are far less popular searches than generic terms, which are not restricted by the settlement agreements); CX 9044 (Tushnet, Dep. at 40)

(identifying as the list of keywords impacted by the settlement the trademarks and variation lists in the settlement exhibits)).

1160. For example, the settlements do not impact the purchase or appearance of advertisements in response to generic searches such as “contacts,” “contact lens,” and “contact lenses,” and other retailers compete with 1-800 Contacts in auctions for those terms. (Hamilton, Tr. 453-54 (“Q: And isn’t it true that the settlement agreements that you discussed earlier, those settlement agreements with 1-800 Contacts, do not prevent Vision Direct or Walgreens from bidding on those search terms? A: Correct. Q: And isn’t it true that Vision Direct and Walgreens actively bid against 1-800 Contacts and others for those search terms? A: That’s correct”); CX 9031 (Schmidt, Dep. at 234 (“There should be robust competition for [the term “contacts”]”))).

1161. The intent and purpose of the settlement agreements was to target only those search queries most likely to be navigational in nature and most likely to result in consumer confusion. (CX 9040 (Miller, Dep. at 42 (“I believe the intent was let’s put in the ones that are meaningful with relation to searching for our trademark and – and navigational in the context of looking for us. And that’s what we want to preclude...you don’t have to preclude everything to get the protection of your trademark that you’re trying to get and to avoid the consumer confusion you’re trying to avoid.”)); CX 709-001 (explaining that the purpose of the settlement was “to prevent sponsored ads from being displayed in response to searches for the other party’s registered trademarks and exact URLs”)).

1162. To that end, the challenged agreements prohibit only one limited kind of infringing behavior relevant to this case: “causing a Party’s brand name, or link to the Party’s Restricted Websites to appear as a listing in the search results page of an internet search engine, when a user specifically searches for the other Party’s brand name.” (CX 311 (Vision Direct Settlement)



§ 4(A)e; CX 9040 (Miller, Dep. at 26 (“So I believe the intent when it says “specifically searches for the other party’s brand name” is they’re trying to restrict or target searches where the user is searching for that party and that party’s brand...I’m not just searching for contact lenses in general, I’m searching for a specific retailer ... So I think the use of ‘specifically searches for the other party’s brand’ is meant to limit it to searches where the search is for that brand rather than contact lenses in general or comparative understanding of the industry in general”))).

1163. The non-use provisions were drafted to reflect the party’s trademark rights by preventing competitor advertisements from appearing when a user is looking to navigate to the 1-800 Contacts website. (CX 9040 (Miller, Dep. at 220 (“the point we raise in our trademark infringement claims and—and the point we raise with everybody we talk to is the issue is to prevent competitor ads from coming up when...[t]he type of search that is done is somebody looking specifically for 1-800 Contacts to go to their website. And that’s the context...situations where users are looking to go to the 1-800 Contacts’ website. They’re navigating towards us. Their searches are driven by their understanding of our brand. They’re not doing a comparative search. They’re not doing just a market research type of inquiry. They’re looking for us as a source. And so that was always the intent and import of all the settlement agreements.”))).

1164. The settlements include two mechanisms to achieve that goal. First, although the specific language varies, the settlements generally prohibit “using the other Party’s trademark keywords or URLs . . . to target or trigger the appearance or delivery of advertisements or other content to the user,” and include as exhibits lists of the specific restricted trademark keywords. (E.g., CX 317 (ACLens Settlement) § 2(A)b); *see also* (CX 311 § 4(A)d.,e.; CX 310 § 3d.,e.; CX 313 § 5(A)b.; CX 315 § 4(A)b.; CX 320 § 4(A)b.; CX 319 § 2(A)b.; CX 321 § 3(A)b.; CX 322 § 3a.; CX 323 § 4(A)b.; CX 324 § 4(A)b.; CX 325 § 5(A)b.; CX 326 § 3a.).

1165. Second, the settlements require the parties to implement the listed trademark terms as negative keywords, which instruct search engines not to display ads in response to searches for those terms. (E.g., CX 313, § 5(B.) (“However, when any keyword purchase of any kind, including the purchase of generic, non-trademarked words, is made through any internet search provider, the Parties shall use the prohibited key words (as listed in Exhibit 3) as negative keywords in order to prevent the generation of advertisements and internet links triggered by keywords that are prohibited under this agreement”); Pratt, Tr. 2532-33 (“Q: And what were the elements of the settlement agreement that you laid out for Mr. Hong at that time? A: So at that time I requested that the parties would implement negative keywords – or actually that – yeah, that they would implement negative keywords, when possible, so that the other party’s advertisements would not come up in response to searches for those specific phrases”); *see also* (CX 314-004, -011; CX 315 § 4(B); CX 320 § 4(C); CX 319 § 2(C); CX 317 § 2(C); CX 321 § 3(C); CX 322 § 3b.; CX 323 § 4(C); CX 324 § 4(C); CX 325 § 5(C); CX 326 § 3b.).

1166. The parties modeled the language of the Prohibited Acts in the settlements after the Lanham Act. (CX 9040 (Miller, Dep. at 211-213 (“I had to explain to him ‘using’ is an important word because this settlement is about settling trademark infringement issues. ‘Use’ in commerce is part of—is the first element of trademark infringement. We wanted to keep that language to be consistent with the purpose of the agreement.”))) 1-800 Contacts stated this intention in its settlement negotiation correspondence with retailers. ( RX 691 (“With respect to the term “using” in the subsequent sections, my client wants to keep that term. The Lanham Act discusses trademark “use”. We want to keep that language consistent with the statute”)).

1167. The lists of restricted terms and negative keywords were limited to registered or common law trademarks, owned URLs, and confusingly similar variations thereof. (CX 320,

§ 4(F); CX 9040 (Miller, Dep. at 89-90) (describing the amendment procedure for additional restricted terms)).

1168. During settlement negotiations, 1-800 Contacts adhered strictly to these categories of restricted keywords and refused to impose additional constraints by adding keywords beyond those categories. (CX 823 (Dec. 30, 2009 email from Mark Miller to Dan Garriott, same); RX 690 (email from Mark Miller to Empire Vision challenging extensive list of Visionworks-related entities as restricted keywords); RX 691 (email from Mark Miller to Neal Slifkin refusing to add “King” and “Kings” to the restricted keyword list for Contact Lens King, since those words were too “attenuated” to CLK’s trademark rights)).

1169. The Walgreens and Memorial Eye settlements provide the principles of non-use of the keyword in paid search advertising and implementation of negative keywords as affirmative obligations rather than prohibited acts. (CX 322 (Walgreens Settlement Agreement) § 3a., b.; CX 326 (Memorial Eye Settlement) § 3a., b.).

1170. However, the Walgreens and Memorial Eye agreements had the same intent and operation as the other settlement agreements that were framed in terms of “Prohibited” and Non-Prohibited acts. (CX 9040 (Miller, Dep. at 103-04 (“Q: And if you could explain, how is the phrase as used here in the Standard Optical agreement “engaging in internet search advertising that causes any website” different from “Refrain from purchasing or using any of the key terms” that was agreed to in the Walgreens? ... A: Well, I think substantively, in practice, I don’t think there’s really a difference. There’s – there’s a difference in phraseology ... I think those are two different ways of saying the same thing.”))).

***B. The Settlement Agreements Carved Out Certain Activities As Non-Prohibited Acts To Preserve Lawful, Non-Deceptive Advertising***

1171. The settlement agreements also specified certain “non-prohibited acts,” which would be permissible even if they were otherwise captured by the Prohibited Acts section. (CX 9040 (Miller, Dep. at 60-61); Pratt, Tr. 2551; CX 315 § 4(B)).

1172. First, the parties reserve the right to advertise by purchasing generic terms like “contacts” and “contact lenses”: each agreement expressly lists advertising in response to generic terms as a “non-prohibited act.” (CX 317 § 2(B); CX 311 § 4(B); CX 310 § 3d.,e.; CX 313 § 5(B); CX 315 § 4(B); CX 320 § 4(B); CX 319 § 2(B); CX 321 § 3(B); CX 322 § 3; CX 323 § 4(B); CX 324 § 3(B); CX 325 § 5(B); CX 326 § 3; CX 9040 (Miller Dep. at 60-61)).

1173. For example, the Memorial Eye settlement agreement provides that “Nothing in this Section shall be construed to prohibit the use or purchase of generic words such as contact, contacts, lenses, contact lenses, glasses, eyewear, frames, or other, similar generic terms as long as the appropriate negative keywords are implemented.” (CX 326, § 3).

1174. Ten of the thirteen settlement agreements also contain express protections for comparative advertising: “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 an non-internet context, e.g., the use on the internet of comparative advertising, parodies, and similar non-infringing, uses.” (CX 311 § 4(B); CX 313 § 5(B); CX 315 § 4(B); CX 320 § 4(B); CX 319 § 2(B); CX 317 § 2(B); CX 321 § 3(B); CX 323 § 4(B); CX 324 § 3(B); CX 325 § 5(C); Pratt, Tr. 2551)).

1175. The comparative advertising provision came about as a result of initial settlement negotiations between Vision Direct and 1-800 Contacts in 2004. (RX 250 (“We should both retain

the right to participate in lawful comparative advertising, parodies, ect.”); CX 9040 (Miller, Dep. at 27-28)).

1176. When Vision Direct proposed the comparative advertising clause, Jonathan Coon agreed to the language because 1-800 Contacts had no objection to legitimate comparative advertising, parodies, or other lawful uses of the trademark in advertising. (Coon, Tr. 2742-43 (“Q: And you personally didn’t have any problem with it as well? A: No. I mean, I vaguely remember Joe asking me about this and I was like that’s fine, if somebody wants to do a parody or something like that and it’s clear they’re comparing themselves and they’re not pretending to be us, then that’s – then that’s different”); RX 250 (May 24, 2004 email exchange between Joe Zeidner, Alesia Pinney, and Jonathan Coon)).

1177. 1-800 Contacts was not concerned about rivals presenting advertisements in response to comparative searches such as “cheaper than 1-800 Contacts” because such comparative searches were clearly intended by the consumer to be for price comparison or other comparative shopping purposes and 1-800 Contacts didn’t want to preclude that. CX 9031 (Schmidt, Dep. at 111); Coon, Tr. 2741 (“Q: If you had seen others’ ads appearing in response to a comparative search containing 1-800 Contacts’ trademark name, would you have had a problem with it? A: No. Q: Why not? A: Because it’s not somebody trying to navigate to there, it’s somebody looking for alternatives to 1-800 Contacts.”)).

1178. 1-800 Contacts marketing personnel did not complain about the appearance of rivals’ advertisements being presented in response to comparative searches containing the 1-800 Contacts trademark. (CX 9031 (Schmidt, Dep. at 112-13); Coon, Tr. 2743).

1179. 1-800 Contacts did not monitor advertisements appearing in response to comparative searches. (CX 9031 (Schmidt, Dep. at 113)).

1180. The carve-outs that expressly permit the selection of generic terms and comparative advertising make these agreements narrow relative to other settlements, default judgments, and consent decrees relating to paid search advertising. (Hogan, Tr. 3278-79 (other consent judgments and settlements tend to prohibit more conduct than the 1-800 Contacts settlement agreements and tend not to recognize permitted lawful forms of advertising); RX 732 (Hogan Rep.) ¶ 155).

1181. Complaint Counsel argue that 1-800 Contacts “assigned no meaning to the ‘carveout’” for comparative advertising. Pre-Trial Brief at 17 n. 55. Complaint Counsel’s expert witness also stated that “the key to the dispute is whether you can engage in comparative advertising when someone searches for “1-800 Contacts.”” (CX 9044 (Tushnet, Dep. at 44)).

1182. Comparative advertisements “can be a non-confusing manner in which two brands are presented together, with both brands presented properly within the same advertisement.” (Goodstein, Tr. 2471; CX 9031 (Schmidt, Dep. at 237 (Comparative advertising online occurs when “you make a reference to a competitor on a given feature, price, or characteristic of the business and you invite consumers or prospective customers to compare the business on that axis.”), 239-40 (Comparative advertising must be “explicit” by specifically drawing attention to a comparison between the characteristics of two distinct brands or products))).

1183. However, the sponsored links that appeared in response to a trademark searches for “1-800 Contacts” in the 1-800 Contacts litigations did not constitute comparative advertising. (Goodstein, Tr. 2470-71 (“It is my opinion that those are not comparative advertising.”); Pratt, Tr. 2636-37 (stating that a rival advertisement does not fall properly within the comparative advertising exception to certain settlement agreements); CX 9031 (Schmidt, Dep. at 239-40); Hogan, Tr. 3469 (“search engine advertising is not a forum that lends itself to comparative advertising in the traditional sense” comparing two products such as Pepsi and Coke explicitly in

the same advertisement, since “[y]ou don’t have room in search engine advertising” to do it properly)).

1184. The Federal Trade Commission defines comparative advertising as an “advertisement that compares alternative brands on objectively measurable attributes or price and identifies the alternative brand by name, illustration, or other distinctive information.” (CX 9044 (Tushnet, Dep. at 46); 16 C.F.R. § 14.15 n. 1).

1185. Complaint Counsel’s expert witness takes “exception” to elements of the Federal Trade Commission’s definition and believes instead that the comparative aspect can “come from context.” (CX 9044 (Tushnet, Dep. at 47)).

***C. Negative Keywords Are A Necessary And Administrable Means Of Achieving The Purpose Of The Settlement Agreements***

1186. Negative keywords are commonly used industry tools that optimize return on paid search campaigns. (RX 734 (Hogan Rep.) ¶ 158; RX 483; Hamilton, Tr. 472 (Q: “You would agree that as a general matter, implementation of negative keywords can be beneficial to a company like Walgreens? A: Yes. Absolutely.”)).

1187. By using negative keywords for another company’s trademark along with generic keyword purchases, advertisers can increase their return on investment by ensuring that their sponsored links are displayed to consumers searching for the product offered by the advertiser and not another company’s product. (RX 734 (Hogan Rep.) ¶ 158).

1188. The negative keyword term is necessary to carry out the purpose of the agreements because search engines frequently “broad match” the keyword that a retailer purchases to related, but not identical search queries. (RX 734 (Hogan Rep.) ¶ 164 (“This is because settlements are designed to stop the conduct that gave rise to the dispute in the first place. In this case, the conduct

at issue is the appearance of ads for a competitor, when Internet users search for a well-known trademark term like 1-800 Contacts.”); CX 9040 (Miller, Dep. at 28)).

1189. It is impossible to know just from looking at the search engine results page what match type the advertiser selected that served as the basis for the appearance of a particular sponsored link on a search engine results page. (CX 9031 (Schmidt, Dep. at 46)). There’s no difference from the perspective of the search engine user between an advertisement appearing because the advertiser selects a generic term but fails to implement a negative keyword for the trademarked query, or whether the advertiser selected the trademark itself as a keyword. (CX 9021 (Pratt, Dep. at 188-89)).

1190. Thus, absent the use of negative keywords, a retailer that instructed a search engine to display ads for any queries that are a broad match for the keyword “contacts” might cause its ads to be displayed in response to a search for 1-800 Contacts’ trademark. (CX 9033 (Mohan, Dep. at 185-187 (negative keywords are the “only” way to prevent an ad from showing up when the query includes a generic term)); CX 9040 (Miller, Dep. at 28, 66); CX 1787 (Oct. 12, 2007 letter to Vision Direct describing mutual implementation of negative keywords for the other party’s trademark terms as the “longstanding course of conduct” under the agreement necessary to ensure compliance); Clarkson, Tr. 237-40).

1191. Negative keywords are therefore an “easy-to-administer solution” to disputes between advertisers over the use of trademarks as keywords. (Hogan, Tr. 3304-05 (“when you’re talking about a dispute between two parties, you’re talking about parties where there is adversity and a lack of trust. It is not a recipe for alternative mechanisms to allow each side to confirm what keywords the other side is or is not bidding on, so by having an easy-to-administer solution, like a negative keyword, it makes it easier to settle these cases and eliminate the instances of advertising that lead to future disputes.”)).



1192. In October 2004, several months after their settlement, Vision Direct contacted Joe Zeidner, counsel for 1-800 Contacts, regarding the appearance of 1-800 Contacts' paid advertisements in response to the term "vision direct." (CX 9031 (Schmidt, Dep. at 44-46); RX 258).

1193. 1-800 Contacts responded that it had investigated the issue and concluded that while 1-800 Contacts did not purchase Vision Direct as a keyword, a 1-800 Contacts affiliate was "buying the keyword 'vision' and not adding the negative keyword 'direct' on Google." (RX 258).

1194. Vision Direct further responded that it already implemented negative keywords designed to avoid its ads appearing based on its bids for "contacts" and suggested that 1-800 Contacts do the same for "vision"; 1-800 Contacts agreed. (CX 9031 (Schmidt, Dep. at 47); CX 938).

1195. 1-800 Contacts agreed to take the extra step of requiring its affiliates to use a negative keyword for Vision Direct keywords if Vision Direct would continue to do the same for 1-800 Contacts keywords. (CX 9031 (Schmidt, Dep. at 51)).

1196. In January of 2008, Vision Direct told 1-800 Contacts that it would no longer implement negative keywords for 1-800 Contacts' trademarked terms. (CX 141-002).

1197. In December of 2007, 1-800 Contacts sued Vision Direct for breach of the 2004 Settlement Agreement after Vision Direct indicated it would no longer implement negative keywords. (CX 1062-009). The case was ultimately litigated in United States District Court for the Southern District of New York. (Pratt, Tr. 2640).

1198. In 2009, Judge George B. Daniels issued an order of permanent injunction in *1-800 Contacts, Inc. v. Vision Direct, Inc.*, Case No. 08-cv-1949, which required Vision Direct to implement negative keywords for 1-800 Contacts' trademark terms. (CX 144; CX 314).

1199. Mr. Mark Miller, who drafted the majority of the settlement agreements at issue in this matter, testified that following 1-800 Contacts' experience with Vision Direct, each subsequent settlement agreement included a provision requiring the use of negative keywords. (CX 9040 (Miller, Dep. at 28, 66)).

1200. It is not viable to monitor another company's AdWords accounts because Google does not allow advertisers access to others' AdWords accounts, among other reasons. To this point, the use of negative keywords is the most efficient and effective enforcement mechanism for the trademark settlement agreement between 1-800 Contacts and Vision Direct. (CX 9031 (Schmidt, Dep. at 48 ("you would literally have to have people monitoring a large set of search terms in every state because you have the ability to geotarget the ads"))); Hogan, Tr. 3304-05 ("when you're talking about a dispute between two parties, you're talking about parties where there is adversity and a lack of trust. It is not a recipe for alternative mechanisms to allow each side to confirm what keywords the other side is or is not bidding on, so by having an easy-to-administer solution, like a negative keyword, it makes it easier to settle these cases and eliminate the instances of advertising that lead to future disputes.")).

1201. 1-800 Contacts stressed the common use of negative keywords to address these circumstances in trademark disputes in its correspondence with other parties. (RX 926-0002 (noting the incorporation of negative keywords ordered in other cases and that "an agreement to incorporate negative keywords is the most effective and readily confirmable method for compromise.")).

1202. 1-800 Contacts also emphasized in correspondence with settling parties that the form of settlement agreement that is used, including the negative keyword requirement, had the advantages of being administrable, consistent, and helpful in avoiding future disputes. (RX 926 ("We have found that the incorporation of negative keywords eliminates the display of competing

advertisements in response to searches for trademarked terms. If incorporated, the desired result is always achieved and compliance is readily confirmed by a simple search...it has been our experience that an agreement to incorporate negative keywords is the most effective and readily confirmable method for compromise.”); RX 64 (explaining in a Feb. 16, 2010 email from Mark Miller to Matthew Jenkins, counsel for Lenses for Less, that 1-800 Contacts “need[s] a level of consistency in the agreements we reach” and that the settlement proposed has proven administrable in the past and reflects the “product of significant prior efforts and negotiations with many other parties”); CX 799 (In referring to a proposed settlement with Contact Lens King, Mark Miller writes, “This agreement has proven very effective at facilitating fair competition between the parties and quick resolution of future disputes without significant attorney involvement.”); CX 741 (explaining to Arlington Contact Lens Center in a Mar. 2, 2010 email that 1-800 Contacts will not agree to further changes to the agreement because the “standard agreement we sent is the product of significant negotiation and study on these matters in the past.”)).

1203. Settling parties agreed that negative keywords were an easy and practical way to ensure compliance with the settlement agreements. (CX 9038 [REDACTED] at 105 (compliance is “not difficult in any regards”)); CX 9008 [REDACTED] at 25 (“it’s a pretty easy process”)); CX 9000 [REDACTED] at 103-104 (it is “relatively low maintenance” to insert negative keywords))).

1204. Many settling parties and non-settling parties implement negative keywords for their competitor’s brands voluntarily regardless of whether they have agreements to do so with those competitors. (Clarkson, Tr. 334-337; Alovis, Tr. 1048-49 (“Q: Why does LensDirect implement “1800 Contacts” as a negative keyword in some of its paid search advertising campaigns? A: Internal decision-making. Q: But this is a voluntary decision to implement these negative keywords; correct? A: Yes. We were not – we did not agree to implement those

negative keywords.”)); CX 1653 (AdWords report for LensDirect showing negative keywords implemented from 2010 to 2016)).

1205. For example, ACLens implemented negative keywords for Coastal Contacts, Vision Direct, and other retailers in addition to 1-800 Contacts and required that its affiliates do the same by including that requirement in its affiliate terms and conditions. (Clarkson, Tr. 334-337; RX 813).

1206. Contact Lens King implements negative keywords for a number of its competitors in addition to 1-800 Contacts, including Vision Direct, ACLens, and others. (CX 795).

1207. Companies use negative keywords for their competitors voluntarily for independent business reasons, including that appearing in response to a search for another company’s trademark “constitutes a wildly inefficient use of advertising dollars.” (Schmidt, Tr. 2908-09); (Alovis, Tr. 1043-44 (noting that cost per conversion for LensDirect of 1-800 Contacts’ trademark terms is “about double” the target customer acquisition range for 2017)).

1208. Complaint Counsel’s expert witness, Prof. Tushnet, testified that a court considered a negative keyword request to resolve a keyword advertising dispute. (Tushnet, Tr. 4470 (“So there – so the – the case – the only case to consider a negative keyword request said no. That’s the Rhino Sports case.”)) This is incorrect. (Hogan, Tr. 3479-80); *Rhino Sports, Inc. v. Sport Court, Inc.*, No. CV-02-1815-PHX-JAT, 2007 WL 1302745 (D. Ariz. 2007).

1209. In the *Rhino Sports* case, the issue was “not whether Rhino Sports’ current activities infringe Sport Court’s trademark, but whether Rhino Sports substantially violated the permanent injunction.” *Rhino Sports*, 2007 WL 1302745, \*4; (Hogan, Tr. 3479-80). The Court determined that it would be improper to read the text of the injunction to “preclude Rhino Sports from using these generic terms as keywords.” *Rhino Sports*, 2007 WL 1302745, \*5. The Court

was never presented with, and never considered, the option of negative keywords. *Rhino Sports*, 2007 WL 1302745, \*2-5.

***D. Exact Match Negative Keywords Were Sufficient To Comply With The Settlement Agreements***

1210. According to the plain language of the settlement agreements, thirteen of them do not specify a negative keyword match type. (CX 315, § 4(B); CX 326, § 3(b)).

1211. Contracts do not lend themselves to an interpretation that restricts a greater amount of conduct and, in general, negative keyword provisions expressly specify phrase or broad match types when those more restrictive match types are intended. (RX 734 (Hogan Report) ¶ 154); *see also Pierce v. Pierce*, 2000 UT 7, ¶ 19 (“where there is doubt about the interpretation of a contract, a fair and equitable result will be preferred over a harsh and unreasonable one. And an interpretation that will produce an inequitable result will be adopted only where the contract so expressly and unequivocally so provides that there is no other reasonable interpretation to be given to it.”) (quoting *Plain City Irr. Co. v. Hooper Irr. Co.*, 11 Utah 2d 188, 192-93 (1960)).

1212. The one challenged agreement that does specify a match type, the Luxottica Contact Lens Sourcing and Services Agreement, explicitly requires only exact match negative keywords. (CX 331, § 17.10).

1213. Brian Bethers, the CEO of 1-800 Contacts who negotiated the Luxottica agreement, testified that the agreement specified exact match negative keywords because the “exact term ‘1-800 Contacts’ was the trademark that we were concerned about.” (Bethers, Tr. 3699). The exact-match negative keyword clause in the Luxottica agreement was intended to have the same meaning as the negative keyword provisions in the settlements that were earlier entered into. (Bethers, Tr. 3700 (“The purpose was exactly the same” as the purpose of “all the settlement agreements.”)).

1214. 1-800 Contacts and its outside counsel took the consistent position that a counterparty to the settlement satisfied its obligations by implementing required negative keywords in any match type. (CX 9040 (Miller, Dep. at 66 (“But I think the requirement here is just...if you implement the terms on Exhibit 2 as a negative keyword of *any kind*, a negative keyword of *any match*, you’re in compliance as long as it is a negative keyword. That’s why it doesn’t expressly state you have to exact match it or broad match it as a negative. If that term is listed as a negative keyword of *any match type*, you’re in compliance. And that’s the only thing that was required by these agreements.”)); CX 9031 (Schmidt, Dep. at 116); CX 9020 (Craven, Dep. at 117-121)); *see also Upland Indus. Corp. v. Pacific Gamble Robinson Co.*, 684 P.2d 638, 642 (Utah 1984) (In determining the parties intent, “a construction given to [a contractual provision] by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will when reasonable, be adopted and enforced by the court.”))

1215. An exact match negative keyword comports with the intent and purpose of the settlements to prevent the display of a competitor’s advertisement when a customer is specifically searching for and trying to navigate to 1-800 Contacts. (CX 9040 (Miller, Dep. at 18-20, 217-220)).

1216. In contemporaneous written and oral communication at the time of the negotiation and execution of the settlement agreements, 1-800 Contacts told settling parties they could implement negative keywords in the match type of their preference, including exact match. (CX 9040 (Miller, Dep. at 173-74, 180-81); CX 9021 (Pratt, Dep. at 109)).

1217. For example, Mark Miller testified to numerous oral conversations and email exchanges with Lensfast’s counsel surrounding implementation of the negative keyword provision of the settlement agreement wherein he explained that Lensfast could implement negative

keywords in exact match so that Lensfast's sponsored links could continue to appear in response to larger phrases that included the trademark and smaller sub-parts of the trademark, such as "contacts." (CX 9040 (Miller, Tr. 169-171, 173-74); CX 1786 (Jan. 4, 2010 email from M. Miller to Dan Garriott providing exact match and phrase match as possible suggestions)).

1218. Bryan Pratt wrote to Lenses for Less making the same assurances regarding the adequacy of exact-match negative keywords. (CX 709; CX 9021 (Pratt, Dep. at 109)).

1219. Mark Miller further testified to oral conversations with counsel for Standard Optical Company regarding the availability of negative keyword match types that would only prevent advertisements from appearing in response to the specific trademark terms and variations on the restricted terms list. (CX 9040 (Miller, Dep. at 108-109, 172, 180-181)). In the context of those phone conversations, Mr. Miller also wrote to Standard Optical's counsel, stating, "I want to emphasize that the agreement does not negatively impact your client's online advertising in any respect and will only prevent your client from posting sponsored advertising in response to search for my client's trademark." (RX 253-002).

1220. 1-800 Contacts' marketing team also handled some of the discussions of implementation of the negative keyword provisions of the settlement agreement. (CX 9002 (Craven, IHT at 166-67 (communication with competitors regarding settlement implementation), 179-182); CX 9020 (Craven, Dep. at 20-22)).

1221. 1-800 Contacts' marketing team understood exact match negative keywords for navigational terms to be sufficient to comply with the settlement agreement. (CX 9002 (Craven, IHT at 181)).

1222. Whenever the issue of negative keyword match type arose, Bryce Craven, a member of the search marketing team until 2011, instructed counterparties to the settlement agreements that they could implement the settlement the negative keywords in exact match, unless

they preferred to block additional irrelevant or inefficient queries. ((Craven, Tr. 635-36 (“when any questions arose, from what I remember, the suggestion was exact match should be fine”)); CX 9002 (Craven, IHT at 179-180)).

1223. When asked how to implement the negative keyword requirement for the settlement agreement with 1-800 Contacts, Bryce Craven instructed Lensfast that “exact match would be sufficient.” (CX 234 (Jan. 7, 2010 letter from Bryce Craven to Contactlens.com); (Craven, Tr. 635-36)).

1224. While 1-800 Contacts employed a mix of keyword match types to avoid displaying advertisements in response to low-performing queries, 1-800 Contacts’ marketing team understood exact match negative keywords to be sufficient for their internal compliance with settlement agreement obligations. (CX 159 (Aug. 6, 2010 emails between Bryce Craven, Park Studebaker, and Mark Miller showing implementation of both exact match and phrase match negative keywords as options)).

1225. 1-800 Contacts maintained identical negative keyword policies for its affiliate terms and conditions as it did for its trademark settlement agreements. (Craven, Tr. 637, 640 (“the list of keywords that were prohibited were the same list that we monitored on a regular basis”)).

1226. Jessica Faulkner managed the 1-800 Contacts’ affiliate program and reported to Bryce Craven in the 2009 to 2011 time period as a member of the 1-800 Contacts marketing team. (Craven, Tr. 639).

1227. 1-800 Contacts’ marketing team instructed affiliates when asked that in order to comply with the negative keyword requirement, they should implement negative keywords in exact match type. (RX 1818 (“Thanks, Sandy. Please add all of those negative keywords to your exact match negative keywords in Google, Yahoo, MSN Live”)); Craven, Tr. 641-42).



1228. If an advertiser implements “800 contacts” as a phrase match negative keyword, then that advertiser cannot show up in response to a user query for “1 800 contacts”. (Craven, Tr. 649-50 (“Q: And if we’re talking about the difference between phrase match and exact match, going back to the one on the board, if I used “800 contacts” as phrase match, would that allow or prevent ads from coming up if the search query was “1 800 contacts”? A: That would prevent the ad from showing up because the phrase that you implemented as your negative keyword is contained in the ‘1 800 contacts.’”)).

1229. The lists of restricted keywords included in the exhibits to the settlement agreements are inconsistent with a requirement that negative keywords be implemented other than in exact match. The list of restricted keywords includes terms such as “800 contacts” and “Aquasoft” that make up parts of longer strings of other restricted keywords such as “1 800 contacts” and “Aquasoft Complete Vision System,” respectively. If these restricted keywords were required to be implemented in phrase match or broad match, the inclusion of the longer terms would be redundant since the shorter terms would in those circumstances prevent an ad from appearing when a search was performed for the shorter phrase. For instance, if phrase or broad match was required, the use of 800 contacts as a keyword would prohibit ads from appearing when the search query was for 1 800 contacts. Thus, in order to give meaning to all of the terms of the settlement agreement, the negative keyword provision must be interpreted only to require the use of exact match keywords. (CX 320, Ex. 2; Craven, Tr. 648; CX 316 (listing terms “empire vision,” “empire vision centers,” and “empire vision centers focused on you”, where the single term “empire vision” as a negative keyword in phrase match type would make the longer strings superfluous)); *accord Glenn v. Reese*, 2009 UT 80, ¶ 10 (“Contractual interpretation requires considering “each contract provision . . . in relation to all of the others, with a view toward giving

effect to all and ignoring none.”); *Cent. Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 12 (Courts should “attempt to harmonize all of the contract’s provisions and all of its terms”).

1230. 1-800 Contacts also corresponded directly with Google, after its meetings with the Commission in 2014, to confirm its understanding that exact match negative keywords could be implemented that would permit an advertisement to be served in response to a larger query containing the trademark. (RX 1321-0001 (Oct. 29, 2014 email from Kevin Hutchings to Natalia Bohm)).

1231. In this correspondence, Kevin Hutchings, a 1-800 Contacts paid search analyst, wrote to Natalia Bohm, a Google representative, on October 29, 2014, to confirm how an exact match and phrase match negative keyword would function in reference to “competitors potentially bidding on our brand/trademark terms.” (RX 1321).

1232. Natalia Bohm (Google) responded the next day, on October 30, 2014, to explain the distinction between an exact match negative keyword using brackets, [1800 contacts] and a phrase match negative keyword in quotations, “1800 contacts.” (RX 1328).

1233. Numerous settling parties, including Web Eye Care, Walgreens, and Vision Direct, employed negative keywords in both exact and phrase-match type without regard to the specific requirements of the agreement. (CX 9014 [REDACTED] at 159-160); CX 9008 (Hamilton, IHT at 72-74); (Hamilton, Tr. 474 (“both phrase and exact”)).

1234. For example, when Walgreens implemented negative keywords in phrase match for a 1-800 Contacts term, it did so without understanding whether phrase match negative keywords were actually required by the agreement. (Hamilton, Tr. 474 (“Q: But when you chose to implement them as phrase match, was there anything in the settlement agreements that expressly required you to implement them that way? A: “I don’t believe I made reference to the agreement,

so I didn't really have an opinion on whether it did or not...I didn't understand that if it was the case – and I guess I still don't a hundred percent know”).

1235. No party to a settlement was ever told it had to implement negative keywords in broad or phrase match type to be in compliance with the settlement agreement. (Pratt, Tr. 2560-61; Hamilton, Tr. 475-76 (“Q: In the course of those pretty effective communications, did anyone from 1-800 Contacts tell you that you were required to use phrase match to implement the negative keywords? A: Not specifically, no.”); CX 9039 (Clarkson, Dep. at 147); [REDACTED] [REDACTED] CX 9038 (Hamilton, Dep. at 72-74)).

1236. 1-800 Contacts never insisted that another company implement 1-800 Contacts' trademark terms as negative keywords in broad or phrase match. (CX 9031 (Schmidt, Dep. at 116 (“Q: Are you aware of anyone from 1-800 Contacts ever insisting that others implement 1-800 Contacts' trademarks as negative keywords in broad or phrase match? A: No.”)); CX 9040 (Miller, Dep. at 173-174, 180-181); CX 9020 (Craven, Dep. at 117-121); Craven, Tr. 636).

***E. Complaint Counsel Misinterpret The Meaning Of Certain Settlement Provisions***

1237. The comparative advertising exception present in ten of the settlement agreements is inconsistent with a requirement to implement phrase or broad match negative keywords. (CX 9040 (Miller, Dep. at 37-39, 66)).

1238. Settling parties can place advertisements in response to comparative searches by using exact match negative keywords for the 1-800 Contacts trademark, which would not prevent a search like “cheaper than 1-800 Contacts.” (CX 9031 (Schmidt, Dep. at 115 (“Google gives you the tools, gives you the negative keyword tools to very explicitly say, “I want a negative exact match for this term”...Tools that Google made available were very simple and easy to use, so that if you wanted a negative match for just 1-800 Contacts, but you did want to appear for something

like “lower prices than 1-800 Contacts,” you could manipulate your negative keywords in the syntax associated with – with those ads to do exactly that.”))).

1239. 1-800 Contacts understood that if another party desired to place an advertisement in response to a comparative query that contained a trademarked term, they could do so under the settlement agreements by implementing negative keywords in exact match. (CX 9002 (Craven, IHT at 185-86); CX 9020 (Craven, Dep. at 18-19 (understanding that Vision Direct was not prohibited from displaying search advertising in response to a user query that contained a TM term even if the query also contained other words, and that Vision Direct was not prohibited from displaying a response to “1-800 contacts cheaper competitors”))).

1240. Certain of the settlement agreements state that negative keywords shall be implemented “in order to prevent the display of advertisements and/or internet links in response to or as a result of any internet search that includes the other Party’s trademark keywords or URLs.” (CX 317, § 2C). This language must be construed “in the context of the entire agreement.” (CX 9040 (Miller, Dep. at 119-120)); *accord Glenn v. Reese*, 2009 UT 80, ¶ 10 (“Contractual interpretation requires considering “each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none.”); *Cent. Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 12 (Courts should “attempt to harmonize all of the contract’s provisions and all of its terms”).

1241. More than half of the extant challenged agreements do not have the language “any internet search that includes the other Party’s trademark keywords” or “when the negative keywords are part of a search” in their negative keyword provisions. (*Compare* CX 317, § 2C *with* CX 311; CX 314 (updated Vision Direct settlement subject to stipulated permanent injunction with negative keyword provision); CX 310; CX 313, § 5B; CX 315, § 4B; CX 322, § 3; CX 325, § 3; CX 311, § 17.10 (calling for exact match negative keywords)).

1242. Since contracts shall not be read to render any provision superfluous, *Reyes v. Metromedia Software, Inc.*, 840 F. Supp. 2d 752 (S.D.N.Y. 2012), the natural reading of the agreement as analyzed by Respondent’s trademark expert witness, Howard Hogan, is that the parties are permitted to implement negative keywords in exact match such that they could place an advertisement in response to a comparative query such as “cheaper than 1-800 Contacts.” (Hogan Tr. 105:24-106:20 (“I am aware of the agreements. I’ve seen it. I think for the most part...it appeared to me to be designed to require exact match...[b]y reading the agreement in the context of all the language”)); *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 59, 66 (2d Cir. 2000) (“The language is ‘capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.’”).

1243. Additional keywords that were deemed navigational in nature and that included the trademark or a close misspelling were added from time to time, sometimes informally and sometimes formally via modification to the settlement. (Clarkson, Tr. 381; CX 9040 (Miller, Dep. at 98-99 (“Q: Looking at both the Walgreens and the Memorial Eye agreement, are you aware of whether or not these agreements have ever been changed or modified? A: What do you mean? By adding terms to Exhibit 2? Q: That could be one example. A: It could have. I don’t have a specific recollection if we have. But I know there are times when we would talk about potential breaches, and sometimes we’d do some informal – sometimes I’d do a letter to a party that says, please add this to Exhibit 2. Sometimes we’d do an informal phone call and say, coming up on this, it’s not on Exhibit 2, but are you willing to add it as a negative”))).

1244. Breach notifications and demand letters exchanged between the parties generally only attached screenshots of searches for exact trademark terms and confusing variations of those terms. (CX 796, CX 1468).

1245. 1-800 Contacts occasionally sent a cease and desist letter or breach notification to another party complaining of advertisements appearing in response to navigational queries that contained the trademark term plus one closely related word, for example “1 800 contacts coupons” or “1 800 contacts coupon code.” (CX 453, CX 837, CX 1241; Hogan, Tr. 3471-72 (since 1-800 Contacts is the only company that can offer coupons to 1-800 Contacts, “it would be deceptive and misleading for a competitor” to advertise coupons for 1-800 Contacts))).

1246. The nomenclature and technical specifics of negative keywords changed over time, and the search engines maintained different policies with regard to negative keyword implementation. (Pratt, Tr. 2533 (“the Internet service providers that allowed the search, sometimes you weren’t able to implement negative keywords, you know. Google is one example. There’s Bing and Yahoo and others. And they all had different parameters, so sometimes you could put them in, sometimes you couldn’t. Sometimes there were limitations on what you could enter”); CX 592-001 (identifying negative keywords in Yahoo! search engine as “excluded terms”); CX 9040 (Miller, Dep. at 93 (“And that kind of goes to the same concept of sometimes, you know, Internet search engine can change their policies and some of them had limits on how many negative keywords you could use”))).

1247. To account for these various policies, the settlement agreements were drafted to only require implementation of negative keywords to the fullest extent practicable or allowable by the search engine’s parameters, with minor changes in the language that all conveyed the same meaning. (CX 313, § 5B (“unless the internet search provider does not utilize negative keywords in its search parameters); CX 315, § 4B (“the Parties shall use the prohibited key words as

negative keywords to the extent practicable”); CX 317, § 2C (“to the fullest extent allowable by the internet search provider”); Pratt, Tr. 2556).

1248. The limitation to implement negative keywords to the “extent practicable” or to the “fullest extent allowable” by the internet search provider did not speak to match type, but intended to account for the fact that search engines may cap or otherwise limit the number of negative keywords or length of a negative keyword and the parties were not obligated to go beyond the parameters established by the search engine. (CX 9040 (Miller, Dep. at 62-63).

1249. For example, the Lensfast agreement includes a footnote to clarify that under the language providing that the parties need only implement negative keywords to the extent allowable, Lensfast would not be obligated to implement a negative keyword for the phrase, “Exact Same Contact Lenses, Delivered to your Door, for Less Than You’re Paying Now,” since it exceeded the character limit imposed by the search engine. (CX 315-004, § 4B n. 1; Pratt, Tr. 2555-56).

***F. The Settlement Agreements Lack The Character Of Collusive “Bidding Agreements” Or Reverse Payment Agreements.***

1250. None of thirteen settlement agreements mention the words “bidding,” “bid,” or “auction.” (CX 311 (Vision Direct), CX 310 (Coastal Contacts), CX 313 (Provision Supply d/b/a EZContactsUSA), CX 315 (Lensfast), CX 316 (Empire Vision d/b/a Visionworks), CX 317 (Arlington Contact Lens Service), CX 320 (Lenses for Less), CX 321 (Tram Data d/b/a ReplaceMyContacts.com), CX 322 (Walgreens), CX 323 (Contact Lens King), CX 324 (Web Eye Care), CX 325 (Standard Optical Company), CX 326 (Memorial Eye d/b/a ShipMyContacts.com); Pratt, Tr. 2608-2609)).

1251. The outside counsel for 1-800 Contacts who negotiated the settlement agreements testified that they never discussed bidding or search auctions with settling parties. (CX 9040 (Miller, Dep. at 202-204); Pratt, Tr. 2561).

1252. The outside counsel for 1-800 Contacts who negotiated the settlement agreements testified that they never discussed advertising costs or how the settlement agreements would impact the parties' respective costs with settling parties. (CX 9040 (Miller, Dep. at 202-204); Pratt, Tr. 2561).

1253. No parties testified that they settled the cases in order to save money on advertising costs. Instead, they testified that they settled in order to avoid the costs of litigation or because they might lose the litigation. (CX 9042 (Evans, Dep. at 124); CX 9039 (Clarkson, Dep. at 86-87, 114 (ACLens might "lose" the case, and it would cost "well over \$100,000" to litigate it)); (Clarkson, Tr. 244-45, 338-39 ("the outcome was uncertain, that we may win or we may lose, but either way it would be very expensive to fight it"));

[REDACTED]

[REDACTED]

[REDACTED]);

CX 8000-002 (Park Studebaker, principal for Lenses for Less, "signed a settlement agreement with 1-800 Contacts to resolve the threatened litigation"))).

1254. Every settling party pushed back against 1-800 Contacts at some point in the litigation and settlement negotiation process. (CX 9021 (Pratt, Dep. at 122)). The settlements were not collusive in nature. Instead, they were the result of disputed litigations and arms-length negotiations.

1255. In addition to the Memorial Eye and Lens.com litigations, several of the cases that ultimately settled involved months of litigation and/or contentious negotiations before an



agreement was reached to settle the dispute. (CX 640; CX 823; CX 965; CX 1618; RX 253; RX 1013; RX 1014; RX 1022;).

1256. Settling parties other than 1-800 Contacts were successful in obtaining additional provisions or language through their settlement negotiations. (Pratt, Tr. 2544, 2546 (including a force majeure clause requested by EZ Contacts USA into the EZ Contacts USA settlement); CX 9040 (Miller, Dep. at 104 (“And so I know that in this agreement with Standard Optical the opposing counsel, you know, did some edits of his own”), 111 (“Q: Why did you put a term in this agreement? A: Standard Optical asked for it.”)); CX 9040 (Miller, Dep. at 86-87 (discussing changes proposed and accepted by Walgreens counsel to settlement).); CX 9040 (Miller, Dep. at 95-96 (“It could have been part of the negotiation pushback, and those trademarks are not as commonly searched and so it’s less important to have them on there. And that was kind of a give-and-take in order to get Memorial Eye to settle. That could be the case.”)).

1257. However, none of the settlement agreements required 1-800 Contacts to pay another retailer, and none of the other retailers received financial compensation as part of the settlement agreement. (CX 311 (Vision Direct), CX 310 (Coastal Contacts), CX 313 (Provision Supply d/b/a EZContactsUSA), CX 315 (Lensfast), CX 316 (Empire Vision d/b/a Visionworks), CX 317 (Arlington Contact Lens Service), CX 320 (Lenses for Less), CX 321 (Tram Data d/b/a ReplaceMyContacts.com), CX 322 (Walgreens), CX 323 (Contact Lens King), CX 324 (Web Eye Care), CX 325 (Standard Optical Company), CX 326 (Memorial Eye d/b/a ShipMyContacts.com)).

1258. Settling retailers testified that they received little to no benefit from the settlement agreement. (Clarkson, Tr. 363-64; CX 9039 (Clarkson, Dep. at 164 (1-800 Contacts “didn’t really give anything up by agreeing not to advertise on our marks”)); CX 9024 (Holbrook, Dep. at 175 (“Q: That wasn’t something that was important to you, that you get agreement from 1-800

Contacts that they also implement negative keywords? A: No. Absolutely it was not important to us. It was totally an empty gesture on our part. It was not important to us. It didn't affect us in any way. It was purely symbolic, quite frankly"), 176 ("we did not see that as a benefit to us in any way whatsoever. We were harmed by the agreement totally. We saw no advantage to getting them to implement the negative keywords at all, zero, none")); [REDACTED]

[REDACTED] CX 9014 (Batushansky, Dep. at 45-47 ("So other than not having litigation...there was not any benefit to Web Eye Care signing the agreement"))).

1259. Dr. Evans did not dispute that the settlement agreements did not confer anything of significant value to the other settling parties besides avoiding the costs of litigation and the risks of losing the trademark infringement case. (CX 9042 (Evans, Dep. at 115-16 ("Q: Let's just take AC Lens as an example. What benefit did it get from the settlement agreement? A: It avoided a lawsuit. Q: Did it receive any money? A: It received money in the sense that it received money that – in its pockets that it didn't have to spend on a lawsuit." Q: Other than avoiding the lawsuit did it receive any benefit? A: No")); (CX 9042 (Evans, Dep. at 116 ("One of the costs is the risk of losing the lawsuit"))).

1260. Several settling parties testified that they discontinued selecting 1-800 Contacts' trademarks as keywords and/or began to implement negative keywords as a result of being contacted by 1-800 Contacts in a cease and desist letter or complaint about potential trademark infringement. [REDACTED] CX 8000-002 (Studebaker Decl. on behalf of Lenses for Less); Clarkson, Tr. 238-39)).

1261. LensDirect was sent a cease and desist letter by 1-800 Contacts' outside counsel in June of 2011. (CX 1241; Alovis, Tr. 970-972). LensDirect did not agree to settle the case and continues to place advertisements in response to searches for 1-800 Contacts. (Alovis, Tr. 974, 976 ("Q: Is LensDirect currently bidding on 1-800 Contacts terms as keywords? A: Yes.")).

1262. The 2004 Vision Direct settlement agreement included a nominal \$1.00 payment to 1-800 Contacts. (CX 311, § 3).

1263. Under the 2009 Settlement Agreement and Mutual Release with Vision Direct pursuant to a permanent injunction, Vision Direct paid 1-800 Contacts a sum of \$475,000 as partial reimbursement of 1-800 Contacts' attorney's fees. (CX 314-001, § J).

1264. The EZ Contacts USA settlement included a \$29,000 payment in six installments from EZ Contacts USA to 1-800 Contacts. (CX 313, § 4).

1265. The Lensfast settlement agreement included a \$20,000 payment from Lensfast to 1-800 Contacts. (CX 315, § 1).

1266. The Contact Lens King settlement agreement included an \$8,000 payment from Contact Lens King to 1-800 Contacts. (CX 323, § 1).

1267. The Web Eye Care settlement agreement included a \$2,000 payment from Web Eye Care to 1-800 Contacts. (CX 324, § 1).

***G. Luxottica Sourcing And Fulfillment Agreement***

1268. Complaint Counsel also challenge a sourcing and fulfillment agreement entered into between 1-800 Contacts and Luxottica on December 23, 2013, even though it is not a settlement agreement. (CX 331-001).

1269. Pursuant to the agreement with Luxottica, 1-800 Contacts provides fulfillment services for Luxottica's retail chains (*e.g.*, LensCrafters, Pearle Vision, Sears Optical, and Target Optical). (Bethers, Tr. 3524-25).

1270. The fulfillment services provided by 1-800 Contacts to Luxottica consist of shipping contact lenses directly to Luxottica's retail chain stores and directly to the home of customers of Luxottica's retail stores. (Bethers, Tr. 3524-25).

1271. The products shipped by 1-800 Contacts as part of the fulfillment services provided to Luxottica do not indicate that they came from 1-800 Contacts. (Bethers, Tr. 3524-25).

1272. Under the agreement between 1-800 Contacts and Luxottica, 1-800 Contacts ships contact lens to Luxottica's stores and Luxottica's customers in boxes that are labeled and packaged under the Luxottica names. (Bethers, Tr. 3694-95).

1273. Under the agreement between 1-800 Contacts and Luxottica, the parties work together in sourcing contact lenses from the four major contact lense manufacturers. (Bethers, Tr. 3695).

1274. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**X. Putting The Settlement Agreements In Context**

**A. *The Settlement Agreements Take A Commonplace Form***

1275. The settlement agreements at issue in this litigation “are standard trademark-related settlements.” (Hogan, Tr. 3274-75; RX 734-0005–6).

1276. The settlement agreements “contain terms that are commonly used and accepted in trademark disputes.” (RX 734-0096; Hogan, Tr. 3247-48).

1277. The settlement agreements “correlate to remedies issued by courts in trademark disputes.” (RX 734-0096).

1278. The vast majority of trademark cases involving keyword advertising are resolved through settlements rather than trials. (Hogan, Tr. 3266).

1279. The parties to a trademark infringement settlement agreement are in the best position to determine what restrictions with respect to internet advertising are in their best interests. (Hogan, Tr. 3505).

1280. The parties to a trademark infringement settlement are in the best position to determine the effect on their business of specific restrictions on internet advertising. (Hogan, Tr. 3505).

1281. It is common for trademark litigators to recommend settlement to their clients if it is possible to resolve the dispute quickly and without significantly impacting the party's business. (RX 734-0094).

1282. Trademark cases involving keyword advertising frequently settle because there are many alternative ways for the defendant to advertise its goods or services other than using the plaintiff's trademark as a keyword. (Hogan, Tr. 3266–67; RX 734-0096–97).

1283. Courts, recognizing that parties must have some leeway in reaching a negotiated settlement, generally accord substantial deference to the terms of those settlement agreements. (RX 734-0093; Hogan, Tr. 3271).

1284. The most common way for an accused infringer to settle a trademark dispute is to agree to not use the trademark in question. (RX 734-0096; Hogan, Tr. 3272 (“In the trademark context, the most common form of settlement agreement is what we call a nonuse agreement”)).

1285. In trademark disputes, the most common form of a settlement agreement, referred to as a “non-use agreement,” restricts the defendant from using the allegedly infringed trademark in any context. (Hogan, Tr. 3272–73).

1286. Westlaw's trademark settlement template includes terms to “permanently cease all use of” the owner's trademark. (RX 734-0096).

1287. It is common and typical for trademark judgments and settlement agreements to prohibit not only the use of the trademark terms at issue but also common misspellings and variations of the trademark at issue. (Hogan, Tr. 3291; RX 734-0109–14).

1288. The settlement agreements at issue in this case are limited non-use agreements in that they relate to one specific type of advertising and also carve out and explicitly allow other types of advertising. (Hogan, Tr. 3275).

1289. The scope of the settlement agreements at issue is narrower than the scope of typical agreements and consent judgments involving disputes over paid search advertising because the settlement agreements at issue in this case restrict only one type of advertising — paid search. (Hogan, Tr. 3275–79).

1290. Complaint Counsel offer the opinion of Prof. Tushnet to rebut the opinion of Mr. Hogan that the settlement agreements take a commonplace form. (Tushnet, Tr. 4452). Prof. Tushnet’s opinion on this issue is not reliable and is entitled to no weight, because she lacks the background and expertise required to provide such an opinion.

1291. Prof. Tushnet did not review the settlement agreements at issue in this case. (Tushnet, Tr. 4495-96; CX 9044 (Tushnet, Dep. at 33)). By contrast, Mr. Hogan reviewed all of the settlement agreements at issue in this case, as well as pleadings. (Hogan, Tr. 3248).

1292. The Court noted that since Prof. Tushnet “didn’t review the settlement agreements,” as she admitted she had not, “she will not be allowed to testify regarding the settlement agreements.” (Tushnet, Tr. 4467-68).

1293. Prof. Tushnet was not qualified to opine on what is common or typical in settling trademark cases because Prof. Tushnet has never settled a trademark case. (CX 9044 (Tushnet, Dep. at 21); Tushnet, Tr. 4374). In contrast, Mr. Hogan has settled hundreds of trademark cases. (CX 9047 (Hogan, Dep. at 23)).

1294. Prof. Tushnet has only helped to litigate a handful of trademark cases, when she was an associate at Debevoise & Plimpton more than 15 years ago, and she was not the lead lawyer on any of those cases. (Tushnet, Tr. 4374; CX 9044 (Tushnet, Dep. at 15)). By contrast, Mr. Hogan has litigated and advised clients in hundreds of trademark matters involving paid search advertising. (CX 9047 (Hogan, Dep. at 15, 20)).

1295. Prof. Tushnet only reviewed two settlement agreements in other cases, beyond those cited by Mr. Hogan. (Tushnet, Tr. 4489, 4492-93).

***1. All Of The Agreements Settling Keyword Cases Identified By The Parties Restrict Bidding On Keywords Containing Trademarks.***

1296. The parties identified six settlement agreements that resolved disputed trademark litigation pertaining to the use of trademarks in keyword advertising. (RX 734-0108-09; RX 732-0212-30 [REDACTED] RX 732-0232-35 (*Yahoo!* settlement); CX 9022 [REDACTED] Dep. at 132-34 [REDACTED] RX 732-0237-42 (*Pine Tree Legal* settlement); Tushnet, Tr. 4529-32 (describing *Sen* settlement)).

1297. [REDACTED]  
[REDACTED]  
[REDACTED] (See RX 732-0212-30 [REDACTED]  
[REDACTED] RX 732-0232-35 (*Yahoo!* settlement); CX 9022 [REDACTED] at 132-34  
[REDACTED] RX 732-0237-42 (*Pine Tree Legal* settlement); Tushnet, Tr. 4529-32 (describing *Sen* settlement)).

1298. [REDACTED]  
[REDACTED]  
[REDACTED] (See RX 732-0212-30

(*Greenberg Smoked Turkeys* settlement); RX 732-0232–35 (*Yahoo!* settlement); CX 9022

[REDACTED]

1299. Neither Complaint Counsel nor their experts identified a single settlement agreement in a keyword advertising case that did not include a provision restricting the use of a trademark as a keyword in paid search advertising. (*See Tushnet, Tr. 4484*).

**(a) *Greenberg Smoked Turkeys Settlement Agreement***

1300. [REDACTED]

[REDACTED]

[REDACTED] (RX 732-0212–30; RX 734-0107–08).

1301. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 732-0213;

RX 734-0107–08; Hogan, Tr. 3288–89).

1302. [REDACTED]

[REDACTED]

[REDACTED] (RX

732-0220–227; Hogan, Tr. 3288–89).

1303. [REDACTED]

[REDACTED]

[REDACTED] (Hogan, Tr. 3289).

1304. [REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]  
[REDACTED]  
(Hogan, Tr. 3295).

**(b) American Airlines v. Yahoo! Settlement Agreement**

1305. In *American Airlines, Inc. v. Yahoo! Inc., et al.*, No. 08-CV-626-A (Nov. 27, 2009) (hereinafter the “*Yahoo!* case”), the parties reached a settlement agreement. (RX 732-0232–35; RX 734-0108).

1306. Pursuant to the settlement in the *Yahoo!* case, Yahoo! agreed “to block service of Sponsored Search advertisements on Yahoo!.com, or any website to which Yahoo! services Sponsored Search advertisements to the extent of such service . . . in response to search terms” containing American Airlines’ trademarks. (RX 732-232–33).

1307. [REDACTED]

[REDACTED]

[REDACTED] (Hogan, Tr. 3284).

1308. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Hogan, Tr. 3295).

**(c) American Airlines v. Google Settlement Agreement**

1309. [REDACTED]

[REDACTED] (CX 9022

(Charlston, Dep. at 132–34); Hogan, Tr. 3287).

1310. [REDACTED]

[REDACTED]

[REDACTED] (CX 9022 (Charlston, Dep. at 132–33; Hogan, Tr. 3287).

1311. [REDACTED]

[REDACTED] (CX 9022 (Charlston, Dep. at 133)).

1312. [REDACTED]

[REDACTED] (CX 9022 (Charlston, Dep. at 133)).

1313. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Hogan, Tr. 3295).

**(d) GEICO Settlement Agreement**

1314. In *Government Employee Insurance Co. v. Google, Inc. et al.*, No. 04-CV-507 LMB/TCB (E.D. Va. Nov. 24, 2004) (hereinafter the “*GEICO* case”), the plaintiff reached a settlement agreement with one of the defendants, Overture. (RX 732-138–57; RX 734-0108–09).

1315. The terms of the settlement agreement in the *GEICO* case required Overture to “permanently cease delivering to the Overture Distribution Network any Overture Sponsored Listings for any of the Blocked Queries.” (RX 732-0139; RX 734-0108–09).

1316. The terms of the settlement agreement in the *GEICO* case [REDACTED]

[REDACTED]

[REDACTED] (RX 732-0147–57; Hogan, Tr. 3293–94).

1317. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Hogan, Tr. 3294–95; RX 732-0138–57).

1318. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Hogan, Tr. 3295).

***(e) Pine Tree Legal Settlement Agreement***

1319. In *Pine Tree Legal Assistance v. LegalMatch.com*, No. 06-cv-00045 (D. Me. 2006) (hereinafter the “*Pine Tree* case”), the parties reached a settlement agreement. (RX 732-0237–242; RX 734-0108).

1320. The terms of the settlement agreement in the *Pine Tree* case required the defendant “not [to] use any of the Pine Tree Marks in connection with any Advertising or the sale of any good or services.” (RX 732-0238).

1321. The terms of the settlement agreement in the *Pine Tree* case defined “Advertising . . . to includ[e] without limitation use of key words or search terms to influence or monitor Internet searches, links, or advertisements, and including the generation of ‘impressions’ in response to the use by consumers of certain words in Internet searches to publish advertisements to those consumers.” (RX 732-0238; RX 734-0108).

***(f) Sen v. Amazon Settlement Agreement***

1322. In addition to the five settlement agreements identified by Mr. Hogan, Prof. Tushnet testified at trial about a settlement agreement in *Sen v. Amazon.com, Inc.*, 2013 WL

6730180 (S.D. Cal. Dec. 19, 2013) (hereinafter the “*Sen* case”). (Tushnet, Tr. 4484, 4487; CX 8014-038).

1323. According to Prof. Tushnet, the terms of the settlement in the *Sen* case became public because they were “kind of accidentally unredacted by the court” in that case. (Tushnet, Tr. 4484; CX 8014-038).

1324. The terms of the settlement agreement in the *Sen* case specify that, in the event that the Plaintiff provides notice to Amazon that no third parties are selling the Plaintiff’s product on Amazon.com, Amazon will not use the Plaintiff’s trademark as a paid search keyword. (Tushnet, Tr. 4530–32).

***2. Consent Decrees, Default Judgments, And Other Court Orders Also Restrict Bidding On Keywords Containing Trademarks.***

1325. The publicly available injunctions, consent decrees, and other court orders illustrate that it is a common remedy to prohibit defendants from using the plaintiff’s trademarks as keywords to trigger search engine advertising. (Hogan, Tr. 3297; RX 734-0099, ¶ 149).

1326. Complaint Counsel concede that under the conditions where 1-800 Contacts prevailed on its trademark infringement claims, a court would have the power to issue an injunction that prevented the infringer from purchasing the terms it had used to infringe as keywords. (RX 679A-0005 (“Complaint Counsel admits 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”)).

1327. Complaint Counsel’s expert witness, Prof. Tushnet, also concedes that under the conditions where 1-800 Contacts prevailed on its trademark infringement claims, a court would have the power to issue an injunction that prevented the infringer from purchasing the terms it had

used to infringe as keywords. (CX 9044 (Tushnet, Dep. at 161-162 (“The court would have the power to stop [the defendant] from buying the terms it had used to infringe”))).

1328. Courts have enjoined the purchase of trademarked keywords in contested keyword advertising cases. (Hogan, Tr. 3392-93; RX 734-0099 (citing *Skydive Ariz., Inc. v. Quattrocchi*, No. CV-05-2656-PHX-MHM, 2010 WL 1743189, at \*8 (D. Ariz. Apr. 29, 2010)); *PODS Enterprises, LLC v. U-Haul International, Inc.*, 126 F. Supp. 3d 1263, 1292 (M.D. Fla. 2015))).

1329. Courts have also issued injunctions in default judgment cases preventing the defendants from using or purchasing the plaintiff’s trademarks and confusingly similar variations of the plaintiff’s trademarks in paid search advertising. (Hogan, Tr. 3360; RX 734-0100).

1330. In *World Entertainment, Inc. v. Brown*, No. 09-5365, 2011 WL 2036686, at \*8 (E.D. Pa. May 20, 2011), the court enjoined the defendant from using keywords “containing plaintiffs’ CTO trademark, or any mark incorporating plaintiffs’ CTO trademark, colorable imitations thereof or any confusingly similar mark.” (RX 734-0101).

1331. In *Quidgeon v. Olsen*, No. 10-CV-1168, 2011 WL 1480537, at \*3 (C.D. Ill. Apr. 29, 2011), the courts enjoined the defendants “from using or displaying Plaintiff’s federally registered DADDYO’s TATOO’ service mark and/or common law marks, or any similar or confusing variations thereof ... [in] keywords for Internet search engines.” (RX 734-0101).

1332. In *Rolex Watch U.S.A., Inc. v. Jesus Eloy Hernandez*, No. 13-20653-CIV (Dkt. 14) (S.D. Fla. Aug. 20, 2013), the court enjoined the defendant from “[u]sing or continuing to use the Rolex Marks or trade names in any variation thereof on the Internet (either in the text of a website, as a domain name, or as a keyword, search word, metatag...)” (RX 734-0100).

1333. In *Partners for Health & Home, L.P v. Yang*, No. CV 09-07849 (CBM) (RZx) (Dkt. 146) (C.D. Cal. June 21, 2012), the defendants were enjoined from “using Plaintiff’s PERMA-LIFE mark (with or without spaces, however spelled, whether capitalized, abbreviated,

singular or plural, with or without a hyphen, or used alone or in combination with any other words) in metatags, in keyword or other pay-per-click advertising, or in any sponsored search engine advertising.” (RX 734-0101).

1334. In *Louis Vuitton Malletier, S.A. v. Abags.co.UK*, No. 14-Civ-60288, 2015 WL 11197741 (S.D. Fla. Feb. 27, 2015), the court enjoined defendants from “using the Louis Vuitton Marks, or any confusingly similar trademarks, from search engine’s databases or cache memory, and any other form of use of such terms which is visible to a computer user or serves to direct computer searches to websites registered by, owned, or operated by Defendants.” (RX 734-0100).

1335. In *Transamerica Corp. v. Moniker Online Servs, LLC*, No. 09-60973-CIV, 2010 WL 1416979 (S.D. Fla. Apr. 7, 2010), the court enjoined the defendants from “purchasing, selling, or using any form of advertising including keywords or Adwords in Internet advertising containing any mark that incorporates, initiates, or is confusingly similar to Plaintiff’s ‘Transamerica’ service mark.” (RX 734-0102).

1336. Courts have also issued injunctions in consent judgment cases preventing the defendants from using or purchasing the plaintiff’s trademarks and confusingly similar variations in paid search advertising. (Hogan, Tr. 3378; RX 734-0102).

1337. In *Joshua David Mellberg, LLC v. Advanced Retirement Income Solutions, LLC*, No. 12-cv-854 (Dkt. 89) (D. Ariz. Oct. 27, 2016), the defendants agreed to a permanent injunction prohibiting them from “[u]sing any Accused Keywords or any colorable imitations thereof or confusingly similar words or phrases as Google Ad Words [sic] or otherwise, to divert business, sales or customers to [defendant].” RX 734-0102.

1338. In *Probar, LLC v. One Board*, No. 14-cv-166 (Dkt. 18) (D. Fla. Oct. 29, 2014), the court enjoined the defendants from “purchasing or using any forms of advertising including

keywords or ‘adwords’ in internet advertising containing any mark incorporating Plaintiff’s Marks in text, or any confusingly similar marks.” RX 734-0103.

1339. In *Select Management Resources, LLC v. D and D Marketing, Inc.*, No. CV10-10008 (Dkt. 39) (July 15, 2011), the court enjoined the defendant from “using the QUICKCLICK or QUICKCLICKLOANS.COM trademarks and any confusingly similar variations thereof, alone or in combination with other words, names, styles, titles or marks as a business or trade name on or in connection with the advertising, promotion, . . . including but not limited to the use of the QUICKCLICK or QUICKCLICKLOANS.COM trademarks in Internet advertisement text or as keywords for generation of Internet advertisements.” (RX 734-0103-04).

1340. In *Fragrancenet.com, Inc. v. Les Parfums, Inc.*, No. 09 Civ. 2626 (Dkt. 22) (E.D.N.Y. Mar. 8, 2010), the court prohibited defendant from “purchasing keywords or the functional equivalent from any Internet search provider for the terms FRAFRANCENET, FRAGRANCENET.COM, or any confusingly similar term, phrase, or mark, including without limitation ‘fragrance net’ and ‘fragrance.net.’” (RX 734-0104).

1341. In *Mastercard International Inc. v. Trehan*, 629 F. Supp. 2d 824, 833 (N.D. Ill. 2009), the parties agreed that the defendant is enjoined from “using any names, words, designations or symbols consisting of, or otherwise confusingly similar to MASTERCARD Marks or any translation thereof” as “search terms, keywords, key terms, hit generating pages, or any other devices used, intended, or likely to cause any web sites of [defendant] to be listed by any Internet search engines in response to any searches that include any terms identical with or confusingly similar to the MASTERCARD Marks.” (RX 734-0104).

1342. In *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), the court enjoined the defendant from

“directly or indirectly purchasing advertising keywords, links, and metatags that are identical or substantially similar to True’s ELLIOT & TRUE Trademark.” (RX 734-0104-05).

1343. In *Guardian Pool Fence Systems, Inc. v. Sentry Safety Systems, LLC*, No. CV07-1213 JFW (Ex) (Dkt. 25) (C.D. Cal. Sep. 14, 2007), the court enjoined the defendant from “using the trademark GUARDIAN alone or in combination with other words, symbols, or designs in any manner...including but not limited to, use of said trademark as an Internet keyword or metatag.” (RX 734-0105).

1344. In *J-Rich Clinic, Inc. v. Cosmedic Concepts, Inc.*, No. 02-CV-74324 (Dkt. 359) (E.D. Mich. May 16, 2006), the court ordered the defendant to “discontinue and . . . not commence or resume any and all keyword-linked Internet advertising (on the Google search engine, any other search engine – e.g., and without limitation, MSN, Yahoo!, etc., or any other Internet advertising mechanism employed now or in the future by Sephora), using REAL PURITY as a keyword or trigger for such advertising.” (RX 734-0105).

1345. In *Weightwatchers.com, Inc. v. Diet Patch, Inc.*, No. 04 Civ. 4053 (LAP) (S.D.N.Y. Apr. 18, 2005), the court entered multiple orders enjoining different parties and defendants from using “Plaintiffs’ trademarks as a trigger for the delivery of advertisements.” (RX 734-0106).

1346. In *Happy Feet USA, Inc. v. Serenity “2000” Corp.*, No. 09-cv-1832 (Dkt. 22) (M.D. Fla. Mar. 16, 2010), the court enjoined the defendant from “purchasing search engine keyword advertising, such as but not limited to Google AdWords advertisements, based on keywords incorporating or comprising” plaintiff’s marks. (RX 734-0106-07; Hogan, Tr. 3298-99).

1347. In *Orion Bancorp, Inc. v. Orion Residential Fin., LLC*, No. 807CV1753T26MAP, 2008 WL 816794, at \*3 (M.D. Fla. Mar. 25, 2008), the court enjoined the defendant “from purchasing or using any form of advertising including keywords or adwords in internet advertising



containing any mark incorporating Plaintiff's Mark, or any confusingly similar mark." (RX 734-0107).

1348. [REDACTED]

(Hogan, Tr. 3434, 56 –57).

**3. *A Number Of Settlement Agreements, Consent Decrees And Default Judgments Also Require The Implementation Of Negative Keywords.***

1349. It is increasingly common for trademark agreements and injunctions in the keyword advertising context to require advertisers to designate certain trademarks as "negative keywords." (RX 734-0117; Hogan, Tr. 3300–01).

1350. Courts presiding over trademark infringement litigation have ordered defendants to adopt negative keywords. (RX 734-0118).

1351. In *Porbar, LLC v. Onebody*, No. 14-cv-166 (Dkt. 18) (D. Fl. Oct. 29, 2014), the court required the defendant to "activat[e] . . . the term 'PROBAR' as negative keywords or negative adwords1 [sic] in any internet advertising purchased or used." (RX 732-0119; *see also* RX 734-0118).

1352. In *Porbar, LLC v. Onebody*, No. 14-cv-166 (Dkt. 18) (D. Fl. Oct. 29, 2014), the court defined negative keyword" or "negative adword" as "a special kind of advertiser keyword matching option that allows an advertiser to prevent its advertisement from appearing when the specific terms are a part of a given user's internet search or search string." (RX 732-0119; *see also* RX 734-0118).

1353. In *Transamerica Corp. v. Moniker Online Services, LLC*, No. 09-60973-CIV, 2010 WL 1416979 (S.D. Fla. Apr. 7, 2010), the court required the defendant "when purchasing or selling internet advertising using keywords, Adwords or the like, to activate the name

“Transamerica’ as a negative keyword or negative Adword in any Internet advertising purchased, sold or used.” (RX 732-0102; RX 734-0188).

1354. In *Happy Feet USA, Inc. v. Serenity “2000” Corp.*, No. 09-cv-1832 (Dkt. 22) (M.D. Fla. Mar. 16, 2010), the court required the defendant to maintain plaintiff’s infringed trademarks as “negative keywords on all search engine advertising accounts in their custody or control.” (RX 732-0205; RX 734-0118–19; *see also* Hogan, Tr. 3298–99).

1355. In *Orion Bancorp, Inc. . Orion Residential Fin., LLC*, 807CV1753T26MAP, 2008 WL 816794, at \*3 (M.D. Fla. Mar. 25, 2008), the court required the defendant to, “when purchasing internet advertising using keywords, adwords or the like, require the activation of the term ‘ORION’ as negative keywords or negative adwords in any internet advertising purchased or used.” (RX 732-0210; RX 734-0119).

1356. Legal commentators have also recognized that the advisability of including a negative keyword requirement in any injunctive relief in a keyword advertising trademark case. (Tushnet, Tr. 4526–27).

1357. Professor Eric Goldman, who is the co-author of an advertising law textbook with Complaint Counsel’s expert witness Rebecca Tushnet, wrote in April 2008 that a negative keyword requirement is “a logical addition to any injunctive relief request in a trademark case.” (Tushnet, Tr. 4526).

1358. Similarly, in 2011, Mr. Hogan published an article in BNA’s Patent, Trademark and Copyright Journal that recommended that advertisers “consider applying their competitors’ marks as ‘negative match’ keywords” in order to avoid liability. (Hogan, Tr. 3499; CX 1872-004).

1359. [REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED] (Hogan, Tr. 3503).

1360. It is common for businesses to require their affiliates to use negative keywords in order to prevent the affiliates' advertisements from displaying in response to a search for the business's trademark. (Hogan, Tr. 3303; RX 734-0114-16).

1361. An employee of ACLens, Peter Clarkson, testified that using negative keywords is the only way to prevent ACLens's paid advertisements from displaying in response to a search for 1-800 Contacts' trademarks. (Clarkson, Tr. 237-40; CX 9039 (Clarkson, Dep. at 80-82)).

1362. An employee of Walmart, Sandhya Mohan, testified that using negative keywords is the only method to prevent Walmart's paid advertisements from displaying in response to a particular search query. (CX 9033 (Mohan, Dep. at 185-87)).

1363. Trademark practitioners have recently learned more about the usefulness and advisability of using negative keywords in trademark settlement agreements in order to prevent disputes regarding the defendants' displaying allegedly infringing advertisements in response to a search for the plaintiff's trademark. (Hogan, Tr. 3301).

1364. The requirement of negative keywords is a settlement provision that is easy to manage and administer. (Hogan, Tr. 3304; [REDACTED]  
[REDACTED])

1365. Including in a settlement agreement a provision requiring the implementation of negative keywords reduces the risk of further disputes between the advertising parties. (Hogan, Tr. 3304-05).

1366. Including in a settlement agreement a provision requiring the implementation of negative keywords reduces monitoring and administration expenses. (Hogan, Tr. 3304-05).

**4. *The Purported Alternative Remedies Identified By Complaint Counsel Are Not Feasible.***

1367. Complaint Counsel have proposed that an alternative remedy to resolve keyword advertising disputes is for the parties to agree not to engage in advertising that has “purportedly confusing text.” (RX 680-0004 (Response to Interrogatory No. 1); Hogan, Tr. 3305).

1368. [REDACTED]

[REDACTED] (Hogan, Tr. 3504).

1369. [REDACTED]

[REDACTED] (Hogan, Tr. 3504).

1370. Complaint Counsel’s proposed alternative remedy is not a feasible or efficient remedy to resolve trademark disputes pertaining to keyword advertising. (Hogan, Tr. 3305; RX 734-0119–23).

1371. Trademark practitioners heavily disfavor settlements that restrict only “confusing” ads because they are a recipe for future litigation and its attendant costs. (Hogan, Tr. 3272, 3305, 3495).

1372. The goal of any settlement agreement is to achieve finality, to eliminate the risk and cost of litigation, and to resolve an issue so as to avoid repeat litigation. (Hogan, Tr. 3271).

1373. In order to accomplish these goals, trademark practitioners draft clear settlement agreements that are easy to administer and do not invite future disputes. (Hogan, Tr. 3271).

1374. Complaint Counsel's proposed alternative remedy would not satisfy any of the goals that trademark practitioners seek to accomplish in drafting a settlement agreement. (RX 734-0119-23; Hogan, Tr. 3305-06).

1375. Complaint Counsel's proposed alternative remedy would invite further disputes between the settling parties because it does not clearly define the scope of the prohibited conduct. (Hogan, Tr. 3305-06; RX 734-119).

1376. Complaint Counsel's proposed alternative remedy, which focuses on whether the defendant's advertisement text is "confusing," would invite further disputes among the settling parties because it does not clearly define what constitutes "confusing" text. (Hogan, Tr. 3305-06; RX 734-0119-20).

1377. The parties to a trademark settlement agreement frequently do not agree on what conduct constitutes trademark infringement or what conduct is likely to cause confusion. (Hogan, Tr. 3272).

1378. Complaint Counsel's proposed alternative remedy would hinder each party's ability to monitor compliance with the settlement agreement. (RX 734-119).

1379. Complaint Counsel's proposed alternative remedy would cause confusion on the part of business personnel regarding how to accomplish the settlement's requirements. (RX 734-0119-20).

1380. Complaint Counsel's proposed alternative remedy would necessitate additional future agreements between the settling parties that specify each party's prohibited conduct. (R0734-0120).

1381. In cases where infringement has been found, courts typically order relief that is broader than what was alleged as the specific infringing acts in the complaint. (Hogan, Tr. 3503).

1382. It is not common for trademark settlement agreements simply to prohibit the defendant from infringing the trademark in the future. (Hogan, Tr. 3272).

1383. It is not typical for courts to limit the relief granted in a trademark injunction to preventing the use of the trademark within the text of the advertisement, but otherwise permitting advertisements to be presented in response to internet searches for a plaintiff's trademark. (Hogan, Tr. 3503–04).

1384. Unlike Complaint Counsel's proposed alternative remedy, the settlement agreements at issue in this litigation achieve the goals that practitioners seeks to accomplish in a trademark settlement agreement by clearly defining the scope of the prohibited conduct. (Hogan, Tr. 3276).

**XI. The Settlement agreements Had Significant Procompetitive Benefits**

***A. The Settlements Were Efficient***

1385. Settlements are generally efficient because they reduce litigation costs. (RX 737-0017 (Landes Report); RX 739-0053 (Murphy Report); Murphy, Tr. 4208; CX 9042 (Evans, Dep. at 196).

1386. Dr. Evans agreed that settlements of litigation promote efficiency. (CX 9042 (Evans, Dep. at 196).

1387. It is efficient for firms to settle when it is in their interest to do so. (RX 739-0034 (Murphy Report); Murphy, Tr. 4208).

1388. Forcing firms to litigate when it is in their interests to settle would be inefficient. (RX 739-0053 (Murphy Report; Murphy, Tr. 4208)).

1389. Firms will have an incentive to settle trademark litigation claims, rather than litigate them, when the expected net benefits to both parties from continuing the challenged practice are lower than the expected litigation costs for both parties. (RX 737-017 (Landes

Report); RX 739-0053, 0034 (Murphy Report); Murphy, Tr. 4203-05; CX 9048 (Murphy, Dep. at 272)).

1390. Dr. Evans agreed that economists analyzing a settlement generally assume that, in deciding whether to proceed with litigation, parties evaluate the cost of litigation and the likely benefits of a favorable outcome, accounting for the likelihood of that outcome. (Evans, Tr. 1830-1831; CX 8009-045 (Evans Rebuttal Report at n.103) (“As a purely general matter, I agree that parties in litigation bargain to reach settlements and they take expected values and costs into account. Most litigation, and particularly routine litigation, settles for this reason.”)).

1391. Economists generally assume that firms act rationally in settling litigation. (Evans, Tr. 1830).

1392. There is no reason in this case to depart from the general economic assumption that firms act rationally in settling litigation. (Evans, Tr. 1830).

1393. From the settling parties’ perspective, the settlements were economically rational. (CX 9042 (Evans, Dep. at 119-120)).

1394. The settlements reflected the parties’ best assessment of their interests in light of the expected outcome of the litigations. (Evans, Tr. 1831. (“Q. In this case do you have any reason to doubt that the settlements are the result of the parties on each side taking into account their best assessments of the probabilities and outcomes as well as their expected costs of litigation? A. I think as a general description that’s – that’s fine.”)).

1395. Dr. Evans did not calculate the costs to the settling parties of defending against 1-800 Contacts’ trademark litigation. (CX 9042 (Evans, Dep. at 135)).

1396. While Dr. Evans tried to suggest that some of the settling parties were capital constrained, he admitted that Walgreens, one of the settling parties, was not. (Evans, Tr. 1831-32; CX 9042 (Evans, Dep. at 133-134)).

1397. Dr. Evans did not investigate the capital available to any of the settling parties to determine whether they were capital-constrained. (Evans, Tr. 1832; CX 9042 (Evans, Dep. at 135)).

1398. ACLens made a business decision to settle with 1-800 Contacts in light of the potential costs and protracted nature of the litigation between the companies. (Clarkson, Tr. 342; CX 9039 (Clarkson Dep.) at 86-87, 144; CX 9003 (Clarkson, IH at 108-109)).

1399. [REDACTED]

[REDACTED] (Batushansky, Dep. at 46-48)).

1400. [REDACTED]

[REDACTED] (Batushansky, Dep. at 46-48)).

1401. Memorial Eye settled with 1-800 Contacts to avoid paying an expected \$150,000 in expert witness fees. (Holbrook, Tr. 2032; CX 9024 (Holbrook, Dep. at 63, 160-61)).

1402. Memorial Eye settled with 1-800 Contacts due to “the continuing impact that the legal cost would have on our business.” (CX 9024 (Holbrook, Dep. at 162); Holbrook, Tr. 2032)).

1403. Memorial Eye settled with 1-800 Contacts due to legal uncertainty regarding the case. (Holbrook, Tr. 2032; CX 9024 (Holbrook, Dep. at 63, 164-65)).

1404. [REDACTED]

[REDACTED] (Duley Decl.) ¶ 10).

1405. Dr. Evans did not determine whether the expected benefits to the settling parties of continuing with the conduct challenged in 1-800 Contacts’ trademark litigation were greater than or less than the out-of-pocket costs that they would have incurred. (CX 9042 (Evans, Dep. at 133)).



1406. The only significant economic benefit that the settling parties other than 1-800 Contacts received was avoiding a lawsuit and its attendant costs, including costs associated with the risk of losing. (CX 9042 (Evans, Dep. at 115-16 (“Q. Okay. So the only significant economic benefit [AC Lens] received, in your opinion, is the avoidance of a lawsuit and the costs attendant upon a lawsuit. A. Yeah. Where I’m using the word ‘costs’ expansively, all the things that related to having to deal with a lawsuit. Q. And one of those costs was the risk of losing the lawsuit; right? . . . THE WITNESS: One of the costs is the risk of losing the lawsuit – well, is the risk of losing the lawsuit and any attendant financial consequences that that would bring.”)); CX 9042 (Evans, Dep. at 119) (“Q. Okay. Are the benefits received by the other settling parties the same as the benefits you describe being received by AC Lens, namely, avoiding the costs writ large of a lawsuit? A. Yes.”); RX 739-0050 to -0051 (Murphy Report); [REDACTED] [REDACTED].

1407. [REDACTED] (RX 733-0053 (Ghose Report); Ghose, Tr. 3924).

1408. According to data from Google regarding ads for 1-800 Contacts that appeared between 2002 and 2016, only [REDACTED] of such ads appeared based on 1-800 Contacts’ bid on another retailer’s trademark. (RX 733-0053 (Ghose Report); Ghose, Tr. 3923).

1409. According to data from Google regarding ads for 1-800 Contacts that appeared between 2002 and 2016, less than 1% of such ads appeared based on 1-800 Contacts’ bid on another retailer’s trademark. (RX 739-0027 (Murphy Report)).

1410. According to data from Bing regarding ads for 1-800 Contacts that appeared between 2013 and 2016, only [REDACTED] out of approximately [REDACTED] ads for 1-800 Contacts appeared based on 1-800 Contacts’ bid on another retailer’s trademark. (RX 733-0053 (Ghose Report)).

1411. According to the Commission, one measure of whether a settlement is anticompetitive is if it involves payments by the plaintiff to the defendant in excess of litigation costs. (RX 739-0051 (Murphy Report); CX 9048 (Murphy, Dep. at 283)).

1412. If the settlements significantly reduced settling retailers' profits, economics teaches that the settling parties would have received a settlement payment. (RX 739-0049 (Murphy Report); CX 9048 (Murphy, Dep. at 239)).

1413. The fact that the settling parties did not receive a settlement payment indicates that the settlements did not significantly reduce the settling retailers' profits. (RX 739-0049 (Murphy Report); Murphy, Tr. 4091).

1414. The settling retailers would have had an incentive to settle for any settlement payment greater than the difference between the expected incremental profits from litigating and their litigation costs. (RX 739-0049 (Murphy Report)).

1415. The fact that the settling parties did not receive a settlement payment indicates that any incremental profits from the settlement must have been less than the cost of litigating the case. (RX 739-0049-0050 (Murphy Report)).

1416. The fact that the settling parties did not receive a settlement payment indicates that the settlements did not significantly reduce the settling retailers' ability to compete. (RX 739-0049 (Murphy Report); Murphy, Tr. 4091; CX 9048 (Murphy, Dep. at 239-241)).

1417. The fact that the settling parties did not receive a settlement payment indicates that the settlements were not critical to the settling retailers' ability to compete. (RX 739-0049 (Murphy Report); Murphy, Tr. 4091; CX 9048 (Murphy, Dep. at 239-241)).

1418. The average cost of trademark litigation in which more than \$25 million are at risk is \$2.1 million. (RX 739-0050 (Murphy Report)).

1419. Lens.com spent \$1.4 million defending 1-800 Contacts' trademark suit against it prior to trial. *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, No. 2:07-cv-591, Dkt. 271-2 (D. Utah Mar. 7, 2011) at ¶ 4.

1420. The fact that the settling parties settled suggests that they expected to earn less than ██████████ in profits from advertising in response to searches for 1-800 Contact's trademark. (RX 739-0049 to -0050 (Murphy Report); Murphy, Tr. 4205-07).

1421. The fact that the settling parties settled suggests that they believed that advertising in response to searches for 1-800 Contact's trademark was less economically significant than the costs of litigation. (RX 739-0049-0050 (Murphy Report); Murphy, Tr. 4205-07).

1422. If the settlements enabled 1-800 Contacts to earn monopoly profits, economics indicates that 1-800 Contacts should have been willing to make a payment to the settling parties as large as its expected incremental profits from the litigation. (RX 739-0050 (Murphy Report)).

1423. The fact that 1-800 Contacts did not make a settlement payment indicates that the settlements did not enable 1-800 Contacts to earn monopoly profits. (RX 739-0050 (Murphy Report)).

***B. The Settlements Provided Procompetitive Trademark Protection***

***1. Trademarks Promote Interbrand Competition***

1424. Respondent's expert, Dr. William Landes, is an expert in the economics of trademarks. (RX 737 (Landes Report)).

1425. With Richard A. Posner, Dr. Landes authored seminal works regarding the economic principles of trademarks, including "Trademark Law: An Economic Perspective," *Journal of Law and Economics* (Oct. 1987).

1426. Trademark policies reflected in trademark law enhance economic efficiency. (Evans, Tr. 1829; CX 9042 (Evans, Dep. at 157 (Q. So what I want to ask you is, do you agree

that the trademark policies encompassed in trademark law are efficient? . . . A. Yeah . . . the general concept of trademarks is efficiency enhancing, so as an economist, I would support trademark policy generally as something that is valuable for promoting economic efficiency.”); CX 9042 (Evans, Dep. at 196 (Q. So protection of trademark – well, trademark law promotes efficiency? . . . THE WITNESS: “So trademark law as a general matter promotes efficiency.”); CX 8009-031 (Evans Rebuttal Report, at n.65) (“As Professor Landes observes there is no dispute between us that trademarks play an important role in market economics and can promote efficiencies.”); Murphy, Tr. 4208).

1427. A trademark provides informational benefits to consumers about relevant product and quality attributes that reduce their cost of searching. (RX 737-0005, 0007 (Landes Report); CX 9050 (Landes, Dep. at 29, 56-58); RX 739-0033 (Murphy Report); CX 9048 (Murphy, Dep. at 10-11)).

1428. There is a consensus among economists that the primary role of trademarks is to reduce consumers’ search costs. (RX 739-0033 (Murphy Report); Murphy, Tr. 4116-17; CX 9048 (Murphy, Dep. at 10-11)).

1429. Different consumers experience different search costs and value those costs differently. (CX 9050 (Landes, Dep. at 67-68); RX 739-0033 (Murphy Report)).

1430. A retailer’s brand name enables a consumer to use his prior experience or information acquired from others to distinguish a particular retailer from other retailers without conducting an exhaustive examination of each retailer and the goods and services each provides. (RX 737-0007 (Landes Report); CX 9048 (Murphy, Dep. at 10-11)).

1431. Trademark enforcement can improve market efficiency by reducing consumers’ search costs. (CX 9050 (Landes, Dep. at 76)).

1432. Consumers' inability to visit a brick-and-mortar 1-800 Contacts means that their search costs are likely to be higher than for in person retail shopping. (RX 737-0009 (Landes Report)).

1433. For that reason, 1-800 Contacts' trademark will have more potential to reduce search costs and 1-800 Contacts' service mark is likely to be more valuable than the mark for retailers with physical locations. (RX 737-0007, -0008 (Landes Report)).

1434. A consumer who makes a one-time only purchase from a retailer tends to derive less value from a trademark's reduction in search costs because the consumer is unlikely to take advantage of the reduction to find the retailer again in the future. (RX 737-0007 (Landes Report)).

1435. The more common it is for consumers to return to the same retailer, the more value a trademark tends to be in reducing search costs. (RX 737-0007 (Landes Report)).

1436. [REDACTED]  
(Bethers, Tr. 3571-72).

1437. Trademarks are particularly valuable for companies like 1-800 Contacts that rely primarily on repeat customers. (RX 737-0010 (Landes Report)).

1438. A trademark's value to a firm is a function of the information it provides consumers and its ability to reduce search costs. (RX 737-0011 (Landes Report)).

1439. In economic terms, the true cost of purchasing a good or service includes both the dollar price paid and the search costs of finding it. (RX 739-0033 (Murphy Report)).

1440. By lowering search costs, a firm's trademark lowers the full cost of a consumer's purchase from that firm. (RX 737-0007 (Landes Report)).

1441. By lowering search costs, 1-800 Contacts' trademark lowers the full costs of consumers' purchases from 1-800 Contacts. (RX 737-0007 (Landes Report)).

1442. The greater the information value of a firm's trademark or service mark, the lower the search costs the consumer incurs and the greater the monetary price the consumer is willing to pay. (RX 737-0012 (Landes Report); CX 9050 (Landes, Dep. at 31)).

1443. Trademarks therefore enable firms to charge a 'premium,' which gives them an incentive to invest in and develop their trademarks. (RX 737-0012 (Landes Report); CX 9050 (Landes, Dep. at 33-35); RX 739-0033 (Murphy Report); CX 9048 (Murphy, Dep. at 15-16)).

1444. Any difference in prices between 1-800 Contacts and other online retailers is consistent with 1-800 Contacts having a stronger trademark than other online retailers. (RX 737-0019 (Landes Report); CX 9050 (Landes, Dep. at 73 ("Q. 1-800 Contacts has a trade name that has some value, correct? A. Correct. Q. And for which it can charge a premium, correct? A. Yes".))).

1445. Firms that produce products of consistently high quality are best placed to capture the trademark 'premium' associated with a trademark's potential to reduce search costs because inconsistency and poor quality undermine the predictability necessary to lower search costs. (RX 737-0011 (Landes Report)).

1446. According to Dr. Evans, "[f]irms may invest in developing and offering a high quality product if they can charge a higher price for it and thereby recover their investments. A trademark can help convey information to consumers that the product is high quality. It thereby attracts consumers who are willing to pay a higher price for superior quality." (CX 8009-039 (Evans Rebuttal Report)).

1447. Firms' incentives to invest in and develop their trademarks benefit consumers by reducing search costs and giving firms an incentive to provide products and services that benefit consumers. (RX 737-0012 (Landes Report); CX 9050 (Landes, Dep. at 33-35); RX 739-0034 (Murphy Report)).

1448. As Dr. Evans explained, “[p]rotecting trademark rights encourages investment in this sort of brand-building activity, which in turn generates valuable market information, promotes competition and ultimately benefits consumers.” (CX 8006-135 (Evans Report)).

1449. In order to reduce search costs, a brand must maintain a consistently reliable and positive association between its trademark and the product or service that the brand provides. (RX 739-0033 (Murphy Report); CX 9048 (Murphy, Dep. at 12-14)).

1450. Where firms provide products and services that lack uniform attributes or quality, a trademark will have less impact on reducing consumer search costs, thereby undermining the consumer’s willingness to pay a premium. (RX 737-0013 (Landes Report); RX 739-0033-0034 (Murphy Report)).

1451. In order to fully realize the value of investments in its trademark, a firm has a strong incentive to provide products and services of consistent quality. (RX 737-0013 (Landes Report); CX 9050 (Landes, Dep. at 33-35, 42); RX 739-0034 (Murphy Report)).

1452. A firm that supplies products or services of poor and uneven quality may actually suffer from the information benefits that a trademark provides because the trademark would enable consumers to more easily identify and reject the firm’s product or service. (RX 737-0013 (Landes Report)).

1453. Firms have significant incentives to produce consistently high quality produce and services to prevent a trademark’s signifying effect from working against them. (RX 737-0013 (Landes Report)).

1454. The benefits of trademarks – reducing search costs and incentivizing firms to provide products and services of consistently high quality – can be compromised if other firms use the mark in confusingly similar ways. (RX 737-0014 (Landes Report); CX 9048 (Murphy, Dep. at 17)).

1455. Other retailers' use of 1-800 Contacts' trademarks to generate paid search advertising undermined the investment that 1-800 Contacts made in its brand. (Coon, Tr. 2731).

1456. Infringers have a strong incentive to use a mark belonging to a firm that has a reputation for producing a consistently high quality product or service because they may be able to obtain the higher price that consumers are willing to pay without incurring the expense of building awareness of the mark and producing products or services of consistently high quality. (RX 737-0016 (Landes Report)).

1457. It can be rational for one firm to infringe another's trademark. (Athey, Tr. 841).

1458. Using a firm's trademark in confusingly similar ways reduces the information associated with the mark, thereby raising consumer search costs. (RX 737-0014 (Landes Report); CX 9050 (Landes, Dep. at 35-36)).

1459. Confusion negates a trademark's effect of reducing search costs by limiting the extent to which consumers can rely on the trademark to correctly distinguish one seller from others. (RX 737-0016 (Landes Report)).

1460. By increasing consumer search costs, confusion reduces the value of the mark to consumers and the monetary premium they are willing to pay for the trademarked product or service. This undermines the trademark owner's incentive to invest in the mark and produce goods or services of consistently high quality that benefit consumers. (RX 737-0016 (Landes Report); RX 739-0034 (Murphy Report); Murphy, Tr. 4121-22; CX 9048 (Murphy, Dep. at 17)).

1461. Competing ads that reduce 1-800 Contacts' return on advertising on its trademark will reduce 1-800 Contacts' incentive to invest in its trademark through advertising. (RX 739-0034 (Murphy Report); Murphy, Tr. 4122; CX 9048 (Murphy, Dep. at 46-49, 146-49); Coon, Tr. 2829-31, 2833 ("if we didn't get the benefit of our ads, we wouldn't run ads"), 2834 ("If somebody gets less benefit from investing in advertising, they will spend less."), 2837-39).



1462. A reduction in 1-800 Contacts' incentive to invest in its trademark through advertising will harm consumers by reducing competition to offer ECP customers lower prices and superior service. (Murphy, Tr. 4122-24).

1463. By preventing infringement, trademark protection can induce potentially infringing firms to invest in developing their own valuable trademarks. (RX 739-0036 (Murphy Report); Murphy, Tr. 4123-25).

1464. Limiting the settling retailers' ability to use 1-800 Contacts' trademark increased the settling retailers' incentives to develop recognized brands of their own. (RX 739-0052 (Murphy Report)).

1465. The economic effect of trademark dilution by tarnishment is to undermine the positive association that consumers have with a famous mark, diminishing the trademark owner's reputational capital. (RX 737-0016 (Landes Report)).

1466. The economic effect of trademark dilution by blurring is to weaken the signaling effect that connects the mark to its owner, which undermines the trademark's informational benefits. (RX 737-0017 (Landes Report)).

## ***2. Trademark Settlements Balance Competitive Interests***

1467. Trademark law balances interests of trademark holders, consumers and competitors. (Evans, Tr. 1829-30; CX 9050 (Landes, Dep. at 146 (trademark law "itself tries to incorporate important limitations on the trademark holder's rights when they spill over to reducing competition by making it more difficult for consumers to compete"))).

1468. From an ex ante perspective, companies compete by investing in their brands to differentiate their products or services, which benefits consumers. (RX 739-0052 (Murphy Report)).

1469. From an ex post perspective, companies compete on price and other dimensions given the different perceptions of quality, which also benefits consumers. (RX 739-0052 (Murphy Report)).

1470. Even if the settlements reduced ex post price competition, consumers could still benefit because the settlements would increase ex ante investments in brands. (RX 739-0052 (Murphy Report)).

1471. Analyzing the competitive effects of the challenged settlement agreements required comparing the potential effect of the settlements to limit ex post price competition and the potential effect of the settlements to increase ex ante interbrand competition. (RX 739-0065, 0082 (Murphy Report)).

1472. Analyzing the effects of trademark protection requires balancing an increase in firms' incentive to invest in their brands and lower search costs that can benefit consumers, and a decrease in competitors' ability to make a use of a mark that can in theory also benefit consumers. (RX 739-0037 (Murphy Report)).

1473. Owners of valuable trademarks negotiating a settlement will seek terms that maximize the value of their trademark. (RX 739-0053 (Murphy Report)).

1474. A trademark owner's rivals negotiating a settlement will seek terms that allow them to use their trademark to increase competition between their products and the trademark owner's product. (RX 739-0053 (Murphy Report)).

1475. According to Dr. Evans, trademark policies "reflect a balance between the benefits of encouraging investment in trademarks that are valuable for the competitive process and the benefits encouraging the free flow of information." (CX 8006-137 (Evans Report)).

1476. Dr. Evans offered no opinion that the balance trademark law strikes should be shifted one direction or the other. (CX 9042 (Evans, Dep. at 158)).

1477. The fact that the settlements did not involve monetary payments from 1-800 Contacts indicates that the settlements achieved a balance of competitive incentives that benefit consumers. (RX 739-0053 (Murphy Report)).

1478. Limiting a trademark owner's freedom to settle trademark litigation raises the costs of trademark protection. (RX 737-0018 (Landes Report); RX 739-0035, -0053 (Murphy Report)).

1479. For a trademark owner that cannot settle trademark litigation without risking antitrust liability, the expected costs of trademark enforcement are more likely to reflect the full costs of litigating the case through trial as well as the expected costs of any antitrust liability. (RX 737-0018 (Landes Report)).

1480. Increasing the expected costs of trademark enforcement will reduce a trademark owner's incentives to enforce its trademark, which will reduce the value of the trademark. (RX 737-0018 (Landes Report); CX 9050 (Landes, Dep. at 218-219; RX 739-0035).

1481. Increasing the expected costs of trademark enforcement will reduce firms' incentives to invest in brands that lower search costs. (RX 739-0035, -0053 (Murphy Report)).

1482. Trademark infringement is costly for trademark owners because it involves monitoring the use of their trademarks by rivals as well as the costs of settling and litigating trademark infringement claims. (RX 739-0035 (Murphy Report)).

1483. Settlements that prohibit confusing uses of a mark are costlier to the parties than broad non-use settlements because they require ongoing monitoring enforcement. (CX 9050 (Landes, Dep. at 158-60)).

***C. The Settlement Agreements Reduced Consumer Confusion***

1484. The weight of the evidence shows that the Settlement Agreements reduce potential consumer confusion.

***1. Consumer Survey Evidence Shows The Restricted Ads Potentially Cause Consumer Confusion***

1485. Respondent's expert, Dr. Kent Van Liere, conducted a study to test whether competitor ads showing in response to the search query "1-800 Contacts" are likely to cause consumer confusion. (RX 735 (Van Liere Report); RX 728 (curriculum vitae); RX 729 (documents relied upon); RX 730 (study questionnaire)). More specifically, Dr. Van Liere sought to determine whether or not keyword-generated advertisements on search engines caused consumers to believe that the companies whose advertisements are placed on the page are the same as (i.e., source confusion) or affiliated with (i.e., affiliation confusion) 1-800 Contacts. (RX 735-0003).

1486. Based on his study, Dr. Van Liere concluded that among consumers who search using the 1-800 Contacts trademark as a search query there is a potential for real-world confusion regarding whether paid-search advertisements sponsored by competitors of 1-800 Contacts are advertisements for 1-800 Contacts or are affiliated with 1-800 Contacts. (RX 735-006; Van Liere, Tr. 2976).

1487. Dr. Van Liere thus concluded that there is the potential for consumer confusion if the at-issue settlement agreements did not exist and the parties to the settlements could cause their ads to appear in response to consumer searches using the 1-800 Contacts trademark as the search term. (Van Liere, Tr. 2976-2978).

***(a) Dr. Van Liere's Qualifications***

1488. Dr. Van Liere is a survey and sampling expert. (RX 735-0003; Van Liere, Tr. 2958). Complaint Counsel stipulated to his qualification as a survey expert. (Van Liere, Tr. 2962).

1489. Over the course of his nearly 40-year career, Dr. Van Liere has been primarily been involved in conducting social science research using survey and sampling methods on a wide range of consumer and business decision-making issues. (Van Liere, Tr. 2958).

1490. Dr. Van Liere has a Ph.D. in sociology, with a specialization in methods and statistics. (RX 728-0003). He was a professor in the Department of Sociology at the University of Tennessee from 1978 to 1985, where he taught various courses, including survey methodology, sampling and statistics. (RX 728-0003; Van Liere, Tr. 2960). Dr. Van Liere was a visiting professor at the University of Wisconsin-Madison in 1985. (RX 728-0003).

1491. After teaching, Dr. Van Liere spent 17 years conducting applied survey research for corporations and government agencies. From 1985 to 1995, Dr. Van Liere was a Principal and later President of a survey research-based applied social science market research company. (RX 728-0003; Van Liere, Tr. 2961). At that survey research company, he conducted studies of consumers and business decision makers on a wide range of topics, including for large corporations and large government agencies (such as the National Park Service, NOAA, and the Bureau of Reclamation). (Van Liere, Tr. 2961-63). His work included surveys regarding new products and services, switching behavior, segmenting markets to identify consumers who were interested in different benefits, and customer satisfaction surveys. (Van Liere, Tr. 2961-2963).

1492. From 1995 to 2000, Dr. Van Liere was a Director and later Senior Vice President in the market analysis and survey research group of another consulting firm. (Van Liere, Tr 2964-5; RX 728-0003). At that firm, Dr. Van Liere conducted survey research for most of the electric and gas utilities in the U.S. as well as for a variety of large companies, including Whirlpool, Microsoft, and Procter & Gamble. (Van Liere, Tr 2965).

1493. In 2000, Dr. Van Liere became the CEO of Primen, a joint venture formed by the Electric Power Research Institute and the Gas Research Institute. (Van Liere, Tr. 2966; RX 728-

0003). Primen conducted regular surveys of electric and gas utility customers, including both consumers and business customers. (Van Liere, Tr. 2966).

1494. None of Dr. Van Liere's work from 1985 to 2002 involved litigation. (Van Liere, Tr. 2963; RX 728-0003).

1495. From 2002 to present, Dr. Van Liere has provided survey and sampling work for litigation purposes. (Van Liere, Tr. 2967; RX 728-0003). He has conducted studies in 60 to 80 cases in which his involvement has been disclosed. (Van Liere, Tr. 2968-2969).

1496. Dr. Van Liere has conducted surveys primarily in intellectual property cases, such as trademark, trade dress and patent-type cases. (Van Liere, Tr. 2968; RX 728-0004-0006). He has also conducted studies in false advertising cases and antitrust cases, including for the Federal Trade Commission. (Van Liere, Tr. 2968-2970; RX 728-0006-0011).

1497. Dr. Van Liere has had 15 to 20 engagements involving likelihood of confusion or secondary meaning. (Van Liere, Tr. 2970). He has represented both plaintiffs and defendants in such cases. (Van Liere, Tr. 2970).

1498. Dr. Van Liere has conducted consumer confusion studies in several cases involving keyword advertising, i.e., cases in which the question involves whether consumers who search using a trademark term are likely to be confused by sponsored ads triggered by that trademark term but are placed by companies other than the trademark holder. (Van Liere, Tr. 2971). These cases include *American Airlines, Inc. v. Google, Inc.* and *Rosetta Stone Ltd. v. Google, Inc.* (RX 728-0005-6).

1499. In *Rosetta Stone*, the United States Court of Appeals for the Fourth Circuit stated that Dr. Van Liere's survey conducted regarding confusion from sponsored link advertisements that appeared in response to a user's Internet search for the trademark term "Rosetta Stone" "yield[ed] a net confusion rate of 17 percent"—that is, '17 percent of consumers demonstrate

actual confusion.’ This result is clear evidence of actual confusion for purposes of summary judgment. . . . [T]his evidence should have been added to the other evidence of actual confusion to be considered in the light most favorable to Rosetta Stone.” (RX 735-0004; *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 159 (4th Cir. 2012)).

1500. Dr. Van Liere’s expert opinions have never been excluded by a court. (Van Liere, Tr. 2975).

1501. Dr. Van Liere conducted a study in this case similar to the studies he has done in other keyword advertising cases. (Van Liere, Tr. 2978). He sampled consumers in the relevant market, showed them various search results pages, and measured, using certain survey questions, the degree to which they were likely to be confused in terms of source or affiliation confusion. (Van Liere, Tr. 2978).

**(b) *The Relevant Population***

1502. The relevant population for a survey is the population of people whose opinions matter to the particular issue. (Van Liere, Tr. 2981). The definition of the relevant population is typically case-specific. (Van Liere, Tr. 2981).

1503. In this case, the Complaint alleges that 1-800 Contacts entered into agreements that prevented certain retailers of contact lenses from displaying paid search advertisements in response to consumer searches that included 1-800 Contact’s trademark in the search query. (Complaint ¶¶ 17-25, 27). According to the Complaint, one relevant market can be defined as “the sale of search advertising by auction in response to user queries signaling the user’s interest in contact lenses, or smaller relevant markets therein.” (CX 1132 (Complaint ¶ 28)). The Complaint alleges a second relevant market as “no larger than the retail sale of contact lenses, or smaller relevant markets therein, including the online retail sale of contact lenses.” (CX 1132 (Complaint ¶ 29)).

1504. Based on the allegations in the Complaint, the consumers whose perceptions would matter are those who would be searching the Internet for information regarding contact lens retailers and who could encounter sponsored ads of competitors to 1-800 Contacts. (Van Liere, Tr. 2981-2982).

1505. Dr. Van Liere therefore defined the relevant population for his study “as adult consumers 18 years or older who reside in the US who either a) have purchased contact lenses online within the past 12 months; or b) would consider searching on the internet to purchase contact lenses in the next 12 months.” (RX 735-0009).

***(c) Sampling The Relevant Population***

1506. To identify and sample from the relevant population, potential respondents were contacted via email using a well-respected national online survey firm – Critical Mix – that has a panel of millions of consumers. (RX 735-009; Van Liere, Tr. 2983).

1507. Critical Mix has demographic, occupational, and other information regarding the persons who agree to participate on its panels. (Van Liere, Tr. 2986). This information is verified through a number of quality control measures, including third-party validation. (Van Liere, Tr. 2986-2987).

1508. Dr. Van Liere’s study used the Critical Mix online panel of consumers. (Van Liere, Tr. 2980-2981). The study did not use pop-up surveys, in which the study is not actually accessing members of a survey panel but instead accesses people who go to a particular website. (Van Liere, Tr. 2980-2981).

1509. An invitation was sent via email by Critical Mix to a representative random sample of adult consumers in the US, age 18 and older, who were part of their consumer panel. (RX 735-0009).



1510. Respondents were asked a set of screening questions to determine whether they are members of the relevant population. (RX 735-0009; RX 730-0002-0004; Van Liere, Tr. 2986-2987).

1511. To qualify for the study, respondents must have either purchased contact lenses online in the past 12 months or would consider searching on the internet to purchase contact lenses in the next 12 months. (RX 730-0003, 0014; Van Liere, Tr. 2992-2999).

1512. Because the study used search results pages based on the Google and the Yahoo! search engines, to qualify for the survey respondents had to indicate they had used either the Google or Yahoo! search engine in the past 12 months or thought they would use one of those search engines in the next 12 months. (RX 730-0004, 0014; Van Liere, Tr. 2998).

1513. To participate in the survey, respondents must also agree to abide by a set of instructions; wear glasses or contacts; complete the survey on a desktop, laptop, or tablet computer; and not work for (or anyone in their household work for) certain types of companies that may give the respondent insight that would bias the survey (e.g., an optometrist or a market research company). (RX 730-0002-0003, 0013-0014; Van Liere, Tr. 2987-2992).

1514. There were 689 respondents who met the qualifying criteria for the study. (RX 735-0006).

1515. Dr. Van Liere verified that the sample population was representative of the relevant population by comparing the demographics of the sample population against data regarding contact lens wearers from the Center for Disease Control as well as against data regarding the customers of 1-800 Contacts. (RX 735-0010-0011; Van Liere, Tr. 2999-3002). Based on these comparisons, Dr. Van Liere concluded that the study sample population can be considered representative of the relevant population. (RX 735-0011; Van Liere, Tr. 3001-3002).

*(d) The Design Of The Study Stimuli*

1516. The 689 respondents were assigned to perform a simulated internet search for “1-800 Contacts” as a keyword using one of two search engines: either Google or Yahoo!. (RX 735-0006).

1517. Respondents in both groups were then randomly assigned to view either a test or control stimulus. (RX 735-0006). The stimuli were designed to be reasonable reflections of a search results page from Google and Yahoo!. (Van Liere, Tr. 3002).

1518. As both party’s experts acknowledged, for a consumer confusion study to be reliable, it is important for the study stimuli reasonably replicate what consumers would encounter in the marketplace. (Van Liere, Tr. 3004-3005; Jacoby, Tr. 2263-2264).

1519. In the test conditions, respondents performed a search and then were shown an image of search results that included sponsored advertisements that could appear if the agreements challenged in the FTC’s complaint were not in place and that are representative of the type of advertisements that currently appear in response to a search related to contact lenses. (RX 735-0006). In the control conditions, respondents were shown the same test stimuli but with the sponsored advertisements removed. (RX 735-0006).

1520. The control stimulus for the Dr. Van Liere’s Google condition is designed to look like what a consumer would typically see in in response to the search query “1-800 Contacts.” (Van Liere, Tr. 3003-3004).

1521. For the Google control stimulus, Dr. Van Liere used actual organic listings that are shown in response to the search query “1-800 Contacts.” (Van Liere, Tr. 3008-3009).

1522. The similarity between the Google control stimulus in Dr. Van Liere’s study and actual real-world search results is verified by a comparison of the control stimulus with actual

search results in response to searches on the 1-800 Contacts trademark and its variations.

*(Compare RX 730-0010 with RX 314-0001-0010).*

1523. To avoid introducing bias, Dr. Van Liere replaced certain of the organic listing in the “In the news” section that referred to this litigation with other news items that appeared on later pages. (Van Liere, Tr. 3011-3013).

1524. Dr. Van Liere followed a similar procedure to create the control stimulus for the Yahoo! condition. (Van Liere, Tr. 3014-3015; RX 730-0012).

1525. The similarity between the Yahoo! organic listings in Dr. Van Liere’s study and actual real-world search results is verified by a comparison of the control stimulus with actual search results in response to searches on the 1-800 Contacts trademark and its variations.

*(Compare RX 730-0012 with RX 314-0011-0029).*

1526. In a consumer confusion study, test stimuli include the allegedly confusing or allegedly infringing content. (Van Liere, Tr. 3016). In this case, the test stimuli represent the but-for world in which the Settlement Agreements did not exist and advertisements from the settling parties appear in response to searches using 1-800 Contacts trademarks as the search term. (Van Liere, Tr. 3016-7; RX 735-0013-0014).

1527. In Dr. Van Liere’s study, the Google and Yahoo! test stimuli are identical to the respective control stimuli, except the test stimuli include advertisements from certain of the settling parties. (Van Liere, Tr. 3017-3021; RX 730-0009, 0011; RX 735-0013-0014). These advertisements appeared in response to queries using generic search terms, such as “contact lenses.” (Van Liere, Tr. 3017-3021).

***(e) The Purpose Of A Control Condition***

1528. Dr. Van Liere explained that in trademark confusion studies, it is possible that the observed level of confusion in the test condition may be the result of so-called “background noise”

such as confusion due to elements of the test stimuli that are not allegedly infringing, demand effects of the survey instruments themselves, or guessing. (RX 735-0015; Van Liere, Tr. 3022-3024).

1529. As a consequence, most surveys used for litigation in trademark disputes include a control stimulus to assess the effects of background noise on the results. (RX 735-0015).

1530. By using a control, the researcher is able to “net off all of the things other than the alleged confusing element.” (Van Liere, Tr. 3025-3026).

1531. In general, the control group stimulus should be designed such that the control stimulus “shares as many characteristics with the experimental stimulus as possible, with the key exception of the characteristic whose influence is being assessed.” (RX 735-0015; Van Liere, Tr. 3025-3026).

1532. Dr. Van Liere’s stimuli were designed to test the presence of the allegedly confusing elements, the sponsored ads. (Van Liere, Tr. 3027-3030). In this study, a search using the trademark “1-800 Contacts” which generates only organic listings would be the non-infringing alternative to the test stimuli because it would not include any allegedly confusing sponsored links. (RX 735-0015). Thus, the appropriate controls for this study are identical to the test screenshots in every way except that they do not include any of the sponsored links (or any of the other features of the Google or Yahoo search results pages that are used to distinguish the sponsored links such as the heading “Ad” on Google or “Ad related to:” on Yahoo). (RX 735-0015).

1533. The test and control stimuli are identical except for the presence of the sponsored ads from the settling parties in the test stimulus. (Van Liere, Tr. 3027-3028; *compare* RX 730-0011 *with* RX 730-0009).

*(f) The Survey Questionnaire*

1534. After the screening questions in Dr. Van Liere's survey questionnaire, respondents are introduced to the main part of the survey. (RX 730-0005, 0016; Van Liere, Tr. 3039-3040).

1535. The main questionnaire was designed to simulate searching the internet using the Google or Yahoo search engines. (RX 735-0012).

1536. With a limited exception, respondents were assigned to either the Google or Yahoo conditions based on what search engines they indicated during the screening questions they used or would use. (RX 735-0012; Van Liere, Tr. 3096-3097 (small number of respondents assigned to the wrong Google versus Yahoo condition, but removing those respondents does not change overall results; moreover, these respondents were equally randomly assigned to the test and the control conditions, so any effect netted off)).

1537. The introduction to the main section of the questionnaire informs respondents that the study is "on how consumers use the internet" and to look at the search results "as you would normally if you were conducting an online search." (RX 730-0005-0006, 0016).

1538. The survey did not instruct respondents to look at the results as though they were seeking to make a purchase of contact lenses because doing so would have been improper. (Van Liere, Tr. 3041-3043). As Dr. Van Liere explained, respondents "should be in the state of mind of information seeking. They're about to do a search. They're gathering information. They're going to respond to a search results page. So as a consequence, we did not want to set the respondent up to think just about making a purchase. We want them to just do a search, look at the search results page as they normally would, and tell us something about what they see." (Van Liere, Tr. 3041-3043).

1539. Respondents were shown their assigned Google or Yahoo basic search page with an empty search box and instructed to type the words "1-800 Contacts" into the Google or Yahoo

search box. (Van Liere, Tr. 3040-3041; RX 730-0006, 0016-0017). The respondent initiated the search by clicking on the search button. (RX 735-0012; RX 730-0006, 0016-0017).

1540. Respondents were randomly assigned to either the test or control conditions. (RX 735-0012). Respondents were thus shown one of the four stimuli: the Google test stimulus, the Google control stimulus, the Yahoo! test stimulus, or the Yahoo! control stimulus. (RX 730-0006-0007; Van Liere, Tr. 3043-3045).

1541. The assigned search result appeared to respondents as though they had just conducted a search using the trademark “1-800 Contacts.” (RX 735-0012).

*(i) Source Confusion*

1542. Source confusion occurs when advertising leads a consumer to believe that the source of the advertisement is the trademark owner, in this case 1-800 Contacts, when in fact it is not. (Van Liere, Tr. 3030, 3045-3046).

1543. To test for source confusion, after the search results appeared, respondents were instructed, “Using your mouse, please point and click on the link or links, if any, that you think will take you to the website of the company that you searched for. Please select all that you think apply. When you are finished please click the forward button.” (RX 730-0007, 0018; Van Liere, Tr. 3045-3046).

1544. Respondents were free to click on any of the links on the page; they were not directed to any particular link nor were they restricted with regard to which links they could select. (Van Liere, Tr. 3047-3048).

1545. Dr. Van Liere asked respondents to “point and click on the link or links, if any, that you think will take you to the website of the company that you searched for” rather than asking them to click on the link that they think would take them to 1-800 Contacts for two reasons. (Van

Liere, Tr. 3046-3047). First, phrasing the instruction this way avoids any possibility of a leading question. (Van Liere, Tr. 3046-3047).

1546. Second, and more important, the phrasing ensures that respondents are engaged in conducting a search. (Van Liere, Tr. 3046-3047). As Dr. Van Liere explained, the study is “trying to have the respondent conduct a search, and we want them engaged on the search. And by having them have to rethink about, well, okay, what is the company I searched for, they're looking at the search results page reasonably more engaged on conducting a search.” (Van Liere, Tr. 3046-3047).

1547. In the test condition, respondents were counted as confused if they clicked on any of the sponsored ads. (RX 735-0017; Van Liere, Tr. 3049-3050). If they clicked on any other link, they were counted as not confused. (Van Liere, Tr. 3049-3050).

1548. In the control condition, respondents were counted as confused if they clicked on any of certain organic links, e.g., TIME, New York Times, www.fda.gov. (RX 735-0017-0018; Van Liere, Tr. 3052-3053)

1549. The survey instructs respondents that if they need not give an answer if they have no opinion and that should not guess. (RX 730-0002, 0013 (“If for any question you have no opinion, please feel free to choose the ‘don’t know’ option. Please do not guess.”); RX 730-0002, 0016 (“If you don’t know the answer to any of the questions, that’s okay, just say you don’t know or that you do not have an opinion.”)).

1550. Consistent with these instructions, the survey asks respondents to click on the appropriate link or links, “if any,” indicating that the respondent need not select any of the links. (RX 730-0007, 0018; Van Liere, Tr. 3048).

1551. If a respondent did not believe that any of the links on the page would take the respondent to the website of the company searched for, the respondent could either check a box

next to “None of these” at the bottom of the page or simply hit the “next” button. (Van Liere, Tr. 3048-3049). If a respondent did so, he or she was counted as not confused. (Van Liere, Tr. 3051).

1552. Each of the respondents that selected a link or links, whether scored as confused or not confused, was then shown each listing they selected and asked, “You said that you think that the following link would take you to the website of the company that you searched for. What makes you say that?” (RX 735-0006; RX 730-0019; Van Liere, Tr. 3053-3056). This question was repeated for each link selected. (RX 735-0006; RX 730-0019; Van Liere, Tr. 3053-3056). The responses are sometimes called “verbatim.” (Van Liere, Tr. 3053-3056).

1553. The responses to this question were used as a quality control to ensure that respondents were generally understanding the study. (Van Liere, Tr. 3054-3055). For instance, if a respondent simply entered gibberish, that respondent may be excluded from the survey. (Van Liere, Tr. 3054-3055).

1554. After giving verbatims, all respondents who selected any of the links indicating confusion were routed to the end of the survey. (RX 735-0012; Van Liere, Tr. 3064-3065). The remaining respondents moved on to the next question in the survey. (RX 735-0012; Van Liere, Tr. 3064-3065).

***(ii) Affiliation Confusion***

1555. Affiliation confusion occurs when advertising leads a consumer to believe that the ad is affiliated with the trademark holder, here 1-800 Contacts, when in fact it is not, or that there is an affiliation between one entity and another entity when in fact there is none. (Van Liere, Tr. 3030, 3062).

1556. To test for affiliation confusion, respondents in Dr. Van Liere’s study were told, “We would now like to ask you another set of questions about the original page of search results you were shown. When the Search results appear, please look at them as you would normally if



you were conducting an online search. This time, please click on the link or links, if any, that you think will take you to a website of a company that is affiliated with the company that you searched for.” (RX 730-0007, 0023).

1557. Respondents were again shown the search results page and instructed, “Now, using your mouse, click on the link or links, if any, that you think will take you to the website of a company that is affiliated with the company that you searched for. Please select all that you think apply.” (RX 730-0008, 0024).

1558. As in the source confusion test, respondents were free to click on any or none of the links on the page. (Van Liere, Tr. 3063-3064 (“So this is the same exercise but with regard to affiliation. They’re asked to look at the whole search results page and click on any of the links, sponsored or organic, that they think will take them to the website of a company that is affiliated with the company they searched for.”)).

1559. The use of the term “affiliated” in the survey question is appropriate. (Van Liere, Tr. 3064-3066). Terms such as “business relationship” or “business connection” are too restrictive. (Van Liere, Tr. 3064-3066). As Dr. Van Liere explained, “if you ask the question as a business connection or a business relationship, it leads the respondent to think they may have to determine whether there’s a legal relationship between the entities, so that language is often considered too restrictive or forcing the respondent to consider whether there’s a legal relationship, which is something they wouldn’t know, so I think the more standard practice and certainly the treatises that talk about this generally talk about asking as affiliation, not as business relationship or business connection.” (Van Liere, Tr. 3064-3066).

1560. In the test condition, respondents were counted as confused if they clicked on any of the sponsored ads. (RX 735-0017; Van Liere, Tr. 3066-3067).

1561. If a respondent clicked on more than one sponsored ad, the respondent was scored as confused only once. (Van Liere, Tr. 3067).

1562. In the control condition, respondents were counted as confused if they clicked on any of certain organic links, e.g., TIME, New York Times, www.fda.gov. (RX 735-0017-0018; Van Liere, Tr. 3068-3070)

1563. If a respondent did not believe that any of the links on the page were affiliated with the company searched for, the respondent could either check a box next to “None of these” at the bottom of the page or simply hit the “next” button. (Van Liere, Tr. 3067-3068).

***(iii) Survey Results***

1564. Dr. Van Liere found a net confusion rate in his Google condition of 13.3% and a net confusion rate in his Yahoo! condition of 27.2%. The results of Dr. Van Liere’s study are summarized in the following table:

**Table 3: Summary of Confusion**

	<u>Test</u>		<u>Control</u>		<u>Net</u>
	<u>Count</u>	<u>Percent</u>	<u>Count</u>	<u>Percent</u>	
<b>Google</b>					
Confused as to Source	22	13.0%	5	2.8%	
Confused as to Affiliation	8	4.7%	3	1.7%	
Total Confused	30	17.8%	8	4.5%	13.3%
Total Google Respondents	169		178		
<b>Yahoo</b>					
Confused as to Source	58	33.0%	9	5.4%	
Confused as to Affiliation	11	6.3%	11	6.6%	
Total Confused	69	39.2%	20	12.0%	27.2%
Total Yahoo Respondents	176		166		
Overall Confused	99	28.7%	28	8.1%	20.6%
Total Study Respondents	345		344		

Note: Respondents who were confused as to source were not asked questions about affiliation.

Source: NERA 1-800 Contacts Survey Data

(RX 735-0021).

1565. Based on these data, Dr. Van Liere concluded that “there is potential for real world confusion among consumers in the relevant population regarding whether the sponsored advertisements of the type tested are the same as or are affiliated with 1-800 Contacts when searching for 1-800 Contacts using various search engines.” (RX 735-0006).

**(g) *The Purported Criticisms Of Complaint Counsel’s Expert, Dr. Jacoby, Are Invalid.***

1566. Complaint Counsel retained Dr. Jacob Jacoby as an expert, who sought to raise various criticisms of Dr. Van Liere’s study. (CX 8011). These criticisms have no weight, are invalid and unsupported, and none indicate any unreliability in Dr. Van Liere’s results.

1567. Dr. Jacoby contended that Dr. Van Liere should not have used the search term “1-800 Contacts” in his control conditions. (Jacoby, Tr. 2219-22). According to Dr. Jacoby, respondents in Dr. Van Liere’s control condition should not have searched using the query “1-800 Contacts” but should have used a generic term, such as “contact lenses.” (Jacoby, Tr. 2219-22). These contentions are wrong. As discussed more extensively below, Dr. Jacoby’s use of a different search term in his control condition was a fundamental flaw in his own study, rendering that study unreliable.

1568. Dr. Van Liere appropriately had respondents in both the test and control conditions search using the query “1-800 Contacts.” (Van Liere, Tr. 3035-36). As Dr. Van Liere explained, the basic idea in a trademark confusion study “is that the test and the control should be identical except for the allegedly confusing elements, so here we want the respondents in both conditions to come to the exercise with the same frame of reference. That means they’re both searching on ‘1-800 Contacts’ and then evaluating the search results page based on having done that exercise.” (Van Liere, Tr. 3035). Respondents in the control and the test conditions must be asked to think about what they’re looking at the same way. (Van Liere, Tr. 3036).

1569. In this case, the appropriate frame of reference is a consumer looking at results after having searched using the term “1-800 Contacts.” (Van Liere, Tr. 3036). As Dr. Van Liere explained, “the searching on ‘1-800 Contacts’ is a key element of the alleged confusion, so we want both the test and control to do that.” (Van Liere, Tr. 3036).

1570. Dr. Jacoby also contends that Dr. Van Liere’s control condition was improper because it has fewer links than the test condition. (Jacoby, Tr. 2225-26). This contention is invalid.

1571. By making the test and control stimuli identical except for the presence of the sponsored ads, the test stimuli have overall more links on the page. (Van Liere, Tr. 3030-31). Having fewer links in the control condition does not affect the reliability of the study. (Van Liere, Tr. 3030-31). As Dr. Van Liere explained, both stimuli are “realistic replications of what those search results pages would look like if you had one that had no sponsored links and one that had a typical number of sponsored links, so in that sense, both the test and the control replicate marketplace conditions.” (Van Liere, Tr. 3030-3031; *compare* RX 730-0011 (control stimulus) *with* RX 310-0634-35 (actual search result), RX 310-0636-37 (actual search result)). Because of this, including fewer links in the control condition enhanced the realism, and therefore the reliability, of the study.

1572. Dr. Jacoby’s criticism would only have weight if respondents were randomly clicking on links. But the survey data show that respondents were not randomly clicking on links; the data show respondents were looking at the control search results and reacting to the content on the page. (Van Liere, Tr. 3031-3035).

1573. The survey data show that the average number of links clicked by respondents in the test group and the control group were very close. (RX 735-0020). For instance, respondents in the Google test group clicked on an average of 1.8 links in response to the Source Question and

those in the Google control group clicked on an average of 1.7 links for that question. (RX 735-0020; Van Liere, Tr. 3034). These data show that having fewer links in the control stimulus than the test stimulus did not affect the reliability of the study. (Van Liere, Tr. 3031-3035).

1574. Dr. Jacoby contended that Dr. Van Liere's test and control stimuli were improper because they did not include an advertisement for 1-800 Contacts. (Jacoby, Tr. 2231-2232). This contention is incorrect.

1575. Dr. Jacoby's contention assumes that (1) 1-800 Contacts should be required in the but-for world to pay to have its ads placed in response to other advertisers bidding on its trademarks as keywords and (2) the search engines would always place 1-800 Contacts ads in response to queries using its trademarks. Neither assumption is valid.

1576. As Dr. Van Liere explained, "we're being asked to measure confusion in this case in a but-for world in the future where the agreements weren't in place and the sponsored ads of the competitors are now appearing. We want to test that, whether those ads themselves are confusing, whether 1-800 Contacts chose to buy their way to the top of or into the sponsored links or not. So in this case and in prior of these cases I've worked on, the basic idea is you want to measure the impact of those ads without the trademark owner having to essentially purchase its own ad to be in the sponsored link area, so that's why we've designed these, both in other cases and here, without the trademark owner's sponsored link in the pool that's tested." (Van Liere, Tr. 3037-3038; *see also* CX 9049 (Van Liere, Dep. at 187-188 ("confusion has to be measured whether 1-800 Contacts is forced to purchase its own names as the first sponsored link or it is not."); (Van Liere, Tr. 3214 ("After discussion with counsel of my prior work and my understanding, ultimately the way we agreed to do it and therefore the way I was instructed to do it was to leave it off. But it wasn't a unilateral decision by counsel . . . it was never unilateral. I discussed at some length with them what we've done in prior cases and why it wasn't necessarily appropriate to assume that the

trademark owner had to purchase the top spot or one of the upper links as an assumption in how you design the test and control conditions.”)).

1577. Moreover, given the complexities of the search engine auctions, it is not appropriate to assume that the search engines would always place 1-800 Contacts ads even if 1-800 Contacts bid on its trademarks as keywords. In fact, although 1-800 Contacts has bid on its own trademarks as keywords, its ads do not always appear in response to searches using those trademark terms. (*See, e.g.*, RX 310-0318, RX 310-0634-35, RX 310-0636-37, RX 310-0640-41, RX 311-0007-08, RX 311-0009-10, RX 311-0034-35, RX 311-0426-27, and RX 311-0579-80).

1578. Dr. Jacoby contends that Dr. Van Liere should have considered respondents’ verbatims in coding for confusion. (Jacoby, Tr. 2237-2238). This contention is not correct.

1579. Dr. Van Liere counted respondents as confused or not confused based their click behavior not on the verbatims for a number of reasons: (1) any effects of respondents who are inattentive or guessing is netted off because respondents are randomly assigned to the test and control conditions; (2) respondents vary in their ability to articulate their reasons why they have an opinion; (3) doing so would require the researcher “to impose too much of their own judgment on who they’re going to count as confused or not.” (Van Liere, Tr. 3056-3058).

1580. In fact, Dr. Jacoby admitted that “it is much easier for individual respondents to tell us their state of mind as opposed to why or how they came to be in that state of mind.” (Jacoby, Tr. 2341). He further admitted that “there is considerable empirical evidence, both from cognitive, consumer and other research psychologists, that people have an inability to observe directly or identify how their own minds work.” (Jacoby, Tr. 2341).

1581. Accordingly, Dr. Jacoby has written, “it is an illusion to think that answers respondents give to questions seeking to measure their mental processes, such as whether or not

they were confused, what caused them to be confused, it's an illusion to think that those are reliable indicators of the actual influence of the stimuli on the responses." (Jacoby, Tr. 2341).

1582. Dr. Jacoby contended that Dr. Van Liere improperly weighted the Yahoo! results in his survey. (Jacoby, Tr. 2239-2240). But Dr. Van Liere reported his Google and Yahoo! results separately and then a combined number for the respondents in the study. (RX 735-0021). As Dr. Van Liere explained, "[W]hen you have multiple conditions, multiple versions of a product, multiple versions of the -- a trademark on different types of products, so on and so forth, you just report the results for the conditions that you tested and then -- and then you give an overall result, so that's simply what I did here." (Van Liere, Tr. 3074).

1583. Dr. Jacoby's suggestion that the results should have been weighted by the search engine's share of search queries is wrong; those data do not reflect the shares of users, which would be the relevant measure. (Van Liere, Tr. 3119-3120). Moreover, even if appropriate, Dr. Jacoby's weighting using search results yields a net confusion of 15.68%, which is still significant. (Jacoby, Tr. 2240-2241).

1584. Dr. Jacoby contended that certain of respondents in Dr. Van Liere's study were improperly put in the Yahoo! condition. (Jacoby, Tr. 2243-2244). But this issue had no effect on the reliability of Dr. Van Liere's study. As Dr. Van Liere explained, "We had an issue where a small number of people were assigned to the wrong Google versus Yahoo condition, but if you remove those respondents, they don't change my overall results or my opinions. And the individuals were equally randomly assigned to the test and the control conditions, and as a consequence, if they had had an effect, it was equally affecting both the test and the control, so therefore, it didn't change anything about my opinions." (Van Liere, Tr. 3096-3097).

1585. Dr. Jacoby contended that Dr. Van Liere improperly excluded persons who wear contact lenses for distance vision but not for reading. (Jacoby, Tr. 2248). But there is no evidence

in the record that anyone wears contact lenses for distance vision and then takes them out for reading. Dr. Jacoby's contention is completely unsupported.

1586. Dr. Jacoby contended that Dr. Van Liere should only have included future purchasers in his survey and should not have included past purchasers. (Jacoby, Tr. 2250). This is wrong. Dr. Van Liere appropriately included past purchasers in the relevant population.

1587. Dr. Van Liere explained the relevant population includes past purchasers because such purchasers are also often future purchasers. (Van Liere, Tr. 2993-2994). In fact, in response to the responses to the screening questions many respondents indicated they were past purchases and that they also intend to search on the internet to purchase contact lenses in the future. (Van Liere, Tr. 2993-2994).

1588. Dr. Van Liere also explained the relevant population includes past purchasers because people who have purchased contact lenses online in the past, even if they don't intend to purchase them again in the next twelve months, are part of the group of people whose perceptions of the sponsored links would matter. (Van Liere, Tr. 2993-2994). As he explained, these consumers have "been online, they know about contact lens buying online, so we want to know -- we want them as part of the population that we use to measure whether consumers are likely to be confused by the sponsored ads." (Van Liere, Tr. 2993-2994).

1589. Dr. Van Liere also included past purchasers in the relevant population because the study sought to measure initial interest confusion (as he has in other keyword advertising cases). (Van Liere, Tr. 2994-2996). Initial interest confusion occurs when a consumer is in the process of searching for information about products and services. (Van Liere, Tr. 2994-2995). Initial interest confusion is distinct from point-of-sale confusion, which has to do with whether consumers at the point of making a purchase are likely to be confused by a trademark or a trade dress or advertising.



(Van Liere, Tr. 2994). The perceptions of both past and future purchasers are relevant to the question of whether there is potential initial interest confusion. (Van Liere, Tr. 2996).

1590. Dr. Jacoby's contentions that Dr. Van Liere used improper phrasing in his questions is incorrect. As discussed above, Dr. Van Liere's survey was properly worded.

***(h) Prof. Tushnet Is Not Qualified To Opine On Survey Methodology***

1591. Complaint Counsel offered the opinions of Prof. Rebecca Tushnet in rebuttal to critique Dr. Van Liere's survey.

1592. Prof. Tushnet is not qualified to offer an opinion on survey design or survey methodology. Accordingly, the Court will not consider her opinions regarding the consumer surveys in this case.

1593. Prof. Tushnet is a law professor with a law degree; she has "the knowledge that every lawyer in this courtroom has." (Tr. 4430).

1594. Prof. Tushnet does not have a graduate degree in marketing, economics, sociology, psychology, or mathematics. (Tushnet, Tr. 4479).

1595. Prof. Tushnet has never taught a marketing course. (Tushnet, Tr. 4480).

1596. Prof. Tushnet has not taken any courses in survey design or administered a consumer survey. (Tushnet, Tr. 4479-81).

1597. Prof. Tushnet is not familiar with basic concepts in survey methodology, testifying that she had only a "minimal understanding" of conjoint analysis and would "have to refresh my memory" regarding a t-statistic. (Tushnet, Tr. 4483).

1598. Experts prepared to design, conduct, and analyze a survey generally should have graduate training in psychology (especially social, cognitive, or consumer psychology), sociology, political science, marketing, communication sciences, statistics, or a related discipline; that training should include courses in survey research methods, sampling, measurement, interviewing,

and statistics. S. Diamond, *Reference Guide on Survey Research*, in Reference Manual on Scientific Evidence Third Edition 375 (2011).

1599. In all cases, the expert must demonstrate an understanding of foundational, current, and best practices in survey methodology, including sampling, instrument design (questionnaire and interview construction), and statistical analysis. Publication in peer-reviewed journals, authored books, fellowship status in professional organizations, faculty appointments, consulting experience, research grants, and membership on scientific advisory panels for government agencies or private foundations are indications of a professional's area and level of expertise.

S. Diamond, *Reference Guide on Survey Research*, in Reference Manual on Scientific Evidence Third Edition 375 (2011).

1600. Further, an expert who gives an opinion about the adequacy and interpretation of a survey not only should have general skills and experience with surveys, but also should demonstrate familiarity with the following properties of the survey being discussed: (1) purpose of the survey; (2) survey methodology, including (a) the target population, (b) the sampling design used in conducting the survey, and (c) the survey instrument (questionnaire or interview schedule); (3) results, including rates and patterns of missing data; and (4) statistical analyses used to interpret the results. S. Diamond, *Reference Guide on Survey Research*, in Reference Manual on Scientific Evidence Third Edition 375 (2011).

1601. Prof. Tushnet does not qualify as an expert on survey design or methodology.

**2. *The Study Conducted By Complaint Counsel's Expert, Dr. Jacob Jacoby, Is Unreliable And Will Be Accorded No Weight***

1602. Complaint Counsel's survey expert, Dr. Jacoby, also conducted a consumer confusion study. For the several reasons explained below, Dr. Jacoby's study is fundamentally

flawed. Accordingly, the Court finds Dr. Jacoby's study to be unreliable and will give it no weight.

***(a) Dr. Jacoby's 2016 Test Stimulus Failed To Replicate Marketplace Conditions***

1603. Dr. Jacoby created two sets of stimuli for his survey. According to his report, Dr. Jacoby's "study replicated both the Google SERP as it looked prior to 2016, and as it looks today" (i.e., in 2016). (CX 8008-007). Half of the respondents in his survey were shown the pre-2016 stimulus; the other half were shown the 2016 stimulus. (CX 8008-007).

1604. The 2016 test stimulus is shown at CX 8008-429-430. (Jacoby, Tr. 2264-2267).

1605. As described below, Dr. Jacoby's 2016 test stimulus fails to replicate market conditions, thereby rendering his study unreliable.

1606. As Dr. Jacoby admitted, the test stimuli provided to respondents as a basis for the responding to the survey's questions needs to conform with what is found in the real-world marketplace. (Jacoby, Tr. 2263-2264). As he explained, the closer a stimuli get to reflecting real world conditions, "the better able you are to make accurate predictions." (CX 9041 (Jacoby, Dep. 16); *see also* CX 9041 (Jacoby, Dep. at 17-18 (the closer stimuli are "to what's real in you're being asked what would you do with something that's real, the more likely you as a respondent can give an honest answer"))).

1607. To create his 2016 test stimulus, Dr. Jacoby had a subcontractor take an actual search result page supplied by Complaint Counsel and make a few modifications. (Jacoby, Tr. 2267-2268).

1608. Dr. Jacoby testified that his intent was to design test stimuli that was very close to what would happen when somebody actually saw a search engine results page on a screen after they did a search. (Jacoby, Tr. 2264)).

1609. For his 2016 test stimulus, Dr. Jacoby intended create a search results page to look as much as possible as would look like in real life for a real-life person doing a real-life search for “1-800 Contacts.” (Jacoby, Tr. 2266-2267 (“Q. And what you did when you designed this search engine result page is you wanted to have a page to look as much as possible as would look like in real life for a real life person doing a real-life search for “1-800 Contacts”; right? A. Yes. Recognizing that the page changes as Google changes its format, but to do something that exemplified what Google has typically done.”); *see also* Jacoby, Tr. 2273 (“Q. And your intent in using that was to reasonably reflect what would come up when a person searches on ‘1-800 Contacts’; right? A. Yes.”)).

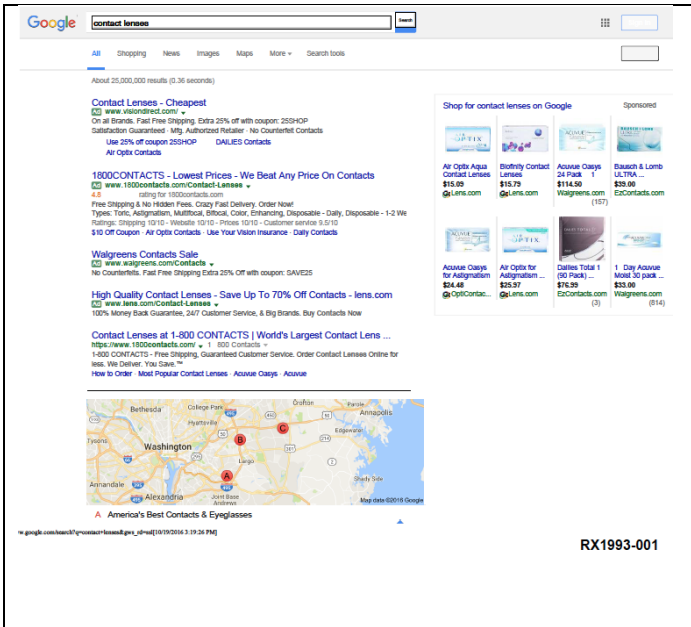
1610. Dr. Jacoby’s 2016 test stimulus includes sponsored ads of 1-800 Contacts’ rivals. (Jacoby, Tr. 2269). According to Dr. Jacoby, the purpose of putting in the sponsored ads was to otherwise keep that test stimulus as close as possible to a search engine results page that would come up in response to a search for “1-800 Contacts.” (Jacoby, Tr. 2269; *see also* CX 9041 (Jacoby, Dep. at 143 (“And your goal in putting these other sponsored links in the page, if necessary, is to keep the page otherwise as close as possible to what actually would have come up with the search for 1-800 Contacts? A. Generally speaking, yes.”))).

1611. Despite Dr. Jacoby’s repeatedly stated intent to create a search results page that replicated the results of a search for “1-800 Contacts,” his 2016 test stimulus fails to do so.

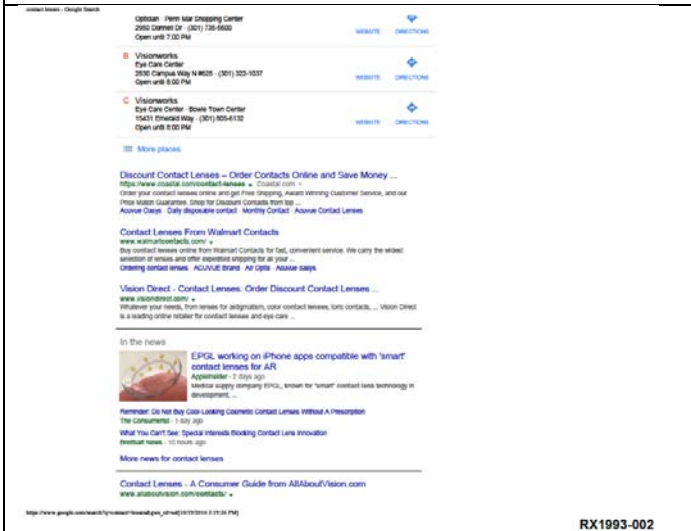
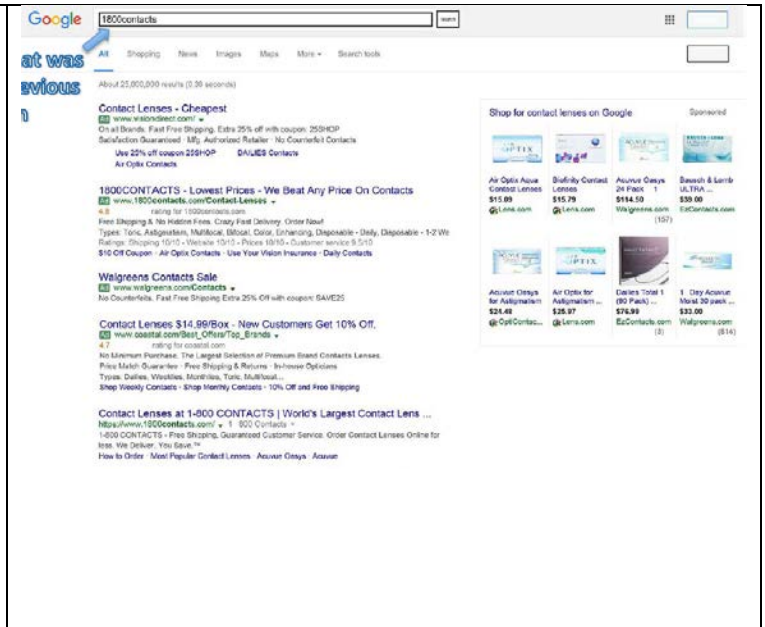
1612. Rather than using an actual SERP for the query “1-800 Contacts” as the basis for his 2016 test stimulus, Dr. Jacoby used an actual SERP for the query “contact lenses.” (Jacoby, Tr. 2270-2275).

1613. The fact that Dr. Jacoby used a SERP for the query “contact lenses” as the basis for his 2016 test stimulus is readily apparent by comparing the actual SERP for the query “contact lenses” in the materials Dr. Jacoby’s relied on with Dr. Jacoby’s 2016 test stimulus. (*Compare*

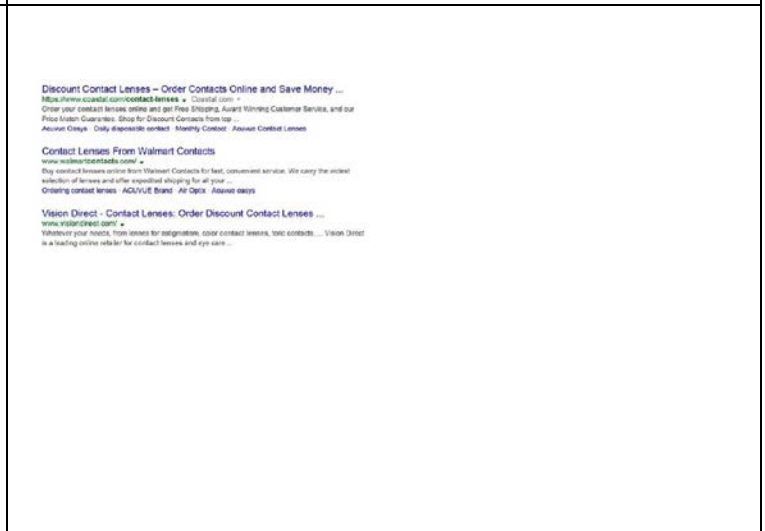
RX 1993 (actual SERP for search query “contact lenses”) with RX8008-429-430 (2016 test stimuli); Jacoby, Tr. 2270-2275 (admitting that actual SERP and 2016 test stimulus have numerous identical elements)). The actual SERP for the query “contact lenses” in the materials Dr. Jacoby’s relied on (left side) and Dr. Jacoby’s 2016 test stimulus (right side) are shown below:



RX1993-001



RX1993-002



(RX 1993; RX8008-429-430).

1614. As can be seen by comparing the actual SERP for the query “contact lenses” in the materials Dr. Jacoby’s relied on with Dr. Jacoby’s 2016 test stimulus, (1) the first three ads are identical, (2) the fourth ad in the test stimulus is identical to the first ad below the organic listings in the actual SERP, (3) the last ad below the organic listings are identical, (4) with the exception of the map in the actual SERP, the organic listings are identical, (5) the news items are identical, and (6) each page states “About 25,000,000 results in .36 seconds.” (RX 1993; CX 8008-429-430; Jacoby, Tr. 2270-2275).

1615. Because Dr. Jacoby used an actual SERP for the query “contact lenses,” his 2016 test stimulus does not replicate the results of a search for “1-800 Contacts.”

1616. In his rebuttal report, Dr. Jacoby provided an actual SERP for the query “1-800 Contacts.” (CX 8011-057; Jacoby, Tr. 2276). The actual SERP for the query “1-800 Contacts” in

Dr. Jacoby's rebuttal report is typical of Google SERPs for the that query and variations of the 1-800 Contacts trademark. (*Compare CX 8011-057 with RX 310-0001-0010*).

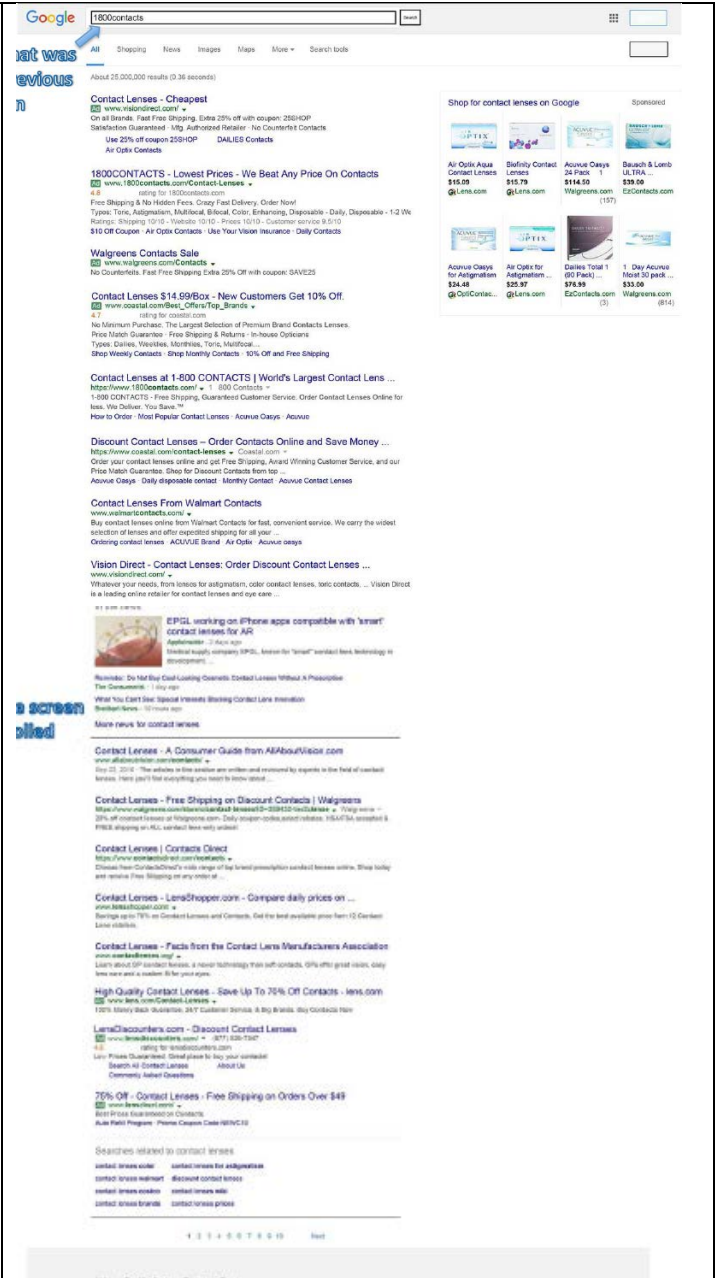
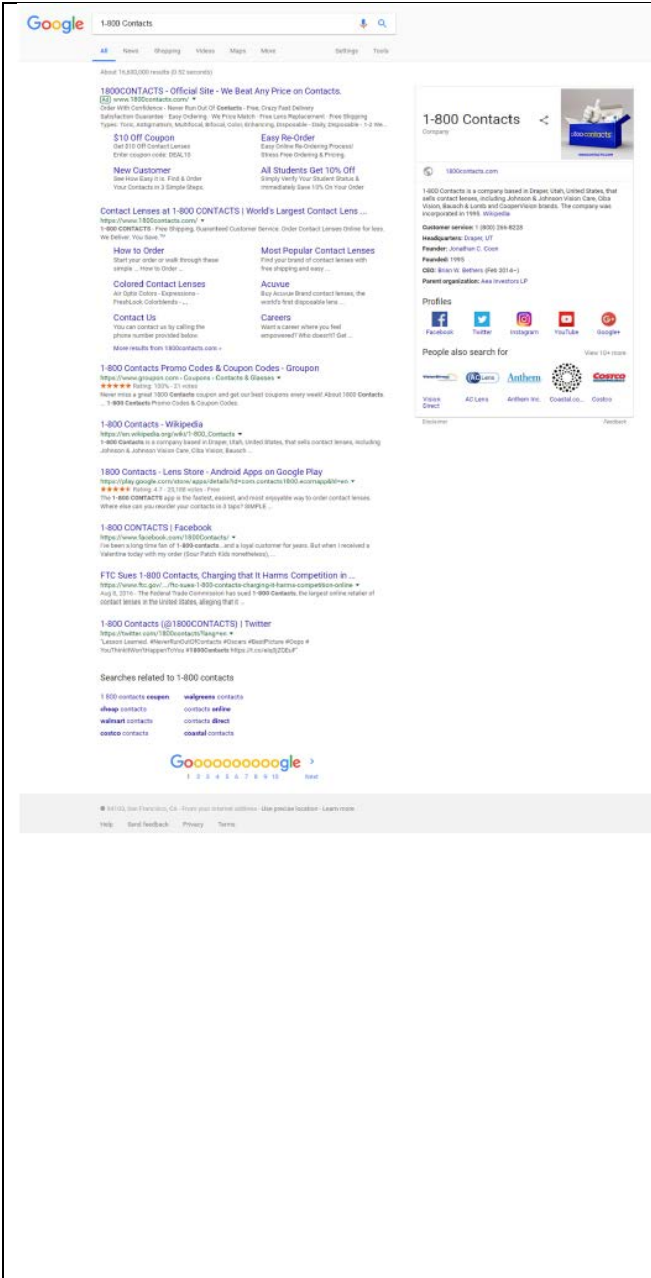
1617. A comparison of Dr. Jacoby's 2016 test stimulus with an actual SERP for the query "1-800 Contacts" shows significant differences. (Jacoby, Tr. 2275-2280; *compare CX 8011-057* (actual SERP in Jacoby rebuttal report) *with CX 8008-0429-430* (2016 test stimulus)).

1618. Dr. Jacoby's 2016 test stimulus includes PLAs, or Shopping, ads on the right side of the SERP. (CX 8008-0429; Jacoby, Tr. 2275-2280). In contrast, the actual SERP for the query "1-800 Contacts" does not have PLA, or Shopping, ads on the right side. (CX 8011-057). Instead, it includes a Knowledge Graph for 1-800 Contacts. (CX 8011-057; Jacoby, Tr. 2275-2281).

1619. Dr. Jacoby's 2016 test stimulus includes organic links for competitors of 1-800 Contacts. (CX 8008-0429; Jacoby, Tr. 2275-2280). In contrast, the actual SERP for the query "1-800 Contacts" does not have any organic links for competitors of 1-800 Contacts. (CX 8011-057; Jacoby, Tr. 2275-2280).

1620. Dr. Jacoby's 2016 test stimulus includes one organic link for 1-800 Contacts. (CX 8008-0429; Jacoby, Tr. 2275-2280). In contrast, the actual SERP for the query "1-800 Contacts" has five organic links for 1-800 Contacts. (CX 8011-057; Jacoby, Tr. 2275-2280).

1621. The actual SERP for the query "1-800 Contacts" in Dr. Jacoby's rebuttal report (left side) and Dr. Jacoby's 2016 test stimulus (right side) are shown below:



(CX 8011-057; CX 8008-0429-430).

1622. Because of the significant differences between Dr. Jacoby’s 2016 test stimulus and the actual SERP for the query “1-800 Contacts,” Dr. Jacoby admitted that his 2016 test stimulus did not test the question of whether rivals ads shown in response to the query “1-800 Contacts” on a SERP with the characteristics of an actual actual SERP for the query “1-800 Contacts”:



QUESTION: So if the relevant question in this case is whether there would be confusion caused by rival ads showing up on a search engine result page that had, like in the real world, a Knowledge Graph for 1-800 Contacts on the right-hand side, no organic links for rival sellers of contact lenses, and only organic links that related to 1-800 Contacts, your test stimulus did not test that question, did it?"

THE WITNESS: The answer is, if that was the question, I don't agree, but if that was the question, my stimulus did not represent that....

(Jacoby, Tr. 2281).

1623. Dr. Jacoby further admitted that he could not tell us, without running a different test, whether or not there would be significant confusion on a search engine results page caused by rival ads in response to a search on "1-800 Contacts" and showing on a page that has a Knowledge Graph about 1-800 Contacts, organic results that all related to 1-800 Contacts, and no organic links for rival companies." (Jacoby, Tr. 2282).

1624. In effect, Dr. Jacoby used the wrong test stimulus. Accordingly, his survey results are unreliable and will be accorded no weight.

1625. Dr. Jacoby made this same mistake in another case, resulting in his survey being excluded. (Jacoby, Tr. 2285).

1626. In addition, Dr. Jacoby used the wrong test stimulus in a case in front of the Trademark Trial and Appeal Board. In *Factory Five Racing, Inc. v. Carroll Shelby*, 2010 WL 4232609 (TTAB Oct. 13, 2010), the Board found that Dr. Jacoby had used as his stimulus the photograph of the wrong model car, which did not have a distinguishing feature that the real-world car had. 2010 WL 4232609, \*15. When asked at deposition about this mistake, Dr. Jacoby replied, "You know, this is interesting to me. Number one, these photographs were provided by Mr. Cummings. Why he didn't provide a photo with that very distinguishing feature, exhaust pipes, would be a question for him. I took what I was provided." 2010 WL 4232609, \*16.

1627. The Board found that the discrepancy “calls into question the reliability of the survey” and “diminishes the probative value of the survey.” 2010 WL 4232609, \*16. Based on this and other failings, the Board found Dr. Jacoby’s survey of “no probative value.” 2010 WL 4232609, \*15.

***(b) Dr. Jacoby’s Pre-2016 Test Stimulus Failed To Replicate Recent Marketplace Conditions***

1628. Dr. Jacoby also created a pre-2016 test stimulus. (CX 8008-431). According to Dr. Jacoby, his pre-2016 test stimulus was intended to replicate the format of a Google SERP just before February 2016, when Google removed ads from the right-hand side of the SERP. (Jacoby, Tr. 2286-2287, 2288 (“And what you tried to do here with CX 8008 at page 431 was to create a search engine results page that is what you would see in the real world in the beginning of 2016; right? A. Yeah. To exemplify it, right.”); RX 715-1734 (Google SERP format changed in February 2016)).

1629. In creating his pre-2016 SERP, Dr. Jacoby was not intending to “to go back and way back to 2004 or something when these [1-800 Contacts] lawsuits happened.” (Jacoby, Tr. 2288).

1630. As Dr. Jacoby admitted, a survey could be questioned for using an outdated format for a Google SERP. (Jacoby, Tr. 2286-2287). As he put it, “You really can’t go back in time.” (Jacoby, Tr. 2286-2287).

1631. In this case, Dr. Jacoby thought it was appropriate to use an outdated SERP format because the change in formatting was very recent. (Jacoby, Tr. 2287).

1632. As Dr. Jacoby stated in his rebuttal report, it was critical to the reliability of his survey that the pre-2016 test stimulus replicate the Google SERP format in early 2016: “[I]t is important to understand that we are testing consumers on a SERP that existed last year, not on

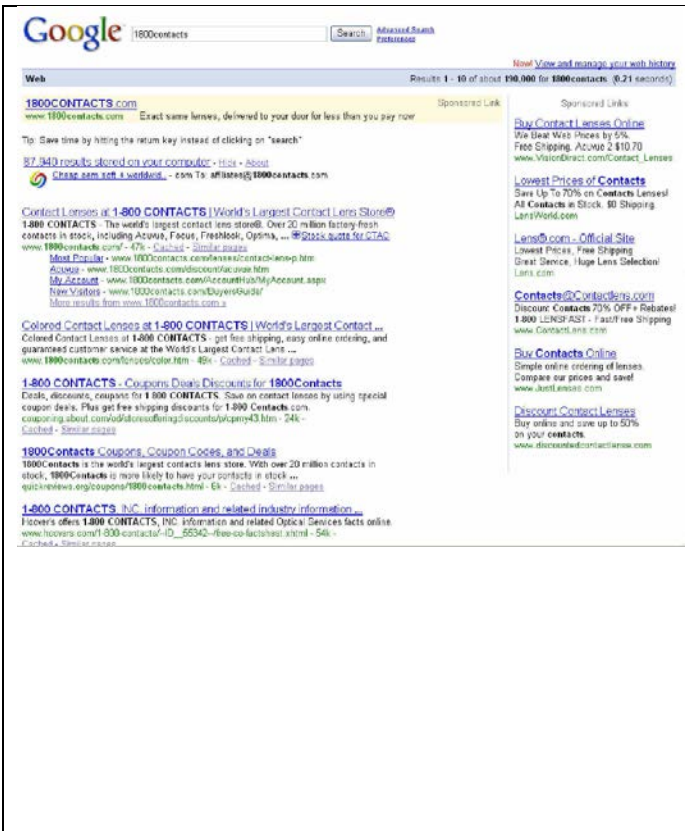
pages from the advent of the Internet age. Displaying advertisements in the real-world manner in which Google displayed such advertisements until very recently is perfectly reasonable and consistent with accepted survey protocol.” (CX 8011-029-30).

1633. The pre-2016 test stimulus is shown at CX 8008-431-432.

1634. As discussed below, Dr. Jacoby’s pre-2016 test stimulus does not replicate a Google SERP as of early 2016. Rather, his pre-2016 test stimulus replicates a Google SERP from October 2007. Accordingly, Dr. Jacoby’s study is unreliable and will be accorded no weight.

1635. As Dr. Jacoby was forced to admit, instead of using a SERP from early 2016 to create his pre-2016 test stimulus, he used a SERP from October 2007 that was included in a complaint filed by 1-800 Contacts in 2008. (Jacoby, Tr. 2288-2292, 2291-2292 (“Q. So what you used in your pre-2016 test stimulus was not based on a search engine result at the beginning of 2016, it was based on a search engine result page that was created in 2007; right? A. Yes.”)).

1636. The fact that Dr. Jacoby’s pre-2016 test stimulus replicates the format of a Google SERP from October 2007 is demonstrated by a comparison of the pre-2016 test stimulus and the SERP included in the 1-800 Contacts 2008 complaint. (*Compare* CX 8008-431-432 (pre-2016 stimulus) *with* RX 414-0007 (SERP in 2008 complaint)). The Google SERP from October 2007 (left side) and the the pre-2016 test stimulus (right side) are shown below:



(RX 414-0007; CX 8008-431-432).

1637. There can be no doubt that Dr. Jacoby’s pre-2016 test stimulus was based on the 2007 Google SERP. The organic results in the 2007 SERP and Dr. Jacoby’s pre-2016 test stimulus are identical. (Jacoby, Tr. 2290-2291). Both state at the top right, “Results 1-10 of about 190,000.” (Jacoby, Tr. 2290-2291). Both state below the 1-800 Contacts ad, “87,940 results stored on your computer.” (Jacoby, Tr. 2290-2291).

1638. When confronted by this evidence and his testimony that he had based his pre-2016 test stimulus on Google search results from early 2016, Dr. Jacoby equivocated and claimed that he could not remember how the stimulus was created. (Jacoby, Tr. 2293 (“Q. Ten minutes ago, Dr. Jacoby, you testified that you created your pre-’16 test condition based on a search engine result that was run in the beginning of 2016; correct? A. Mr. Gates, that’s what I testified. You’re running a lot of stuff by me. If you want me to sit down and spend 15 minutes looking at each one

of these exactly, I will. But I don't remember exactly what happened at this point in time, as I tried to answer your previous question. A lot has gone on in your life and mine since the time these were created. I don't know exactly what was used at this point and what I instructed the subcontractor. To be definitive about that, I'd have to be able to go back with the subcontractor and try and recreate what happened at that point in time.”)).

1639. When asked point blank whether he based his “pre-2016 test condition on a search engine result that was generated at the beginning of 2016,” Dr. Jacoby claimed that it was based “on that and it’s an amalgam of many things I saw.” (Jacoby Tr. 2294). Given the clear evidence that Dr. Jacoby’s pre-2016 test condition was based on the 2007 Google SERP, Dr. Jacoby’s testimony is not credible.

1640. When pushed, Dr. Jacoby admitted that he could not answer the question of whether his pre-2016 test stimulus was an accurate representation of the Google SERP format as of the beginning of 2016. (Jacoby, Tr. 2295 (“Q. Dr. Jacoby, can you tell us, based on your personal knowledge, whether the test stimuli represented at CX 8008 page 431 is an accurate representation of the format in which Google's search engine pages appeared in January of 2016? A. .... I can't answer your question. The total, complete, honest answer to your question is I don't know.”)).

1641. The evidence in the record demonstrates that the Google SERP format has gone through numerous changes since 2007. [REDACTED]; *see also* RXD027 (illustrating testimony); Jacoby, Tr. 2295-2297)).

1642. Given the numerous changes to the Google SERP since 2007, the use of Dr. Jacoby’s pre-2016 test stimulus rendered his study unreliable.

1643. Dr. Jacoby’s pre-2016 test stimulus also rendered his survey unreliable because Dr. Jacoby failed to ensure that respondents were in the market at the relevant time. (Van Liere, Tr.

3078). As Dr. Van Liere testified, one problem with Dr. Jacoby's use of the pre-2016 stimulus was "if he's trying to measure whether confusion over this search results page would have occurred in the past, he would have had to include in his screening questions ... that would determine whether the consumers who were seeing it were actually in the market during the period of time at which he intended to represent the data for. So, for example, if this is a 2009 version of the search results page, you'd have to know, well, am I asking people who were in the market in 2009 whether they're confused or not by these ads. He didn't do that. He doesn't do anything to determine whether consumers in the past were in the market for any given period of time." (Van Liere, Tr. 3078).

1644. Dr. Jacoby also failed to take any steps to ask respondents to view the pre-2016 test stimulus as they would have in 2007. (Van Liere, Tr. 3078-3079). As Dr. Van Liere explained, "But if [Dr. Jacoby is] actually trying to use it as some sort of an estimate of what -- whether there was confusion in the past, he would have had to ask some sort of question in which respondents would have to think back, well, if you were looking at this in 2009, what would you think about this or that. And I -- it's a separate issue whether it even could be reliably done, but he doesn't do anything to set the consumer's mindset back to the time when this particular search results page would have occurred." (Van Liere, Tr. 3078-3079).

1645. Accordingly, Dr. Jacoby's survey shall be given no weight.

**(c) *Dr. Jacoby's Survey Failed To Replicate Recent Marketplace Conditions***

1646. Dr. Jacoby admitted that courts have excluded or given little weight to some of his prior surveys because they determined that the survey failed to sufficiently replicate marketplace conditions. (CX 9041 (Jacoby, Dep. at 164).

1647. In this case, Dr. Jacoby's survey is also unreliable because it fails to replicate market conditions in a number of ways.

(i) *The Survey Improperly Drew Attention To A Single Ad*

1648. To begin with, Dr. Jacoby's survey failed to replicate marketplace conditions because, in its main question, the survey improperly drew respondents' attention to a single sponsored ad by inserting into the stimulus a large green arrow.

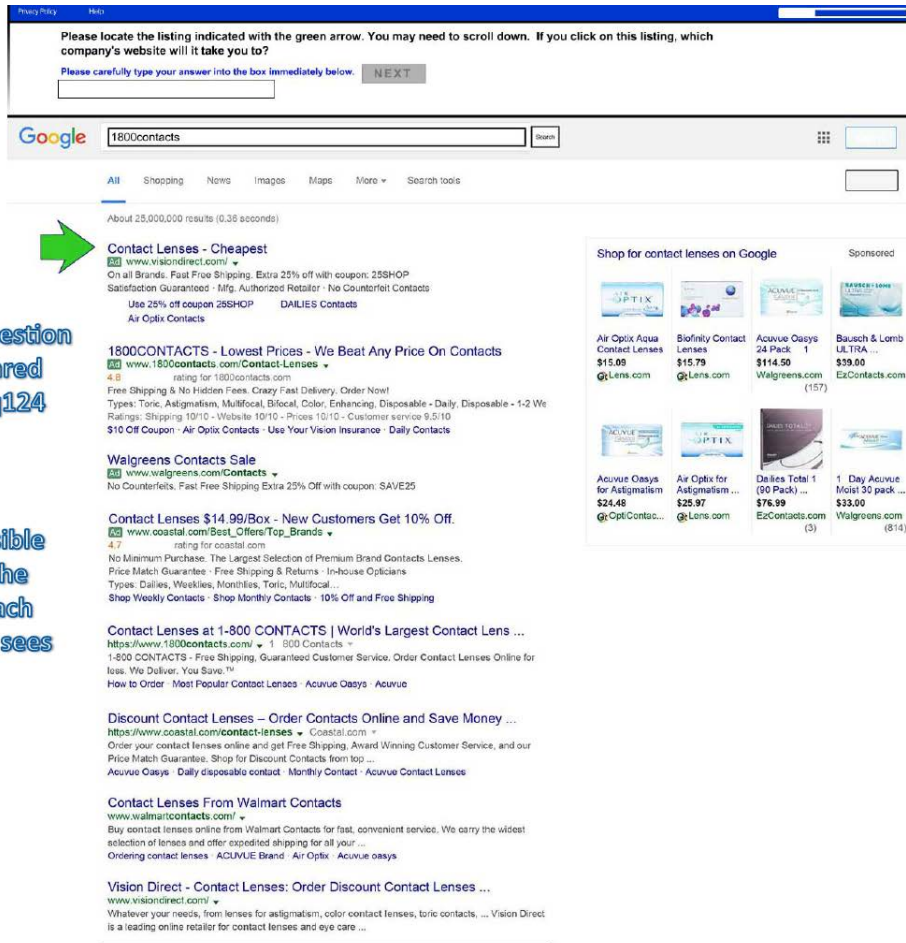
1649. The "main question" in Dr. Jacoby's survey related to source confusion. (Jacoby, Tr. 2310-2311; CX 8008-445).

1650. In this "main question" related to source confusion, the survey asked the respondents to look at the ad indicated by the green arrow and asked respondents to write in the answer to the following question, "If you click on this listing, which company's website would it take you to." (CX 8008-445). Each respondent was asked only about one ad. (Jacoby, Tr. 2310-2311).

1651. The screen shot with the "main question" in Dr. Jacoby's survey is below:

Condition 1  
Arrow 1

q128



Note: this q128 question randomly appeared before or after q124

There are 6 possible listings to get the green arrow. Each respondent only sees one.

1652. As Dr. Van Liere explained, Dr. Jacoby does not replicate a real search environment in which consumers are free to scan as much or as little of the search results page as they wish before making their own selections. (RX 735-0023). Consumers reviewing actual search results pages are able to select the natural, or organic, listings as well as sponsored advertisements if they wish. (RX 735-0023).

1653. Instead, Dr. Jacoby modifies the Google search results in very artificial ways. (RX 735-0023). Dr. Jacoby places large green arrows on the page, singling out and directing the respondent to a particular link or links and then asks closed-end questions about the highlighted links. (RX 735-0023). Dr. Jacoby's instruction to respondents for his key source questions direct the respondents, "Please locate the listing indicated with the green arrow. You may need to scroll



down.” (RX 735-0023). Dr. Jacoby then asks respondents, “If you click on this listing, which company’s website will it take you to?” (RX 735-0023).

1654. This is highly artificial and does not reasonably replicate consumer review of search results. (RX 735-0023). By contrast, in Dr. Van Liere’s study, the respondent is instructed that he or she should “review these search results as you normally would” and click on the “link or links, if any” that she would like to select. (RX 735-0023).

1655. Dr. Jacoby’s use of the green arrows and asking about a single ad makes the survey unreliable. (Van Liere, Tr. 3080-3082). As Dr. Van Liere explained, “the way in which [Dr. Jacoby] uses these large green arrows to essentially force respondents to look at very specific parts of the page ... doesn’t replicate marketplace conditions, meaning doesn’t replicate the way in which a consumer would interact with a search results page, so in that sense it also doesn’t reasonably replicate marketplace conditions.” (Van Liere, Tr. 3079-3080).

1656. By using the green arrow to identify specific elements of the SERP for respondents to at, the survey leads respondents “to inspect it to a greater degree than they might have if he had simply asked them to look at the page and respond to the page as a whole,” causing respondents to “consider certain parts of the stimulus that you’ve decided they should pay attention to rather than let them look at the stimulus as they normally would .... creating a very artificial way for them to look at the results that they see.” (Van Liere., Tr. 3080-3081).

1657. In fact, Dr. Jacoby himself has written, “The test stimulus, including the mark that appears on the test stimulus, should not be diminished or supplemented in any way that would change how it appears in the marketplace.” (CX 9041 (Jacoby, Dep. at 19-20)).

1658. Other literature regarding surveys confirms that drawing attention to a particular aspect of a stimulus is problematic. As one scholar wrote:

When consumers purchase a product in the real world, they obtain the information they want about the product on their own (without being led by the questions that may be included in the interview). [emphasis in original] They may elect to obtain a great deal of specific information, or they may be satisfied with overall impressions without going into details. To capture this phenomenon, the respondents should be instructed to look at the products, advertisements or marks at issue as they would normally when considering whether to make a purchase of the products at issue.

(CX 735-0025 (quoting Ostberg, Henry D. (2005) “Response to the Article Entitled: A ‘Reading’ Test or a ‘Memory’ Test: Which Survey Methodology Is Correct?” Trademark Reporter, 95: 1446-1449)).

1659. Dr. Jacoby nonetheless admitted that the purpose of the green arrow in his survey was to draw attention to one particular ad. (Jacoby, Tr. 2313 (“Q. Now, just to be a hundred percent clear respondents did see the big -- the green arrow pointed to the particular ad to which you were trying to draw attention; correct? A. Yes. Q. And the purpose of that green arrow was in fact to draw attention to that particular ad; right? A. It was to say, Hey, that's the one we're asking the question about. Yes.”)).

1660. As Dr. Van Liere opined, “Dr. Jacoby fails to meet his own standard and creates an artificial survey environment removed from the way consumers actually interact with the search results page.” (CX 735-0023).

**(ii) *The Survey Did Not Allow Respondents To Engage With The Search Results In A Realistic Way***

1661. By using the green arrow to draw attention to a single ad, and asking only about that ad, the survey did not allow respondents to, as they would in the real-world, select and click on any link on the screen. (Jacoby, Tr. 2308-2312). Dr. Jacoby’s survey therefore did not allow respondents to engage with the search results in a realistic way.

1662. Dr. Jacoby admitted that he could have designed the survey to allow respondents to click on the links; there was no technological or technical impediment to doing so. (Jacoby, Tr. 2312-2313 (“I’m not limited by the technology.”)).

1663. Dr. Jacoby further admitted that he had designed a survey in a prior keyword advertising case in which respondents were allowed to select any of the links that were presented. (Jacoby, Tr. 2315-2316; CX 9041 (Jacoby, Dep. at 20-25)).

***(iii) The Survey Amounted To A Reading Test***

1664. By asking respondents to look at the particular ad indicated by the green arrow and to type into a box the company’s website clicking on the ad will it take you to, Dr. Jacoby’s survey amounted to reading test. (RX 735-0024-0025).

1665. The data show that respondents in Dr. Jacoby’s survey simply read the ad copy or URL and typed it into the box. (RX 735-0024; Jacoby, Tr. 2317-2321; Van Liere, Tr. 3086-3087).

1666. Dr. Jacoby’s data show that 53% of respondents asked “If you click on this listing, which company’s website will it take you to?” simply typed into the supplied box the URL of the link in the ad indicated by the green arrow. (RX 735-0024; Jacoby, Tr. 2317-2321; Van Liere, Tr. 3086-3087).

1667. Thus, for example, respondents asked “If you click on this listing, which company’s website will it take you to?” with regard to the following link simply copied into the answer box “www.lens.com/Contact-Lenses.” (Jacoby, Tr. 2317-2319).



1668. Dr. Jacoby counted such answers as “not confused.” (Jacoby, Tr. 2319-2220).

1669. Dr. Jacoby’s data also show that 8% of respondents asked “If you click on this listing, which company’s website will it take you to?” simply typed into the supplied box a portion of the ad copy from the ad indicated by the green arrow. (RX 735-0024; Jacoby, Tr. 2317-2321).

1670. Thus, for example, respondents asked “If you click on this listing, which company’s website will it take you to?” with regard to the following link simply copied into the answer box “High Quality Contact Lenses - Save Up To 70% Off Contacts.” (Jacoby, Tr. 2317-2319).



1671. Dr. Jacoby counted such answers as “not confused.” (Jacoby, Tr. 2319-2220).

1672. In fact, so long as respondents typed in anything that they saw next to the green arrow, or in fact anything other than “1-800 Contacts,” Dr. Jacoby counted the respondent as “not confused.” (Jacoby, Tr. 2320 (“With a qualification, and that is, a few people typed in gibberish answers. They were just taken out. They weren’t counted at all in the data.”)).

1673. Respondents could type in just “contact lenses” and would be counted as not confused in Dr. Jacoby’s survey because they didn’t type in “1-800 Contacts.” (Jacoby, Tr. 2320).

1674. As one scholar explained, a “reading test” is not appropriate in circumstances, as here, consumers are not making involved, deliberate, thoughtful decisions:

A “reading” test generates a higher level of attention – e.g., a respondent may reflexively examine a product when asked who puts it out. A reading test should thus be used to assess point-of-sale confusion under circumstances where consumers make involved, deliberate, thoughtful decisions.

A “reading” test is inappropriate, however, to disprove likely confusion among normally inattentive consumers, particularly where the stimulus conveys information that might not otherwise come to a consumer’s attention.

(RX 735-0025 (quoting Swann, Jerre B. (2005) “A ‘Reading’ Test or a ‘Memory’ Test: Which Survey Methodology Is Correct?” Trademark Reporter, 95: 876-881)).

1675. As Dr. Van Liere explained, “the one issue that you have to consider is how you’re going to show the stimuli and whether the way in which consumers interact with the stimuli would lead them essentially to just read information off the stimuli rather than interact with it or respond with their perceptions in a way that more reliably measured the degree to which they were confused.” (Van Liere, Tr. 3084).

1676. Dr. Jacoby’s survey “leads the respondent to inspect the particular link with the big green arrow and essentially parrot back what they saw next to the big green arrow rather than any evidence that they’re considering whether the thing they searched on is a website that -- whether this is a website that they would have gone to as 1-800 Contacts . . . . So it’s not really measuring whether the consumer is confusing this link with 1-800 Contacts. It’s simply asking the respondent to look at this ad and tell them what company it would go to with a big green arrow next to the URL of that company.” (Van Liere, Tr. 3085-86).

1677. In particular, Dr. Jacoby’s data showing that 53% of respondents simply copied the URL of the ad and 8% typed in the ad copy next to the green arrow, demonstrates that Dr. Jacoby’s survey is unreliable. As Dr. Van Liere testified, “The use of the big green arrow and the use of a question that divorces it from the search process and a specific question that’s asking to look at, inspect this single ad and say which company’s website it takes you to, all that suggests that it’s not really measuring whether there was some initial interest confusion created by that ad appearing on a search results page.” (Van Liere, Tr. 3088-3089).

1678. Dr. Jacoby’s survey is thus unreliable because it does not measure potential consumer confusion in a realistic circumstance.

*(iv) The Survey Improperly Lengthens The Time To Decide*

1679. Dr. Jacoby's survey also failed to replicate marketplace conditions by requiring respondents to view the test stimuli for an unrealistic amount of time. The survey slowed the decisionmaking process

1680. In the real world, consumers view SERPs very quickly before clicking on a link. (Goodstein, Tr. 2416-17; RX 736-0019, 0030-31).

1681. In Dr. Jacoby's survey, however, respondents were shown a search result and instructed, "Please take as much time looking at this screen as you normally would when thinking about ordering contact lenses online; feel free to scroll up or down if that's what you normally would do." (CX 8008-0034; Jacoby, Tr. 2302-2303). The survey programming would not allow respondents to go to the next part of survey until at least five seconds passed. (CX 8008-114; Jacoby, Tr. 2302-2303).

1682. After respondents clicked the "Next" button, they continued to view the search result and were instructed, "Please locate the listing indicated with the green arrow. You may need to scroll down. If you click on the listing, which company's website will it take you to?" (CX 8008-115; Jacoby, Tr. 2303).

1683. In designing his survey, Dr. Jacoby did not do any study or seek any other's research on how long consumers typically take after they type in a search query, before they select a link. (Jacoby, Tr. 2305-2306).

1684. Respondents in Dr. Jacoby's survey were not limited in the amount of time they could take to respond to the survey question. (Jacoby, Tr. 2306). Dr. Jacoby did not build into the survey anything that would ensure that respondents would try to only take the amount of time that they would take in the real world when they searched on something and picked a link. (Jacoby, Tr. 2306).

1685. Despite requiring respondents to view the search results page through two sets of instructions, one of which precluded respondents from moving on for five seconds, Dr. Jacoby did not know how long respondents spent viewing the search results. (Jacoby, Tr. 2303-04).

1686. As Dr. Jacoby admitted, if a respondent is allowed to view it for an unrealistic length of time, that might undermine the validity of the survey. (Jacoby, Tr. 2300). People can be confused by something that they look at and they can concentrate on for a very short period of time, when they wouldn't be confused by the very same thing if they could concentrate on it for a longer period of time. (CX 9041 (Jacoby, Dep. 115-116)).

1687. Dr. Jacoby testified that he had data showing how long respondents spent on each page in his survey and that the data were provided to Complaint Counsel. (Jacoby, Tr. 2303-2305). This data, however, was never provided to Respondent. (Van Liere, Tr. 3075). Yet, Dr. Jacoby sought to criticize Dr. Van Liere for not collecting such data. (CX 8011-026). Prompted by Complaint Counsel on redirect, Dr. Jacoby claimed to not have relied on the data, but he could not testify, one way or another, whether he "considered" the data in forming his opinions. (Jacoby, Tr. 2353-2354). Given his criticism of Dr. Van Liere, Dr. Jacoby's testimony is not credible.

(v) ***The Survey Questions Are Divorced From The Search Task***

1688. In addition, Dr. Jacoby's survey failed to replicate marketplace conditions because the questions were divorced from the search task. Respondents in Dr. Jacoby's survey entered the search term only once, at the beginning of the main part of the questionnaire. (Jacoby, Tr. 2308). Respondents then go through a number of screens and are asked about links in several survey questions, none of which refer to the search term. (CX 8008-115, 465, 471, 481, 487; Jacoby, Tr. 2308-2310).

1689. Dr. Jacoby did not know how much time elapsed from the time respondents entered the search term and the various questions asked in the survey. (Jacoby, Tr. 2308-2310).

1690. Moreover, as Dr. Van Liere testified, “So the way [Dr. Jacoby has] done and set up the exercise is he’s asked the respondent to scroll and look for the green arrow on the page, so at the beginning of the process he’s essentially asking you to look for a very specific thing on the page that has a green arrow and indeed tells you you might have to scroll down to find it. Then -- that sort of divorces the whole exercise from the search process, because now he’s having you go up and down the page and find very specific things.” (Van Liere, Tr. 3084-3085).

1691. Accordingly, Dr. Jacoby’s survey failed to sufficiently replicate marketplace conditions and is therefore unreliable. It will be accorded no weight.

**(vi) Dr. Jacoby Used An Improper Control Condition**

1692. Respondents in the control condition in Dr. Jacoby’s survey are not asked to search using the term “1800contacts,” as did the respondents in the test condition, but instead were asked to do an entirely different search using the term “contact lenses.” (CX 8008-014-015).

Respondents in both conditions are then shown the very same search results with the very same sponsored links. (*Compare CX 8008-435 with CX 8008-438*).

1693. Dr. Jacoby’s control stimulus is thus exactly the same as the test stimulus, sharing every characteristic (i.e., the sponsored advertisements) whose influence is being assessed on the test stimulus. (RX 735-0027).

1694. In his survey, Dr. Jacoby does not ask one question about respondents’ opinions about the term searched, rather he asks only about the sponsored advertisements. (RX 735-0027).

1695. Because there is no difference between the test and control conditions, any confusion found in the control condition is caused by the same elements as the test condition, and any net calculation based on the control is inappropriate. (RX 735-0027).



1696. By having respondents in his control condition search using “contact lenses” rather than “1800contacts,” respondents in the control group are conducting a different exercise than those in the test group. (Van Liere, Tr. 3089-3090 (“In Dr. Jacoby’s study, he actually has the respondents search on a different term, and the consequence of that is he’s asking the respondents in the test to do one type of exercise, but he’s asking the respondents in the control to do a different exercise.”)).

1697. Dr. Jacoby admitted that it is critical to ensure that the survey seek to put the test and control groups are in the same state of mind. (Jacoby, Tr. 2321-2322).

1698. Dr. Jacoby did no research to determine whether or not people who type in a search term like “1-800 Contacts” have a different intent or a different state of mind than people that type in a generic term like “contact lenses.” (Jacoby, Tr. 2322-2323).

1699. The evidence shows that consumers searching using the 1-800 Contacts trademark are typically seeking to navigate to the 1-800 Contacts website. (RX 733-0045-52 (Ghose Report); CX 9046 (Ghose, Dep. at 116-117)).

1700. Dr. Jacoby was unaware of this evidence. (Jacoby, Tr. 2323-2325).

1701. Using the different search terms—one a variation of 1-800 Contacts’ trademark and one a generic term—put the respondents in the test and control groups in Dr. Jacoby’s survey in a different state of mind or frame of reference. (Van Liere, Tr. 3089-3090).

1702. Because respondents in the control group search using “contact lenses” rather than “1800contacts,” they are likely to interact with the results differently, rendering the study unreliable. (Van Liere, Tr. 3089-3090 (“So in my opinion, that change in the frame of reference makes the way in which the respondent would interact with the search results page change the nature of the exercise such as it’s not a reliable indicator of how much guessing or background noise is in the test condition.”); *see also* Van Liere, Tr. 3093 (“using the search term in the control

different than the search term in the test, respondents bring a different frame of reference to it, and therefore it is not measuring the degree to which in the test the confusion is elevated by forms of error or noise’’)).

1703. In prior keyword advertising studies, Dr. Jacoby used the same search term for his test and control conditions. (CX 9041 (Jacoby Dep. 29, 88-89)).

1704. Dr. Jacoby’s use of a control condition using a search for “contact lenses,” rather than using the same search term as the test condition, rendered Dr. Jacoby’s study unreliable. Accordingly, the study will be given no weight.

***(vii) Dr. Jacoby Used Improper Leading Questions***

1705. Dr. Jacoby also improperly uses leading questions in his control condition. (RX 735-0027-0028). In survey methodology, a “leading” question is one that may cause consumers to think about or evaluate an association between companies that they otherwise wouldn’t have had in their minds, so in that sense it’s causing them to look for an association that may not otherwise have been there. (Van Liere, Tr. 3093-3094).

1706. Respondents in Dr. Jacoby’s control condition were instructed initially to search on “contact lenses” and “1-800 Contacts” was not mentioned to them. (RX 735-0027-0028). Yet after they searched on “contact lenses,” respondents in Dr. Jacoby’s control condition were then asked questions that in three out of four instances explicitly mention and direct them to focus on 1-800 Contacts, or ask explicitly about advertisements in relationship to 1-800 Contacts. (RX 735-0027-0028).

1707. These questions are leading in the context of the control condition because these respondents did not previously have any reason to focus on 1-800 Contacts. (RX 735-0027-0028). In this manner, Dr. Jacoby has transformed his control condition into no more than a slight variant of a keyword search for 1-800 Contacts. (RX 735-0027-0028). It is no surprise, therefore, that Dr.

Jacoby's control condition and his test condition get similar results and therefore net to practically nothing. (RX 735-0028; Van Liere, Tr. 3093-3096).

***(viii) Dr. Jacoby's Study Is Limited To, At Most, 32% Of The Market***

1708. Dr. Jacoby agreed that the formatting of ads and the formatting of the SERP may affect consumer confusion. (Jacoby, Tr. 2346).

1709. Dr. Jacoby agreed that ads appear differently on a mobile device versus a desktop or a laptop. (Jacoby, Tr. 2346).

1710. Dr. Jacoby's survey was conducted by respondents using desktop or laptop computers. (Jacoby, Tr. 2346). He did not test any respondents using mobile devices. (Jacoby, Tr. 2346).

1711. The evidence shows that more than 50% of searches are done on mobile devices. (RX 715-734).

1712. Dr. Jacoby did not test for confusion using any search engines other than Google. (Jacoby, Tr. 2347).

1713. Dr. Jacoby agreed that the formatting of the search engine results pages on Yahoo and other search engine providers differs from the formatting of Google SERPs. (Jacoby, Tr. 2347).

1714. According to statistics relied upon by Dr. Jacoby, Google's market share of search queries is 64%. (Jacoby, Tr. 2347).

1715. Accordingly, Dr. Jacoby's survey tested for confusion in only 32% of the market at most.

**3. *Prof. Goodstein Addressed The Procompetitive Effects Of The Settlement Agreements In His Expert Report And Trial Testimony.***

1716. Respondent's expert, Professor Ronald C. Goodstein, is an Associate Professor of Marketing at Georgetown University who provided testimony in this matter regarding certain procompetitive effects of the Settlement Agreements. (Goodstein, Tr. 2365-2488; RX 736).

1717. In particular, Prof. Goodstein provided testimony that supports a conclusion that the Settlement Agreements at issue had procompetitive effects by lessening the likelihood of consumer confusion and related harms. (Goodstein, Tr. 2365-2488; RX 736-017-042).

**(a) *Prof. Goodstein's Qualifications.***

1718. Prof. Goodstein has a Ph.D. in Marketing from Duke University. He has taught marketing and related courses to MBA students and undergraduates at Georgetown University since 1998. (Goodstein, Tr. 2365-2366; RX 736-044). Prof. Goodstein teaches a variety of courses at Georgetown, including marketing strategy and analytics, integrated marketing communications, marketing strategy, advertising and promotion, and marketing management. (Goodstein, Tr. 2365-2366; RX 736-044).

1719. Prof. Goodstein has co-written and published approximately twenty-five articles in peer-reviewed journals (RX 736-045-046). Prof. Goodstein's principal focus in his writing is consumer behavior and consumer reactions to marketing communications. (Goodstein, Tr. 2371; RX 736-045-046).

1720. In addition to his teaching and writing, Prof. Goodstein spends ten to twenty hours per month reviewing articles by other authors that are under consideration for publication in various academic journals. (Goodstein, Tr. 2369-2370). Prof. Goodstein's role is to review the quality of the research described in an article before it is accepted for publication. (Goodstein, Tr. 2369-2370).

1721. Prof. Goodstein has personally designed or analyzed hundreds of surveys and questionnaires pertaining to consumers' opinions and behaviors relating to marketing and branding. (RX 736-003). Most of that research examines how consumers react to marketing stimuli. (Goodstein, Tr. 2373). Prof. Goodstein has also consulted with various companies about how to build their brands and make them more effective by analyzing their marketing strategies from the customers' perspectives. (Goodstein, Tr. 2368).

1722. Prof. Goodstein has previously served as an expert witness on issues involving, *inter alia*, marketing communications, consumer confusion, and consumer survey research. (RX 736-003). Two of those lawsuits involved trademark infringement claims arising from the use of trademarks in keyword advertising. (Goodstein, Tr. 2377-2378).

1723. Prof. Goodstein is well qualified to provide expert testimony in this matter regarding consumer behavior, consumer reactions to marketing stimuli, and brand management.

***(b) There Is Substantial Evidence That The Settlement Agreements Have Reduced The Likelihood Of Consumer Confusion.***

1724. Prof. Goodstein provided testimony regarding consumer confusion both in his expert report, which he signed under penalty of perjury, and in his testimony at trial. (Goodstein, Tr. 2402-2425; RX 736-017-042).

1725. In particular, Prof. Goodstein opined that certain factors that were present at the time that 1-800 Contacts entered into the Settlement Agreements created a serious potential for consumer confusion from sponsored ads that appear in response to a search for a particular company brand name. (Goodstein, Tr. 2381-2382; RX 736-034). Prof. Goodstein also opined that as a result, it would have been reasonable in the time period in which the Settlement Agreements were executed to expect that a significant percentage of consumers searching for "1-800 Contacts" were confused as to the source, sponsorship, or affiliation of the sponsored ads from other retailers

that appeared in search results for the search “1-800 Contacts.” (Goodstein, Tr. 2381-2382; RX 736-034).

1726. Prof. Goodstein also opined that the factors that contributed to the potential for consumer confusion that he had identified as being present at the time that the Settlement Agreements were reached continue to exist today and are likely to cause confusion when an Internet user sees sponsored ads from other contact lens retailers in response to a search for “1-800 Contacts.” (RX 736-018-019; RX 736-036; Goodstein, Tr. 2381-2382). Prof. Goodstein’s testimony regarding the factors in question is summarized herein.

1727. Two of the factors that create a serious potential for consumer confusion are that: (1) many consumers expect that the top results for an Internet search will be the most relevant to their search query; and (2) many consumers do not recognize that sponsored ads are actually paid advertisements and therefore confuse the sponsored ads for unbiased, impartial organic links. (Goodstein, Tr. 2404-2414; RX 736-018-021). These two factors act in combination to create a substantial risk of consumer confusion. (Goodstein, Tr. 2404-2414; RX 736-025).

1728. Various studies conducted since 2002 have found that there are a substantial number of Internet users who do not recognize that sponsored ads are actually paid advertisements, including the following studies:

- A 2002 Princeton Survey Research Associates study that found more than 60 percent of respondents were unaware search engines accepted payment to list certain sites more prominently than others in search results;
- A 2003 Consumer WebWatch study that found that consumers have difficulty in distinguishing paid search results from organic search results and that even well informed users may not know whether a listing is a paid ad;
- A 2005 Pew Internet & American Life Project research study that found that 62 percent of consumers could not differentiate between sponsored and non-sponsored links;

- A 2005 iCrossing study that reported that 56 percent of Internet users do not know the difference between a paid search listing and a natural search listing;
- A 2012 SEOBook study in which 1,000 Internet searchers were shown search results pages with between three and four sponsored ads and asked, “Does this search result have ads on it?” Between 37 percent and 55 percent of respondents answered “no.” The study’s author explained: “For most search engines, people are generally unaware of ads vs. organic results if there are no ads in the right column . . . most of these yes/no questions came down to about a 50/50 vote, even though all of them had ads on them. It is every bit as true today as it was in 2003”; and
- An April 2016 research report by the UK Office of Communications (“Ofcom”) that found “[h]alf of search engine users could not identify sponsored links in search engine results.”

(Goodstein, Tr. 2406-2407; RX 736-023-024).

1729. The Commission addressed the question of whether Internet users recognize the difference between sponsored ads and organic links in its 2002 and in 2013 letters to search engines. The Commission’s 2002 letter to search engines cited a Consumers Union national survey that found that 60% of Internet users “had no idea that certain search engines were paid fees to list some sites more prominently than others in their search results.” (RX 598-001; RX 736-025). The Commission’s 2013 letter to search engines similarly stated that “consumers ordinarily expect that natural search results are included and ranked based on relevance to a search query, not based on payment from a third party. . . .” (RX 597-0001; RX 736-026). The Commission’s 2013 letter cited the same Pew Research Center survey that Prof. Goodstein cited and relied on in his report. (RX 597-001-002, footnotes 2 and 3; RX 736-026).

1730. Internal studies and reports conducted by [REDACTED] and Yahoo also found that Internet users could not distinguish sponsored ads and organic links. (RX 736-024-025; RX 1887-0002-0005; RX 1877-0031; [REDACTED])

1731. An internal study by Yahoo conducted in 2009 found that fewer than 50% of users, on average, considered Yahoo’s “North” ads (the sponsored ads at the top of a search results page)

as a form of advertising. (RX 736-024-025; RX 1887-0002). Yahoo found that awareness of advertising depended on users' expertise and education levels, but even in the best case scenario, over 40% of users were unaware that "North" ads were sponsored ads. (RX 736-024-025; RX 1887-0002). Yahoo also found that those most likely to click on sponsored ads had the least awareness that they were, in fact, paid advertisements. (RX 736-025; RX 1887-0005).

1732. A 2006 internal report by Yahoo found that less than half of all respondents considered Yahoo's "North" ads as sponsored links and that the Yahoo users who clicked on the most sponsored ads were less aware of sponsored search links advertising. (RX 736-024; RX 1877-0031).

1733. [REDACTED]

1734. Search engines made various changes to search engine results pages between 2002 and 2013 that made it more difficult for Internet users to distinguish paid ads from organic search results. (Goodstein, Tr. 2413-2414; RX 736-025-029). The Commission's 2013 letter to search engines stated that "the features traditional search engines use to differentiate advertising from natural search results have become less noticeable to consumers, especially for advertising located immediately above the natural results ('top ads')." (RX 597-001; RX 736-026). In support of that conclusion, the Commission's 2013 letter relied in part upon the SEOBook survey that Prof. Goodstein cited in his report. (RX 597-002, footnote 3; RX 736-026).



1735. Since the Commission sent its 2013 letter to search engines, the changes made by search engines to the appearance of their search pages have exacerbated the potential for confusion between organic links and sponsored ads. (RX 736-028). As Prof. Goodstein explained, “things have gotten worse for consumers, not better,” because the differences between organic links and sponsored advertising “have become more blurred, not less.” (Goodstein, Tr. 2413-2414).

1736. The search engines have made sponsored ads and organic links less distinguishable in part by eliminating color distinctions and in part by moving more ads to the top of the page, where consumers are more likely to expect to find organic listings. (Goodstein, Tr. 2413-2414; RX 736-026; RX 1877-0002; RX 597-0001; [REDACTED])

1737. Google’s own personnel have also expressed concerns about the company’s changes to the appearance of Google’s search pages. In an email to council@google.com, Google’s Jeff Dean explained that as a result of changes that Google had made to its search pages, the shading on the background for the top ads was so light that the background appeared white and looked like organic results. (RX 1623-0001). Dean stated that the change was “dangerous,” because the only possible reason for the change was that “we want users to not realize that these are ads and to click on them, which would seem to go against any policy that we give people the best search experience possible.” (RX 1623-0001).

1738. According to Google’s company website, Mr. Dean is currently a Google Senior Fellow in Google’s Research Group, where he leads the Google Brain project. *See* <https://research.google.com/pubs/jeff.html> (last accessed on June 9, 2017).

1739. The fast-growing percentage of Internet users who search using mobile devices also contributes to consumer confusion regarding sponsored ads, because mobile devices often display only sponsored ads, and not organic results, on the initial search results screen (without actively

scrolling down). (RX 736-036). As a result, mobile users have less ability to compare sponsored ads with organic results. (RX 736-036).

1740. The potential for consumer confusion also increases when an Internet search is “navigational” in nature, meaning that the user’s intent is to reach a particular website. (RX 736-019, 027-028; Goodstein, Tr. 2414-2417). The navigational nature of a search increases the potential for consumer confusion for two principal reasons: (1) there is a higher probability that the consumer will believe that the top result on the search page is affiliated with the brand website that the consumer was trying to navigate to; and (2) when consumers are conducting a navigational search, they spend less time scrutinizing a link before clicking on it. (Goodstein, Tr. 2414-2417; RX 736-031).

1741. Survey evidence confirms that sponsored ads triggered by competitors’ use of trademarks as keywords created a serious potential for consumer confusion at the time that 1-800 Contacts entered into the Settlement Agreements. (Goodstein, Tr. 2417-2421; RX 736-031-033).

1742. As Prof. Goodstein, who has personally designed or analyzed hundreds of surveys and questionnaires in the course of his marketing research, explained, the consumer surveys conducted by Dr. Van Liere in the American Airlines cases in 2008-2009 are useful in considering the likelihood of confusion at around the time the Settlement Agreements were entered into, because “it is impossible to ask people what their state of mind is today based on stimuli that are 8-10 years old.” (Goodstein, Tr. 2419).

1743. Dr. Van Liere’s consumer surveys in the American Airline cases support the conclusion that a significant number of users performing a navigational search in the 2008-2009 time period could be confused as to the source, affiliation, or sponsorship of sponsored ads by other companies that appear in response to that search. (RX 736-032).

1744. The Van Liere surveys conducted in the American Airlines cases support the conclusion that sponsored ads placed at the top of a search engine results page are likely to cause an even greater amount of confusion, at least in the 2008-2009 time period. (RX 736-032; Goodstein, Tr. 2420).

1745. In sum, the record evidence supports a conclusion that the Settlement Agreements have reduced the likelihood of consumer confusion to the extent that they restricted the display of other retailers' ads that were triggered by a search for the 1-800 Contacts trademark.

***(c) There Is Substantial Evidence That The Settlement Agreements Have Lessened The Likelihood That Sponsored Ads By Other Retailers That Appear In Response To A Search For "1-800 Contacts" Would Cause That Trademark To Become Less Distinctive To Consumers And/Or Less Associated With High Quality And Excellent Service.***

1746. Prof. Goodstein has an extensive research background regarding the ways in which brand equity is built and the ways in which that brand equity can be diminished. (RX 736-003-005; Goodstein, Tr. 2383).

1747. The strength of a brand – its “brand equity” – can be critical to attracting and retaining customers and to the long-term success of a company. (RX 736-005).

1748. A powerful brand can allow a company to command premium prices because the brand is afforded a higher value by the customer. (Goodstein, Tr. 2383).

1749. A brand's equity is a function of four principal components: (1) brand awareness; (2) a loyal franchise; (3) positive perceived quality; and (4) positive associations related to the brand. (Goodstein, Tr. 2383-2385; RX 736-005).

1750. “Brand association” in this context refers to the image that the company holds in the minds of consumers. (Goodstein, Tr. 2382-2383; 2423-2424; RX 736-037).

1751. “Association” or “associating” is also a marketing tactic whereby a less well-known competitor tries to link, or pair, its brand with a stronger brand, in order to create an association between the two brands in the minds of consumers. (Goodstein, Tr. 2382; RX 736-037-038).

1752. If a less well-known competitor is successful in creating an association between its brand and a stronger brand, the brand equity of the stronger brand will be diminished, and that brand will become less valuable. (Goodstein, Tr. 2424; RX 736-037-039).

1753. The persistent use of 1-800 Contacts’ trademark as a keyword in paid search advertising by a less well-known competitor can be expected over time to build an association in consumers’ minds between the two brands. (RX 736-038-039).

1754. An association between the 1-800 Contacts brand and a less well-known brand would likely erode the value of the 1-800 Contacts trademark. (RX 736-039).

1755. The use of 1-800 Contacts’ trademark to trigger sponsored ads can also be expected to diminish the value of that trademark by causing negative associations with other retailers. (RX 736-039-041).

1756. Negative associations can arise if a consumer has a negative experience with the less well-known brand that has become associated in the consumer’s mind with 1-800 Contacts. (Goodstein, Tr. 2424; RX 736-039-040).

1757. Negative associations can arise if a consumer believes that the ads presented by the less well-known retailer is deceptive or misleading. (RX 736-040-041).

1758. Retailers testified at trial that some online sellers of contact lenses engage in unethical or deceptive business practices. For example, Ryan Aloviz, CEO of online retailer LensDirect, testified that “[t]here’s a lot of companies out there that are [selling contact lenses online] in a way that isn’t ethically correct. . . .” (Aloviz, Tr. 1032).

1759. Peter Clarkson, CEO of online retailer ACLens, testified that some online retailers of contact lenses add hidden handling charges that are not revealed to the customers until the end of the purchasing process. (Clarkson, Tr. 360-361; CX 9039-047 (Clarkson, Dep. at 184)). Mr. Clarkson considers that to be an “unethical and probably a deceptive trade practice.” (Clarkson, Tr. 360-361; CX 9039-057 (Clarkson, Dep. at 224)).

1760. The Commission has recently criticized retailers’ use of hidden handling and shipping charges, for such practices have “the potential to mislead and harm consumers, causing them to pay too much and to waste too much time searching for” various products. (RX 767-0004).

1761. Other potentially deceptive or misleading business practices by online retailers of contact lenses that would diminish the value of the 1-800 Contacts brand if consumers had associated the two companies’ brands include: (1) offering manufacturer rebates that the consumers cannot redeem through online retailers; (2) making unverified claims to offer the “cheapest” prices; and (3) offering “70% off” or similar claims of substantial savings without any effort to verify that such claims are valid or applicable to a substantial group of consumers. (RX 736-039-041).

1762. The record evidence supports the conclusion that the Settlement Agreements have lessened the likelihood that negative associations between 1-800 Contacts’ brand and the brands of lesser-known retailers have become associated in consumers’ minds.

***(d) Prof. Tushnet Is Not Qualified To Rebut The Opinions Of Prof. Goodstein Regarding The Potential For Consumer Confusion Or Harm To 1-800 Contacts’ Trademarks***

1763. Complaint Counsel offered the opinions of Prof. Tushnet in rebuttal to certain opinions offered by Respondent’s expert Prof. Goodstein. (Tushnet, Tr. 4392-93).

1764. Prof. Tushnet is not qualified to offer an opinion on the potential for consumer confusion from sponsored ads or the potential for sponsored ads to harm the value of a company's trademarks. Accordingly, the Court will not consider Prof. Tushnet's rebuttal to Prof. Goodstein or any of Prof. Tushnet's other opinions regarding the potential for consumer confusion from sponsored ads or the potential for sponsored ads to harm the value of a company's trademarks.

1765. Prof. Tushnet lacks the background or expertise in survey design, survey methodology or marketing necessary to serve as an expert witness in those areas. Prof. Tushnet does not have sufficient qualifications to opine on, or rebut, the opinions by Prof. Goodstein set forth in his expert report and testimony regarding the potential for consumer confusion from sponsored ads and the potential for sponsored ads to dilute or harm the value of 1-800 Contacts trademarks. (Tushnet, Tr. 4402, 4408, 4419, 4430).

***D. The Settlement Agreements Reduced Customers' Search Costs***

***1. Most Consumers Who Search For 1-800 Contacts' Trademark Intend To Navigate To 1-800 Contacts' Website***

1766. Consumers who search for a retailer's trademark typically intend to navigate to that retailer's website rather than searching for alternatives. (Ghose, Tr. 3869-70; RX 733-0031 to -0037 (Ghose Report)).

1767. Consumers who search for 1-800 Contacts' trademark typically intended to navigate to 1-800 Contacts' website. (RX 733-0045 to -0052 (Ghose Report); CX 9046 (Ghose, Dep. at 116-117)).

1768. Dr. Athey agrees that typing "1-800 Contacts" into the search bar is a navigational search. (Athey, Tr. 851).

1769. Dr. Athey's model of the counterfactual world includes a variable called "Is searched for" that associates a higher click probability when a search query and an ad are

associated with the same firm. (RX 733-0052 (Ghose Report); CX 8007-062-067, -069-070, -077-080, -108-109 (Athey Report)).

1770. Peter Clarkson of ACLens agreed that a substantial number of people who type “1-800 Contacts” into a search bar are looking for 1-800 Contacts. (Clarkson, Tr. 347).

**(a) Search Engine Data On Consumer Behavior Strongly Indicate Consumers’ Navigational Intent**

1771. Navigational queries are typically associated with click-through rates on links to the website of the retailer the user searched for that are much higher than click-through rates on other sites or ads. (Ghose, Tr. 3880 (“click-through rates are a good proxy for, you know, consumer engagement with the ad, and it shows the typical intent of the person and what he or she might want to do after engaging with the ad”); RX 733-0036, 0037 (Ghose Report)).

1772. Consumers who search for 1-800 Contacts’ trademarks are far more likely to click on a link to 1-800 Contacts’ website than on an ad for another retailer. (RX 733-0046 to -0048 (Ghose Report); RX 733-0050-0052 (Ghose Report)).

1773. [REDACTED]

[REDACTED]

[REDACTED] (RX 733-0095 (Ghose Report); Ghose, Tr. 3881; RX 739-0029, -0096 (Murphy Report)).

1774. [REDACTED]

[REDACTED]

[REDACTED] (RX 733-0095 (Ghose Report); Ghose, Tr. 3881).

1775. [REDACTED]

[REDACTED]

[REDACTED] (RX 733-0095 (Ghose Report); RX 739-0029, -0096 (Murphy Report)).

1776. [REDACTED]

[REDACTED]

[REDACTED] (RX 733-0096 (Ghose Report); Ghose, Tr. 3884).

1777. [REDACTED]

[REDACTED]

[REDACTED] (RX 733-0096 (Ghose Report); Ghose, Tr. 3884-85).

1778. The disparity in click-through rates for ads for 1-800 Contacts and ads for other retailers based on bids for 1-800 Contacts' trademarks [REDACTED]

[REDACTED] (RX 733-0046, 0048 (Ghose Report); Ghose, Tr. 3886, 3892-93).

1779. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 733-0095 (Ghose Report); Ghose, Tr. 3887-88). This disparity in average click-through rates existed regardless of the ad rank of the retailer bidding on its own trademark.

(RX 733-0047 (Ghose Report)).

1780. According to Dr. Evans and Dr. Athey, any retailer will have a higher click-through rate on searches related to its own brand than on searches related to competing brands. (CX 8010-012 (Athey Report); CX 8009-082 (Evans Rebuttal Report)).

1781. [REDACTED]

[REDACTED]

[REDACTED]



[REDACTED] (Ghose, Tr. 3888; RX 733-0047 (Ghose Report)).

1782. According to data from Google regarding ads displayed in response to searches for 1-800 Contacts' trademarks between 2010 and 2016 , the average click-through rate on ads for 1-800 Contacts was [REDACTED]. (RX 733-0046 (Ghose Report); Ghose, Tr. 3883).

1783. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (RX 733-0051 (Ghose Report); Ghose, Tr. 3883).

1784. [REDACTED]  
[REDACTED]  
[REDACTED] (RX 733-0103 (Ghose Report); Ghose, Tr. 3885).

1785. [REDACTED]  
[REDACTED]  
[REDACTED] (RX 733-0103 (Ghose Report)).

1786. [REDACTED]  
[REDACTED]  
[REDACTED] (RX 733-0104 (Ghose Report)).

1787. [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED] (RX 733-0104 (Ghose Report)).

1788. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 733-0050 to -0052 (Ghose Report); Ghose, Tr. 3886, 3892-93).

1789. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ghose, Tr. 3890-91; RX 733-051 (Ghose Report)).

1790. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 733-0051 (Ghose Report); Ghose , Tr. 3891-92).

1791. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ghose, Tr.

3892).

1792. [REDACTED]

[REDACTED] (Ghose, Tr. 3868, 3899-900 , 3927;

RX 733-0048 to 0050 (Ghose Report)).

1793. [REDACTED]

[REDACTED]

[REDACTED] (RX 733-0095 (Ghose Report); Ghose, Tr. 3897).

1794. [REDACTED]

[REDACTED]

[REDACTED] (RX 733-0095 (Ghose Report); Ghose, Tr. 3897).

1795. [REDACTED]

[REDACTED]

[REDACTED] (RX 733-0095 (Ghose Report))

1796. [REDACTED]

[REDACTED]

[REDACTED] (RX 733-0096 (Ghose Report); Ghose, Tr. 3898).

1797. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 733-0096 (Ghose Report); Ghose, Tr. 3898).

1798. [REDACTED]

[REDACTED]

[REDACTED] (RX 733-0049, 0095 (Ghose Report)).

1799. According to data from Google regarding ads displayed based on bids on 1-800 Contact's trademarks between 2002 and 2016, consumers did not convert on more than 0.3% of such ads for any other retailer. (RX 733-0049, 0095 (Ghose Report)).

1800. The disparity in conversion rates for ads for 1-800 Contacts and ads for other retailers based on bids for 1-800 Contacts' trademarks indicates that consumers who search for 1-800 Contacts' trademarks intend to navigate to its website and meaningfully engage with 1-800 Contacts. (RX 733-0048 to 0050 (Ghose Report); Ghose, Tr. 3899, 3899-900, 3927).

1801. The disparity in conversion rates for ads for 1-800 Contacts and ads for other retailers based on bids for 1-800 Contacts' trademarks also supports the inference that consumers who clicked on other retailers' ads did so by mistake. (RX 733-0049 (Ghose Report)).

1802. The disparity in conversion rates for ads for 1-800 Contacts and ads for other retailers based on bids for 1-800 Contacts' trademarks also supports the inference that consumers who clicked on other retailers' ads found those retailers' website less appealing or useful than 1-800 Contacts' website. (RX 733-0049 (Ghose Report)).

1803. [REDACTED]

[REDACTED] (RX 733-0095 (Ghose Report); Ghose, Tr. 3900-01). This disparity in average conversion rates existed regardless of the ad rank of the retailer bidding on its own trademark. (RX 733-0049 (Ghose Report)).

1804. The fact that the average conversion rate on ads for each retailer in response to the retailer's bid on its own trademarks was [REDACTED]

[REDACTED] (RX 733-0049 (Ghose Report); Ghose, Tr. 3901-02).

1805. Dr. Athey agreed that the data show that among consumers who search for 1-800 Contacts' trademarks, the conversion rate for ads for 1-800 Contacts is much higher than for ads for other retailers. (CX 9043 (Athey, Dep. at 282-83)).

1806. Dr. Athey's only explanation for this disparity was that some existing 1-800 Contacts customers might not have their prescription nearby. (CX 9043 (Athey, Dep. at 284-85).

1807. However, Dr. Athey did not point to any evidence about how many consumers who search for 1-800 Contacts' trademarks and click on an ad for another retailer do not have their prescription nearby. (CX 9043 (Athey, Dep. at 286)).

**(b) *Industry Sources Confirm That Searches For A Retailer's Name Are Navigational***

1808. According to Bing, "navigational queries are queries where users typically navigate to a single site or web page." (RX 658-0003).

1809. Bing has cited searches for "target" and "amazon" as examples of navigational queries." (RX 658-0004).

1810. [REDACTED]

[REDACTED] (CX 1669; RX 704-0005 (Iyer Decl.) ¶ 18).

1811. [REDACTED] (CX 1670, RX 704-0005 (Iyer Decl.) ¶ 19).

1812. Google's Search Quality Rating Guidelines recognize that consumers who search for the term "amazon" have "clear intent to go to the amazon.com website." (RX 121-080).

1813. Google's Search Quality Rating Guidelines indicate that a link to Amazon's website will "fully meet" the needs of a consumer who searches for the term "amazon." (RX 121-080).

1814. Google's Search Quality Rating Guidelines define a search result that "Fully Meets" the user's need as one in which "[a]lmost all mobile users would be immediately and fully satisfied by the result and would not need to view other results to satisfy their need." (RX 121-076).

1815. Google’s search result page for a search for “1-800 Contacts” displays the Knowledge Graph. (CX 8007-010 (Athey Report)).

1816. Google’s search results page for a search for “contact lenses” does not display the Knowledge Graph. (CX 8007-009 (Athey Report); RX 733-0034 (Ghose Report)).

1817. The circumstances in which Google displays the Knowledge Graph indicate that consumers searching for 1-800 Contacts typically are interested in information about 1-800 Contacts. (Ghose, Tr. 3873-74, 3875-3876; RX 733-0034 (Ghose Report)).

1818. Google’s search results page for a search for “contact lenses” displays Product Listing Advertisements. (CX 8007-009 (Athey Report); RX 733-0034 (Ghose Report)).

1819. Google’s search results page for a search for “1-800 Contacts” does not display Product Listing Advertisements. (CX 8007-010 (Athey Report); RX 733-0034 (Ghose Report)).

1820. The circumstances in which Google displays Product Listing Advertisements indicates that consumers searching for 1-800 Contacts are not typically interested in comparative price information. (Ghose, Tr. 3874-76; RX 733-0034 (Ghose Report)).

***2. Additional Ads Are Likely To Be Only Minimally Relevant To Consumers Searching With Navigational Intent***

1821. Determining the effect of the settlements on consumers requires evaluating the effect of the settlements on the value of search results. (RX 739-0065 (Murphy Report)).

1822. Determining the effect of the settlements on the value of search results requires comparing the value of any information made unavailable to consumers with the potential benefits of reducing distraction and confusion. (RX 739-0065 (Murphy Report)).

1823. Ads for other retailers in response to searches for 1-800 Contacts’ trademarks are only minimally relevant to many consumers. (Ghose, Tr. 3904-05, 3929-31, 3955-56; RX 733-0006, -0024 to -0025).

1824. Because search engines display organic links based on websites' relevance and usefulness as well as advertisers' bids, the rankings of paid ads and organic links can be very different. (RX 733-0024 (Ghose Report); Ghose, Tr. 3909-10).

1825. Google's algorithms for organic results are a reliable method for assessing what websites will be relevant and useful for a consumer. (CX 9046 (Ghose, Dep. at 47); RX 733-0010 to -011, -0024 to -0025 (Ghose Report)).

1826. In many cases, search engines display ads for websites at the top of the search results page that would be ranked below many other websites in the organic search results. (RX 733-0024 (Ghose Report); RX 733-0156-0194; Ghose, Tr. 3908-11, 4003; RX 739-0055 to -0056, -0093 to -0094 (Murphy Report)).

1827. Search engines do not display organic links to other retailers on the first page of organic search results in response to a search for 1-800 Contacts' trademarks. (RX 733-0025 (Ghose Report)).

1828. Google displays ads at the top of the search results page for a search for 1-800 Contact's trademark that do not appear in the first 20 pages of organic links. (Ghose, Tr. 3910-11; RX 733-0024, RX 733-0156-0190 (Ghose Report)).

1829. The fact that search engines display ads for websites at the top of the search results page that would be ranked below many other websites in the organic search results indicates that links to other retailers in response to searches for 1-800 Contact's trademarks are only minimally relevant to many consumers. (Ghose, Tr. 3911-12; RX 733-0006, -0024-0025; CX 9046 (Ghose, Dep. at 49)).

**3. *Displaying Minimally Relevant Additional Ads To Consumers Searching For 1-800 Contacts Is Likely To Increase Their Search Costs***

1830. Every consumer is not better off when he or she has more paid ads to choose from in response to a search for 1-800 Contacts. (Ghose, Tr. 3913; RX 733-0038-0040 (Ghose Report); CX 9048 (Murphy, Dep. at 79-82); CX 9046 (Ghose, Dep. at 84, 151-52, 175)).

1831. Additional advertisements regarding the prices of 1-800 Contacts' rivals would not necessarily raise welfare for a consumer that is not looking for that information. (RX 739-0082 (Murphy Report)).

1832. A large fraction of consumers who search for 1-800 Contacts are very likely harmed by additional ads for other retailers. (Ghose, Tr. 3928-30, 4080-81; RX 733-0038 to 0040 (Ghose Report)).

1833. Presenting consumers that have an intent to navigate to a particular website with additional ads is likely to increase their search costs. (RX 733-0007, RX 733-0037-0041 (Ghose Report); CX 9046 (Ghose, Dep. at 89, 151-52)).

1834. Presenting additional ads for other retailers to consumers that have an intent to navigate to 1-800 Contacts' website is likely to increase their search costs. (Ghose, Tr. 3928-31, 3989, 4007, 4009; RX 733-0038-0040 (Ghose Report); CX 9046 (Ghose, Dep. at 84, 151-52)).

1835. Presenting additional ads for other retailers to consumers that have an intent to navigate to a particular website has the potential to harm those consumers. (RX 733-0038-040 (Ghose Report); Ghose, Tr. 3928-30, 4080-81; CX 9046 (Ghose, Dep. at 84, 151-52, 175)).

1836. If presenting additional ads for other retailers to consumers that have an intent to navigate to 1-800 Contacts' website is likely to increase their search costs, having settlement agreements in place to prevent such ads can be helpful to consumers. (Ghose, Tr. 3960, 3994; CX 9046 (Ghose, Dep. at 186)).



1837. Economists have long recognized that the process of searching through alternatives before making a choice is costly. (RX 733-0028 (Ghose Report)).

1838. Consumers using search engines experience search costs. (RX 733-0028 to -0029 (Ghose Report); Ghose, Tr. 3912; Athey, Tr. 913, 949; CX 9043 (Athey, Dep. at 188); CX 8007-020 (Athey Report)).

1839. Empirical studies indicate that online search is costly for consumers. (RX 733-0029-0030 (Ghose Report); Ghose, Tr. 3912-13; CX 9046 (Ghose, Dep. at 74-75)).

1840. Dr. Athey agreed that consumers experience search costs online. (Athey, Tr. 913, 949; CX 9043 (Athey, Dep. at 188); CX 8007-020 (Athey Report)).

1841. Consumers' search costs of using search engines on a mobile device are higher than on computers because the devices' screens are smaller. (RX 733-00230 (Ghose Report); Ghose, Tr. 3916-17).

1842. Screen size is particularly important given the trend that more and more searches are being done on mobile devices. (Athey, Tr. 911; Ghose, Tr. 3917).

1843. Today, with respect to searches on mobile devices, paid ads are filling up the entirety of the screen. (Athey, Tr. 911).

1844. Approximately 50 percent of searches are conducted on mobile devices. (Athey, Tr. 912; Ghose, Tr. 3917; RX 733-0010 (Ghose Report)).

1845. Consumers' search costs in using search engines depend on their intent. (Ghose, Tr. 3903-04; CX 9043 (Athey, Dep. at 47-48)).

1846. Providing consumers with additional search results can reduce consumers' satisfaction. (Ghose, Tr. 4013; RX 733-0030, -0031 (Ghose Report); Athey, Tr. 913).

1847. Empirical literature indicates that increasing the number of search engine results may reduce consumers' satisfaction with the search process. (RX 733-0031 (Ghose Report); Ghose, Tr. 4013).

1848. Dr. Athey agreed that search costs can cause consumers to become frustrated and dissatisfied and reduce consumer welfare. (Athey. Tr. 913).

1849. Many consumers find advertising annoying. (Ghose, Tr. 3936).

1850. Consumers often pay to avoid seeing advertisements. (RX 739-0082 (Murphy Report)).

1851. The choice overload problem refers to the fact that when users have to make choices from a number of offers, the task often becomes complex and complicated, and additional information can be overwhelming. (Ghose, Tr. 3913-14; RX 733-0031 (Ghose Report); RX 1963-001).

1852. According to a behavioral scientist at Bing, "even though it seems like more choices should always be better, we are actually less happy when we have too many choices. This is because of a phenomenon psychologists call choice overload and if you've ever stood in the salad dressing aisle at your local supermarket, you know exactly what it is." (RX 1963-001).

1853. According to a behavioral scientist at Bing, there are "several reasons that having too many choices can make us unhappy: "First, it can create post-decisional regret, sometimes called buyer's remorse: that feeling you get after you make a decision and instantly start worrying that another option might have been better. The more options, the more worry." (RX 1963-001).

1854. According to a behavioral scientist at Bing, "even if we end up with choice we are confident about, more choices mean that searching takes longer. So even when we find something that makes us happy, our enjoyment is reduced by the time we spent sorting through the options." (RX 1963-001).

1855. According to a behavioral scientist at Bing, “when the choice set gets too big, we may just give up. 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 much choice can cause us to abandon the things that we truly want.” (RX 1963-001).

1856. A user who suffers from the choice overload problem may completely abandon the search process. (Ghose, Tr. 3915; RX 733-0031 (Ghose Report); RX 1963-001).

1857. According to a behavioral scientist at Bing, psychologists have developed strategies to deal with “choice overload” that “focus on narrowing down the set of options,” or “choice reduction.” (RX 1963-001).

***4. Additional Ads Would Deprive Consumers Of Information That Complaint Counsel Have Not Valued***

1858. When more paid ads appear on a search engine results page, organic results are pushed further down the page. (Athey, Tr. 2082).

1859. Dr. Athey did not quantify the value in terms of social welfare of organic results that would be pushed down the search results page by the additional paid ads for other retailers that she says would appear in response to a search for 1-800 Contacts absent the settlement agreements. (Athey, Tr. 2082-83; CX 9043 (Athey, Dep. at 180)).

1860. Dr. Athey did not compare the value of additional paid ads for other retailers that she says would appear in response to a search for 1-800 Contacts absent the settlement agreements with the value of any organic results that such ads would push down the search result page. (Athey, Tr. 2083; CX 9043 (Athey, Dep. at 281-82)).

***E. Applying Dr. Athey's Own Model Demonstrates That The Settlements Increased Output Of Online Contact Lens Sales***

1861. Assessing whether total consumer welfare was reduced as a result of the settlements requires a determination of the impact of the settlements on all buyers. (RX 739-0083 (Murphy Report)).

1862. It is not sufficient to assess whether the settlements reduced total welfare to analyze the settlements' effects only on buyers who may have purchased from lower priced competitors in a but-for world without the settlements. (RX 739-0083 (Murphy Report)).

1863. Even if in the but-for world average contact lens prices paid by users would be lower, consumers as a whole still could be harmed because in quality adjusted terms average contact lens prices could be higher. (RX 739-0083 (Murphy Report); CX 9042 (Evans Dep. at 202)).

1864. The typical way economists evaluate whether particular conduct causes quality adjusted prices to be higher or lower is to investigate whether the conduct caused an increase or decrease in total output. (RX 739-0083 (Murphy Report)).

1865. [REDACTED]  
[REDACTED]  
[REDACTED] (RX 739-0083 (Murphy Report); CX 8007-032 (Athey Report); Murphy, Tr. 4135-36).

1866. [REDACTED]  
[REDACTED]  
(RX 739-0083 (Murphy Report); Murphy, Tr. 4136)).

1867. [REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 739-0083 (Murphy Report); Murphy, Tr. 4134-36).

1868. [REDACTED]

[REDACTED]

[REDACTED] (RX 739-0083 (Murphy Report); CX 8007-032 (Athey Report);

Murphy, Tr. 4135-36).

1869. [REDACTED]

[REDACTED]

[REDACTED] (RX 739-0083 (Murphy Report); Murphy, Tr. 4136).

1870. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(RX 739-0083, -0084 (Murphy Report); Murphy, Tr. 4136)).

1871. [REDACTED]

[REDACTED]

[REDACTED] (RX 739-0084

(Murphy Report)).

1872. Applying average conversion rates from Google data to Dr. Athey's counterfactual model predicts that the settlement agreements increased conversions in response to searches for 1-800 Contacts' trademarks. (RX 739-0084 (Murphy Report); Murphy, Tr. 4137-4139).

1873. Applying average conversion rates from Google data to Dr. Athey's counterfactual model predicts that the settlement agreements made consumers who searched for 1-800 Contact's

trademarks more successful in purchasing contact lenses. (RX 739-0084 (Murphy Report);  
Murphy, Tr. 4127-4137).

1874. Applying average conversion rates from Google data to Dr. Athey's counterfactual model predicts that the settlement agreements increased consumer welfare. (RX 739-0084 (Murphy Report)).

1875. Applying a conversion rate of 7 percent based on data regarding the conversion rate on ads for Walmart in response to searches for 1-800 Contacts' trademarks would not change the predictions of Dr. Athey's model regarding the number of conversions or output based on searches for 1-800 Contacts' trademarks. (Murphy, Tr. 4362-63).

1876. Applying a conversion rate of 8 percent based on data regarding the conversion rate on ads for Lens Direct in response to searches for 1-800 Contacts' trademarks would not change the predictions of Dr. Athey's model regarding the number of conversions or output based on searches for 1-800 Contacts' trademarks. (Murphy, Tr. 4362-63).

## **XII. The Settlement Agreements Had No Anticompetitive Effects**

### ***A. The Settlement Agreements Are Not Collusive Bidding Agreements***

1877. Collusion does not include an agreement between two companies in which one company claims it had no choice other than to sign the agreement. (Evans, Tr. 1466 ("JUDGE CHAPPELL: Does your definition of 'collusion' include two companies to a contract when one company claims they had no choice but to give in and sign? THE WITNESS: "Yeah. No it doesn't.")).

1878. The settlement agreements are not economically analogous to collusive bidding agreements. (RX 739-0057 to -0059 (Murphy Report)).

1879. The features of the settlement agreements are not consistent with bid rigging cartel arrangements. (RX 739-0057 to -0059 (Murphy Report); Murphy, Tr. 4178-79).

1880. As a matter of economics, if the settlements were designed to rig bids rather than protect trademarks, it would be more effective for the settlement agreements to restrict advertising in response to searches for terms other than the parties' trademarks. (RX 739-0058 (Murphy Report)).

1881. For a bidding cartel to be effective, the cartel must include a high share of potential bidders. (RX 739-0058 (Murphy Report)).

1882. Gains from having an individual bidder join a cartel rise as the number of current members increases because any individual non-member can hold up the existing members and extract all of the cartel profits. (RX 739-0058 (Murphy Report)).

1883. If members of a bidding cartel do not include a high share of bidders, non-cartel members are more likely to win or obtain high placements in auctions that would limit or prohibit the cartel members from increasing their profits. (RX 739-0058 (Murphy Report)).

1884. An effective bidding cartel generally involves a multilateral agreement among firms representing a large share of potential buyers. (RX 739-0058 (Murphy Report)).

1885. The settlement agreements were bilateral, not multilateral. (Evans, Tr. 1711-12; CX 9042 (Evans, Dep. at 114); RX 739-0059 (Murphy Report)).

1886. In a bidding cartel, some members do not win bids even though it would be profitable for them to do so at the winning price. (RX 739-0059 (Murphy Report)).

1887. Cartel members who do not win bids even though it would be profitable for them to do so at the winning price must be compensated for suppressing their bid in order to make it profitable for the members to remain in the cartel. (RX 739-0059 (Murphy Report)).

1888. A cartel therefore must devise a method for distributing cartel profits among members that have agreed to limit their bidding. (RX 739-0059 (Murphy Report)).

1889. The settlement agreements in this case did not include any mechanism for sharing cartel profits. (RX 739-0059 (Murphy Report)).

1890. Economists do not believe that collusion always harms consumers. (Evans, Tr. 1466).

***B. The Settlement Agreements Did Not Deprive Consumers Of Information About Other Retailers Or Their Prices***

1891. In order to have harmed competition, the settlements must have prevented consumers from finding information about 1-800 Contacts' rivals. (RX 733-0062 (Murphy Report)).

1892. The challenged settlement agreements did not deprive consumers interested in comparing price information from obtaining that information. (RX 733-0059 to -0064 (Ghose Report); Ghose, Tr. 3917, 3919; RX 739-0062-63 (Murphy Report); Murphy, Tr. 4094).

1893. [REDACTED]  
[REDACTED] (RX 739-0097, -0099 (Murphy Report)).

***1. The Settlement Agreements Did Not Alter The Relative Mix Of Paid Search Advertising By 1-800 Contacts And Its Competitors***

1894. [REDACTED]  
[REDACTED]  
[REDACTED] (RX 739-0062 to -0063 (Murphy Report); Murphy, Tr. 4195-98).

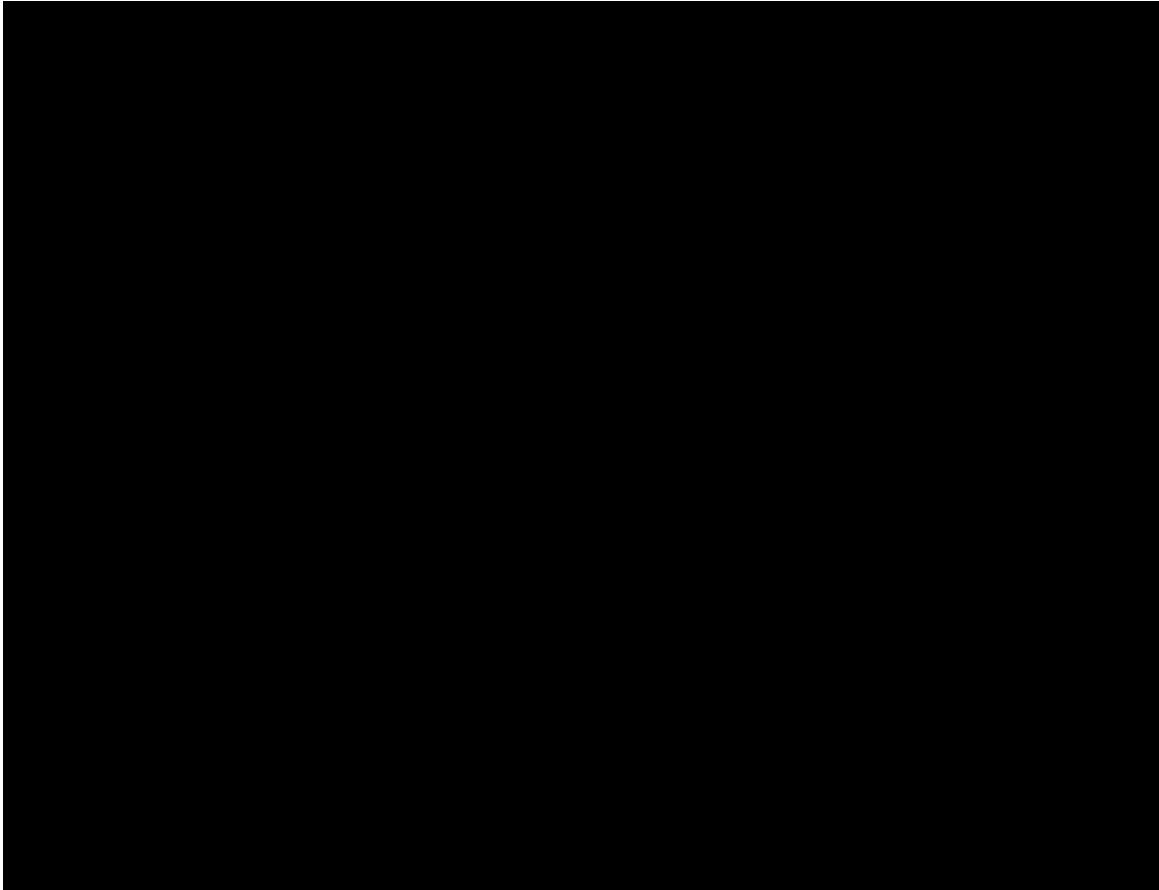
1895. [REDACTED]  
[REDACTED]  
[REDACTED] (RX 733-0062, -0105 (Murphy Report); Murphy, Tr. 4195-98).



1896. As reflected in the below chart, [REDACTED]

[REDACTED]

[REDACTED] (RX 733-0063, -0105 (Murphy Report); Murphy, Tr. 4195-98). [REDACTED]



[REDACTED]  
(RX 739-0105 (Murphy Report)).

1897. [REDACTED]

[REDACTED]

[REDACTED] (RX 739-0063, 0106 (Murphy Report);

Murphy, Tr. 4200-01).

1898. [REDACTED]

[REDACTED]

[REDACTED]

(RX 739-0048, -0069, -0104 (Murphy Report)).

1899. [REDACTED]

[REDACTED]

[REDACTED]

(RX 739-0048, -0069, -0104 (Murphy Report)).

1900. According to data from comScore relied upon by Dr. Athey, only 14 percent of ads displayed in response to a search for 1-800 Contacts' trademarks displayed information on the price of contact lenses. (CX 8007-035, -111 (Athey Report); RX 733-0063 (Ghose Report)).

1901. Accordingly, as to the vast majority of ads displayed in response to a search for 1-800 Contacts' trademarks, consumers who did not click on those ads would not obtain any information about the price of contact lenses. (RX 733-0063 (Ghose Report)).

**2. *The Settlement Agreements Did Not Bind Numerous Major Retailers Who Paid For More Than 260 Million Search Advertisements***

1902. Numerous online retailers of contact lenses were not bound by any settlement agreement with 1-800 Contacts that restricted their ability to advertise in response to searches for 1-800 Contacts' trademarks. (Athey, Tr. 854; CX 9043 (Athey, Dep. at 113)).

1903. America's Best was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

1904. BJ's was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

1905. Contact Direct was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

1906. Costco was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

1907. CVS was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

1908. Discount Lens was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

1909. Eyeconic was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

1910. JC Penney was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

1911. Lens.com was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report); Bethers, Tr. 3693-94).

1912. Lens Discounters was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

1913. Sam's Club was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

1914. Sears Optical was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

1915. Target was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

1916. Walmart was not bound by any agreement with 1-800 Contacts that restricted its ability to advertise in response to searches for 1-800 Contacts' trademarks. (CX 8007-042 (Athey Report)).

1917. [REDACTED]

[REDACTED] (RX 739-0099 (Murphy Report)).

1918. [REDACTED]

[REDACTED] (RX-739-0099 (Murphy Report)).

**3. *Consumers Saw Millions Of Advertisements For The Settling Parties Despite The Settlement Agreements***

1919. The challenged settlement agreements had little impact on the settling parties' ability to promote their services. (RX 739-0047 (Murphy Report)).

1920. The challenged settlement agreements were bilateral, not multilateral. (Evans, Tr. 1711-12; CX 9042 (Evans, Dep. at 114)).

1921. The challenged settlement agreements did not restrict causing paid search advertisements to be displayed in response to searches for the trademarks of the other settling parties other than 1-800 Contacts. (Evans, Tr. 1712).

1922. The challenged settlement agreements did not affect bidding on generic terms except to the extent that they required negative keywords to prevent ads appearing in response to searches for a firm's trademarks. (CX 9042 (Evans, Dep. at 102); Bethers, Tr. 3703).

1923. [REDACTED]  
[REDACTED] (RX 739-0097 (Murphy Report)).

1924. [REDACTED]  
[REDACTED] (RX 739-0097 (Murphy Report)).

1925. [REDACTED]  
[REDACTED] (RX 739-0097 (Murphy Report)).

1926. [REDACTED]  
[REDACTED] (RX 739-0097 (Murphy Report)).

1927. [REDACTED]  
[REDACTED] (RX 739-0097 (Murphy Report)).

1928. [REDACTED]  
[REDACTED] (RX 739-0097 (Murphy Report)).

1929. [REDACTED]

[REDACTED] (RX 739-0030, 097 (Murphy Report)).

1930. A number of the settling retailers obtained more impressions in response to bids on keywords related to contact lenses after they entered into the settlement agreements than they had obtained before doing so. (RX 733-0096 (Ghose Report); CX 9046 (Ghose, Dep. at 35, 156-58)).

1931. On average, impressions based on bidding for 1-800 Contacts' trademarks represented [REDACTED] of a settling party's impressions in the year before it settled with 1-800 Contacts. (RX 739-0047, - 0103 (Murphy Report)).

***4. Consumers Can Easily Obtain Information About 1-800 Contacts' Competitors***

1932. Most consumers who visit 1-800 Contacts' website already know that there is somewhere else to buy contact lenses. (Athey, Tr. 913-14).

1933. As Dr. Athey admitted, more than 70 percent of online contact lens shoppers compare prices. (Athey, Tr. 941; CX 1449-057).

1934. As Dr. Athey admitted, more than half of online contact lens shoppers check prices at three, four or five stores or websites. (Athey, Tr. 941; CX 1449-057).

1935. 1-800 Contacts operated its business based on the belief that consumers knew how to find other retailers of contact lenses. (Bethers, Tr. 3710-11).

1936. Consumers interested in finding information about 1-800 Contacts' competitors had a number of ways to do so other than searching for 1-800 Contacts' trademarks. (RX 733-0059 to -0064 (Ghose Report); CX 9048 (Murphy, Dep. at 56)).

1937. Users tracked in Dr. Athey's comScore data clicked on an algorithmic result rather than a paid result two-thirds of the time. (Athey, Tr. 881; CX 8007-025 (Athey Report)).

1938. Clicks on algorithmic links accounted for two-thirds of the clicks in the comScore dataset that Dr. Athey used. (Athey, Tr. 881).

1939. The settlement agreements did not limit algorithmic results on any search. (Athey, Tr. 881-882).

1940. Consumers often start with generic searches and then narrow their searches to names of manufacturers and retailers. (Ghose, Tr. 4072-73).

1941. All consumers interested in finding out about 1-800 Contacts' online competitors had to do to learn about pricing options and compare prices was search for "cheap contacts" or the name of his or her contact lens. (RX 733-0060 (Ghose Report); CX 9048 (Murphy, Dep. at 56); CX 9046 (Ghose, Dep. at 78-80).

1942. [REDACTED]  
[REDACTED]  
[REDACTED]

(Athey, Tr. 2120).

1943. [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] (Athey, Tr. 2119-20).

1944. Dr. Athey was not aware of any evidence that any consumer who searched for 1-800 Contacts did not know how to use generic searches. (CX 9043 (Athey, Dep. at 261 ("Q. Do you have any evidence that any consumer that searches for 1-800-CONTACTS did not know how to use generic searches for contact lenses? . . . . THE WITNESS: I don't have any direct evidence about – no."))).

1945. Consumers search for generic terms more often than they search for 1-800 Contacts' trademark. (Ghose, Tr. 3919-20; RX 733-0061, -0062; Athey RX 733-0060, -0061 (Ghose Report); Ghose, Tr. 3920; CX 8007-028 (Athey Report); CX 9046 (Ghose, Dep. at 210-11)).

1946. Over 98 percent of contact lens-related searches were for terms other than 1-800 Contacts' trademarks. (Evans, Tr. 1724-25).

1947. Less than two percent of contact lens-related searches were for 1-800 Contacts' trademarks. (Evans, Tr. 1724).

1948. Accordingly, as Dr. Evans admitted, some 98 percent of the time, what consumers searching for contact lens-related information see in response to their search is not affected by the challenged settlement agreements. (Evans, Tr. 1725).

1949. The challenged settlement agreements only affect information seen on less than two percent of searches related to contact lenses. (Evans, Tr. 1725-26).

1950. According to data from comScore compiled by Dr. Athey regarding searches related to contact lenses, approximately 70 percent of searches were for either generic terms or the names of contact lens manufacturers. (RX 733-0060, -0061 (Ghose Report); Ghose, Tr. 3920; CX 8007-028 (Athey Report)).

1951. The challenged settlement agreements did not restrict a firm from placing advertisements on Facebook targeting customers who "liked" competitors. (CX 9042 (Evans, Dep. at 104)).

1952. The settlement agreements did not restrict television or radio advertising. (Evans, Tr. 1714).

1953. Dr. Evans' proposed market for online retail sales of contact lenses [REDACTED]

[REDACTED]



[REDACTED] (Evans, Tr. 1694-95).

1954. The challenged settlement agreements did not affect directly typing a URL, bookmarks, e-mail advertising, banner ads or product listing advertisements.

1955. Display advertising is one way for firms to increase brand awareness. (CX 9043 (Athey, Dep. at 170)).

**5. *Dr. Athey's Opinion That Consumers Believe 1-800 Contacts Is The Only Online Contact Lens Retailer Is Baseless And Unreliable***

1956. Dr. Athey did not have any evidence that any consumers believed that 1-800 Contacts is the only online retailer of contact lenses. (CX 9043 (Athey, Dep. at 262 (“Q. I asked whether you have any evidence that there are any consumers that held the belief that there are no other online contact lens retailers other than 1-800-CONTACTS? A. No.”))).

1957. Dr. Athey did not do any survey regarding whether there are consumers who believe that 1-800 Contacts is the only online retailer of contact lenses. (Athey, Tr. 925-27).

1958. Dr. Athey did not conduct any user survey. (CX 9043 (Athey, Dep. at 60)).

1959. The only survey information that Dr. Athey cited regarding whether consumers believe that 1-800 Contacts is the only online retailer of contact lenses were the results of a question reflected on a single page of a presentation by the private equity firm Berkshire Partners—page 39 of CX 1109. (Athey Tr., 926-27; CX 1109-0039).

1960. The survey reflected in the Berkshire Partners presentation was conducted by Stax (Athey, Tr. 894-95).

1961. Stax was a third party retained by Berkshire Partners to perform some research as an adjunct to Berkshire Partners' evaluation of the potential acquisition of 1-800 Contacts. (CX 9039 (Clarkson, Dep. at 35)).

1962. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1963. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1964. A slide in the Berkshire Partners presentation that purports to summarize some of the Stax survey results states under the header, “Online Buyers Reasons for Initially Choosing Their Online Retailer,” that 34.7% of respondents who were 1-800 Contacts customers selected the option, “It Was the Only Online Contacts Site of Which I Was Aware.” (CX 1109-0039).

1965. Dr. Athey did not know who Stax surveyed, how it selected the respondents or what questions it asked them. (Athey, Tr. 896-97).

1966. The slide on which Dr. Athey relied indicates that only 101 1-800 Contacts customers participated. (CX 1109-0039).

1967. As Dr. Athey admitted, respondents who simply could not remember the name of any other contact lens retailer were likely to select the response, “It Was the Only Online Contacts Site of Which I Was Aware.” (Athey, Tr. 899).

1968. As Dr. Athey admitted, the Stax survey could simply indicate that 34 percent of people who became 1-800 Contacts customers were only aware of 1-800 Contacts at the time they first became a customer because they were relying on TV and radio. (Athey, Tr. 906).

1969. For these reasons, Dr. Athey’s opinion that some consumers believe that 1-800 Contacts is the only online contact lens retailer is unreliable and entitled to no weight.

**6. *Dr. Athey's Analysis Of The Price Premium Is Not Reliable***

1970. Dr. Athey relies on a comment in a memorandum prepared by Berkshire Partners for National Vision stating that they are “concerned that 1-800’s premium pricing position versus its competitors is unsustainable in the medium- to long-term given the commodity-like nature of contact lenses and 1-800’s insufficiently distinguishable service.” (CX 8007-019; CX 1109-003.)

1971. Berkshire Partners, a private equity firm, owned National Vision at the time and was considering whether to make a bid for 1-800 Contacts. (Clarkson, Tr. 199-200).

1972. Despite the concerns expressed by Berkshire Partners regarding 1-800 Contacts’ price premium, Berkshire Partners believed that an acquisition of 1-800 Contacts by National Vision *could* be attractive. (CX 1109-003).

1973. The founder and president of ACLens.com (which is owned by National Vision) recognized that 1-800 Contacts’ service is distinguishable, at least in his view as the president of an online contact lens retailer, when he testified that “1-800 Contacts has excellent service and we [ACLens.com] *aspire* to a similar level.” (Clarkson, Tr. 172-73, 188) (emphasis added).

1974. The Berkshire Partners’ memorandum itself concedes a lack of understanding regarding what contact lens consumers actually care about in selecting a retailer: “we believe that 1-800 has best-in-class service, but we remain uncertain of the degree to which customers care.” (CX 1109-009.)

1975. There is ample evidence in the record of this case that consumers have diverse preferences in selecting a contact lens retailer, and many consumers consider trust, reliability, ease of shopping, convenience, and speed of delivery when selecting a contact lens retailer. (CX 9017 (Blackwood, Dep. at 46, 61, 74, 224); CX 9032 (L. Schmidt, Dep. at 237); RX 106-0001; RX 1128-0121; RX 1108-0010; [REDACTED]).

1976. In relying on the comments in the Berkshire Partners' memorandum, Dr. Athey did not consider or address any of the other evidence in the record of this case regarding why consumers select a particular contact lens retailer or why consumers might be willing to pay a premium for one contact lens retailer over other retailers. (CX 8007-019).

**7. *Dr. Athey's Reliance On The Discredited Bain Surveys Makes Her Opinion On Consumer Interest In Pricing Information Unreliable***

1977. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CX 1162-004; Tr. 169).

1978. Complaint Counsel offered no evidence to support a finding that the survey was conducted using accepted principles of survey research. (Tr. 169).

1979. The Court ruled that the Bain surveys prepared in connection with THLee's contemplated acquisition of 1-800 Contacts were not reliable. (Tr. 168-69 (On CX 1162 and CX 430, "the exhibits are excluded as unreliable")).

1980. The Court further ruled that since forwarding an email is not an adoption of the contents therein without additional statements or context that demonstrate clearly and manifest an adoption or belief in their truth, the Bain presentation is not a statement of a party opponent. (Tr. 169-70).

1981. The Court admitted CX 430 and CX 1162 only for the limited purpose to show that Bain prepared a report and that the report was distributed within 1-800 Contacts. CX 430 and CX 1162 cannot be used as proof that the surveys or reports or charts contained in the report are true and accurate. (Tr. 170).

1982. Despite the Court's ruling, Dr. Athey relied upon CX 1162 and the surveys and documents contained therein that appeared in other exhibits to reach her conclusions about consumer's interest in pricing information. (Athey, Tr. 827 (Q: "Was [CX 1162] one of the pieces of information that you looked at in reaching your conclusion about consumers' interest in pricing information? A: Yes"), Tr. 828 ("JUDGE CHAPPELL: Excuse me. Is she using data from the Bain survey which I excluded from evidence? A: ... Our understanding of Your Honor's order was of course that this information could not be included for hearsay purposes, meaning for the truth of the matter, but rather could be included -- could be introduced for the fact that it occurred. And also our understanding of course is that experts are able to rely on documents and data that are not in evidence in court, but they are what an expert relies on for its conclusions -- JUDGE CHAPPELL: I also determined that those surveys were unreliable based on the way they were offered.")).

1983. Complaint Counsel conceded that the underlying survey contained in CX 1162 that the Court ruled to be unreliable "absolutely formed the basis for some" of Dr. Athey's conclusions. (Tr. 829; CX 547 (incorporating the unreliable Bain survey)).

1984. For these reasons, to the extent Dr. Athey's opinion regarding consumers' interest in prices relies upon survey evidence displayed in CX 1162, CX 547, CX 430, and other documents containing the flawed and unreliable surveys Bain & Company prepared in 2013 in connection with THLee's contemplated acquisition of 1-800 Contacts, it is unreliable and entitled to no weight.

***C. Paid Search Advertising In Response To 1-800 Contacts' Trademarks Is Not Competitively Significant***

1985. The challenged settlement agreements had at most a *de minimis* effect on competition. (RX 739-0047 to -0052 (Murphy Report); CX 9048 (Murphy, Dep. at 46-47, 50-51)).

1986. The fact that the settling parties settled indicates that they believed that advertising in response to searches for 1-800 Contact's trademark was less economically significant than the costs of litigation. (RX 739-0049 to -0050 (Murphy Report); Murphy, Tr. 4205-07).

1987. Between 2011 and 2015, 1-800 Contacts' share of all contact lens sales was less than 10 percent. (RX 739-0087 (Murphy Report)).

1988. 1-800 Contacts earns approximately [REDACTED] of its sales from paid search advertising. (RX 739-0049 (Murphy Report); RX 428-0030)

1989. Even if the challenged settlement agreements restricted all other retailers from competing for sales who search for 1-800 Contacts' trademarks, the settlement agreements would have foreclosed [REDACTED] of contact lens sales. (RX 739-0049 (Murphy Report); CX 9048 (Murphy, Dep. at 174-75)).

1990. An agreement that affects only [REDACTED] of sales does not restrict activity likely to pose a significant competitive constraint. (CX 9048 (Murphy, Dep. at 175-76; RX 739-0049 (Murphy Report)).

1991. Between 2004 and 2014, paid search advertising for keywords containing 1-800 Contacts' trademark accounted for between 6 percent and 14 percent of 1-800 Contacts' total paid search advertising budget. (RX 739-0028, -0092 (Murphy Report)).

1992. [REDACTED]

[REDACTED]

[REDACTED] (RX 739-0028, -0092 (Murphy Report; Murphy, Tr. 4112-13)).

1993. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1994. [REDACTED]

[REDACTED]

[REDACTED] (RX 739-0099 (Murphy Report); Murphy, Tr.

4187-90).

1995. [REDACTED]

[REDACTED]

[REDACTED] (RX 739-0099 (Murphy Report)).

1996. [REDACTED]

[REDACTED]

[REDACTED]

(RX 739-0099 (Murphy Report); Murphy, Tr. 4191).

1997. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 739-0099 (Murphy Report); Tr. 4187).

1998. According to data from Google regarding ads displayed between 2012 and 2016 based on bids on keywords related to contact lenses, only [REDACTED] of such ads appeared based on bids on bids for 1-800 Contacts' trademarks. (RX 733-0054 (Ghose Report)).

1999. According to data from Google regarding ads displayed between 2012 and 2016 based on bids on keywords related to contact lenses, [REDACTED] of such ads appeared based on bids on terms other than 1-800 Contacts' trademarks. (RX 733-0054 (Ghose Report)).

2000. According to data from Google, between 2012 and 2016, ads displayed based on bids on 1-800 Contacts' trademarks and ads for Memorial Eye displayed in response to searches for 1-800 Contacts' trademark based on broad matching together accounted for only [REDACTED] of all ads displayed based on bids on keywords related to contact lenses. (CX 9046 (Ghose, Dep. at 132-33)).

2001. According to data from Google regarding ads displayed between 2012 and 2016 based on bids on keywords related to contact lenses, [REDACTED] of such ads appeared based on bids on the term "contacts." (RX 733-0054 (Ghose Report)).

2002. Even if the settlements affected searches for 1-800 Contacts and comparative words, they would have very little effect. (RX 733-0058, -059 (Ghose Report)).

2003. Searches for "contact lens," "contacts" and "contact lenses" are more prevalent than searches for 1-800 Contacts' trademarks. (CX 9042 (Evans, Dep. at 103)).

2004. According to data from Google, only [REDACTED] of ads displayed based on searches for contact lenses appeared based on searches that included both 1-800 Contacts' trademark and "cheaper," "better," "vs," "expensive," or "competitor." (RX 733-0059 (Ghose Report); Ghose, Tr. 3924-25).

2005. According to data from comScore compiled by Dr. Athey regarding searches containing 1-800 Contacts' trademarks, only two out of [REDACTED] such searches included both 1-



800 Contacts' trademark and "cheaper," "better," "vs," "expensive," or "competitor." (RX 733-0059 (Ghose Report)).

2006. Data from Google regarding searches containing 1-800 Contacts' trademarks between 2010 and 2016 did not include any searches for the phrase "1-800 Contacts cheaper competitors." RX 733-0059 (Ghose Report); Ghose, Tr. 3925-26).

2007. Contact Lens King did not bid on 1-800 Contacts' trademarks prior to entering into settlement agreements with 1-800 Contacts. (CX 8006-057 (Evans Report)).

2008. Walgreens did not bid on 1-800 Contacts' trademarks prior to entering into settlement agreements with 1-800 Contacts. (CX 8006-057 (Evans Report)).

2009. Standard Optical did not bid on 1-800 Contacts' trademarks prior to entering into settlement agreements with 1-800 Contacts. (CX 8006-057 (Evans Report)).

2010. Memorial Eye did not bid on 1-800 Contacts' trademarks prior to entering into settlement agreements with 1-800 Contacts. (CX 8006-057 (Evans Report)).

2011. Dr. Evans did not conduct any analysis of Memorial Eye's profits. (RX 739-0070 (Murphy Report)).

2012. Dr. Athey did not analyze whether, absent the settlement agreements, any firm would find it profitable to bid to have an ad displayed in response to a search for 1-800 Contacts. (CX 9043 (Athey, Dep. at 144); CX 9043 (Athey, Dep. at 296) ("Q. So my question was, though, whether there's any analysis that you've done in this case that I could look at and it would tell me what the profit margin was for any of the parties to the settlement agreements in bidding on any keyword? . . . THE WITNESS: "I did not provide specific profit calculations for any bidder.")).

2013. The fact that Contact Lens King, Walgreens, Standard Optical and Memorial Eye did not bid on 1-800 Contacts' trademarks prior to entering into settlement agreements with 1-800

Contacts indicates that these settling parties did not believe that doing so was profitable. (RX 739-0051 (Murphy Report)).

2014. 1-800 Contacts and WebEyeCare entered into a settlement agreement on September 3, 2010. (CX 324).

2015. [REDACTED]

[REDACTED] (RX 1849; CX 9000 (Batushansky, IH at 8, 34, 38-40)).

2016. 1-800 Contacts and ACLens entered into a settlement agreement on March 10, 2010. (RX 28).

2017. ACLens grew from 50 employees in 2010 to 170 as of December 2016. (CX 9039 (Clarkson Dep., at 11)).

2018. ACLens shipped 2 million orders with a retail value of \$180 million in 2015. (CX 9003 (Clarkson, IH at 9-10)).

2019. National Vision acquired ACLens in June 2011. (Clarkson, Tr. 174).

2020. [REDACTED]

[REDACTED]  
[REDACTED]  
(RX 153-007).

2021. [REDACTED]

[REDACTED] (CX 1309).

2022. [REDACTED]

[REDACTED] (CX 1309).

2023. Memorial Eye was too small of a company to constrain 1-800 Contacts prices. (RX 739-0071 (Murphy Report)).

2024. Dr. Athey identified numerous companies that were not bound by any settlement agreement with 1-800 Contacts. (Athey, Tr. 854; CX 9043 (Athey, Dep. at 113); CX 8007-042 (Athey Report)).

2025. Most of the unbound competitors that Dr. Athey identified did not have ads appear frequently in response to a search for 1-800 Contacts' trademarks. (Athey, Tr. 955).

2026. Dr. Athey agreed that the fact that unbound competitors did not have ads appear frequently in response to a search for 1-800 Contacts' trademarks indicates that these unbound competitors believed that the economic benefits of bidding an amount sufficient to have their ad appear would not justify the cost of doing so. (Athey, Tr. 959; RX 739-0048 (Murphy Report)).

2027. Dr. Athey did not conduct any analysis of whether any unbound competitor would be chilled by the possibility of litigation by 1-800 Contacts. (CX 9043 (Athey, Dep. at 117)).

2028. Memorial Eye's advertisements appeared in response to only [REDACTED] of searches for 1-800 Contacts' trademarks. (CX 8006-094 (Evans Opening Report)).

2029. Dr. Evans had no explanation for why Memorial Eye's ads did not appear in response to 100% of searches for 1-800 Contacts' trademarks other than that Memorial Eye had an advertising budget and cut off its bids. (CX 9042 (Evans, Dep. at 80)).

2030. According to Dr. Evans's analysis of Google data, Memorial Eye obtained approximately [REDACTED] sales from the [REDACTED] impressions for its ads in response to searches for 1-800 Contacts' trademarks. (CX 8006-094, CX 8006-095 (Evans Opening Report)). Thus, only roughly [REDACTED] people who searched for 1-800 Contacts and saw an ad for Memorial Eye purchased contact lenses from Memorial Eye.

***D. The Settlement Agreements Did Not Enable 1-800 Contacts To Raise Prices Or Reduce Output***

2031. The ultimate antitrust inquiry is whether there is competitive harm, also referred to as consumer harm. (Evans, Tr. 1703-04).

2032. Economists analyzing a restraint on competition analyze whether there are other competitive forces that limit the harm to competition or consumers from the restraint. (Evans, Tr. 1704).

2033. The primary way that economists investigate whether allegedly anticompetitive conduct harmed competition is to investigate the effect of the conduct on rivals' ability to compete and to examine whether the conduct allowed the defendant to raise prices, earn higher margins, or restrict output. (RX 739-0061, -0068 (Murphy Report)).

2034. Dr. Evans agrees that economists look for "empirical evidence of actual anticompetitive effects from a practice—such as increases in prices or decreases in output following the implementation of the practice." (CX 8006-110 (Evans Report)).

2035. Assessing whether total consumer welfare was reduced as a result of the settlements requires a determination of the impact of the settlements on all buyers. (RX 739-0083 (Murphy Report)).

2036. It is not sufficient to assess whether the settlements reduced total welfare to analyze the settlements' effects only on buyers who may have purchased from lower priced competitors in a but-for world without the settlements. (RX 739-0083 (Murphy Report)).

2037. Even if in the but-for world average contact lens prices paid by users would be lower, consumers as a whole still could be harmed because in quality adjusted terms average contact lens prices could be higher. (RX 739-0083 (Murphy Report)).

2038. The typical way economists evaluate whether particular conduct causes quality adjusted prices to be higher or lower is to investigate whether the conduct caused an increase or decrease in total output. (RX 739-0083 (Murphy Report)).

2039. Dr. Evans did not form any opinion that the settlement agreements reduced output of contact lenses. (CX 9042 (Evans, Dep. at 263 (“Q. Do you intend to express an opinion at the trial or hearing in this matter that the output, that is, the number of contact lenses sold, has been reduced as a result of the settlement agreements? A. I do not plan to do so.”))).

2040. Dr. Athey did not form any opinion that the settlement agreements reduced output of contact lenses. (Athey, Tr. 799 (Q. Dr. Athey, did you estimate any change in the output of contact lenses? A. No.); CX 9043 (Athey, Dep. at 194-95 (“Q. Have you conducted any analysis in this case of whether the challenged settlement agreements reduced the output of contact lenses? A. No, I did not present empirical analysis that quantified reduction in output.”))).

2041. [REDACTED]  
[REDACTED] (RX 739-0064, -0107 (Murphy Report)).

2042. [REDACTED]  
[REDACTED]  
(RX 739-0064 (Murphy Report)).

2043. Between July 2015 and June 2016, [REDACTED]  
[REDACTED]  
[REDACTED] (RX 739-0064 (Murphy Report)).

2044. Between July 2015 and June 2016, [REDACTED]  
[REDACTED] (RX 739-0064 (Murphy Report)).

2045. Dr. Evans would not rely on a the regression related to 1-800 Contacts' margins that he included in his rebuttal report as evidence of the impact of the settlement agreements on prices. (CX 9042 (Evans, Dep. at 275)).

2046. Dr. Evans' regression did not control for any factors that could explain any relationship between the settlement agreements and 1-800 Contacts' gross margins. (CX 9042 (Evans, Dep. at 273)).

2047. The settlement agreements did not play any role in 1-800 Contacts' pricing. (Bethers, Tr. 3712-13; CX 9025 (Osmond, Dep. at 98-100)).

2048. Dr. Evans did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (Evans, Tr. 1723-24 (Q. In the course of doing the modeling and everything that you did for this case, did you do any quantification of the extent to which you think 1-800 Contacts' prices would have gone down? A. I did not. Q. Did you do any quantification of the extent to which you think any company's prices would have gone down in the absence of the settlement agreements? A. I did not.")); CX 9042 (Evans Dep., at 257)).

2049. Dr. Evans testified that it was "not necessarily" his opinion that the prices charged by online retailers such as Memorial Eye and Vision Direct would have been lower in the absence of the challenged settlement agreements. (Evans, Tr. 1722).

2050. Dr. Evans did not know what methodology was used to compare prices in the data that he relied on. (CX 9042 (Evans, Dep. at 82)).

2051. Dr. Athey did not quantify the extent to which any company's prices would have been lower in the absence of the challenged settlement agreements. (CX 9043 (Athey, Dep. at 201) ("And have you conducted any empirical analysis to determine by how much prices would be lower in a world without the settlement than they were with the settlements? A. No. Q. Okay.

And so you don't intend to offer an opinion about how much prices would be lower in a world without the settlements than they were with the settlements? A. No.”)).

2052. [REDACTED]

[REDACTED] (Evans, Tr. 1671).

2053. According to Dr. Evans, [REDACTED]

[REDACTED]  
(Evans, Tr. 1671).

2054. Dr. Athey did not form an opinion as to how many consumers in the but-for world would purchase from a lower-priced competitor versus how many consumers would use 1-800 Contacts' price match guarantee. (Athey, Tr. 796 (“I did not quantify the distribution of those welfare effects, how those would be distributed across different parts.”)).

2055. Dr. Athey did not conduct any analysis of price elasticity or the extent to which increases in consumer information would increase prices. (CX 9043 (Athey, Dep. at 221-22 (“Q. So you've done no empirical analysis of price elasticity, correct? A. I've done no empirical analysis of the extent to which increases in searches – increases in consumer information would impact prices.”)).

2056. Accordingly, Dr. Athey did not determine the rate at which consumers would supposedly switch from 1-800 Contacts in a world without the settlement agreements in which they supposedly would have more information to compare prices. (CX 9043 (Athey Dep., at 222-23 (“Let's go to paragraph 108 of your report. See that? It says: The increased availability to consumers of price comparisons and the rate of consumers switching from 1-800-CONTACTS to competitors would put downward pressure on prices. Do you see that? A. Yes. Q. Okay. Now, you haven't qualified the rate of consumer switching in that sentence, have you? A. Exactly.”)).

2057. Dr. Athey did not make any particular prediction or forecast of what conversion rates for 1-800 Contacts would be in a world without the settlement agreements. (Athey, Tr. 2079-81).

2058. Dr. Athey did not make any particular prediction or forecast of what conversion rates for other online retailers would be in a world without the settlement agreements. (Athey, Tr. 2081).

2059. A variety of characteristics beyond access to information can play an important role in explaining price dispersion. (RX 739-0081 (Murphy Report)).

2060. Firms that offer high-quality customer service can charge higher prices than firms that offer lower-quality service. (CX 9043 (Athey, Dep. at 214; CX 8007-015 (Athey Report); RX 739-0081 (Murphy Report)).

2061. Dr. Athey recognized that the price difference between 1-800 Contacts and other online retailers could be due at least in part to differences in service levels provided by 1-800 Contacts and other online retailers. (Athey, Tr. 2072).

2062. Though Dr. Athey sought to opine that service did not fully explain the price difference between 1-800 Contacts and other online retailers, Dr. Athey had no opinion on what portion of the price difference was not attributable to service. (CX 9043 (Athey, Dep. at 215)).

2063. As Dr. Athey acknowledged, part of the price difference between 1-800 Contacts and other online retailers could be due to the fact that the brand name and trademark of 1-800 Contacts was well-known. (Athey, Tr. 2072).

2064. Dr. Athey did nothing to measure what part of the price difference between 1-800 Contacts and other online retailers was due to the fact that the brand name and trademark of 1-800 Contacts was well-known. (CX 9043 (Athey, Dep. at 255 (“Did you do anything to measure whether the portion of 1-800-CONTACTS’ trademarks familiarity or success accounts – that is



not attributable to the settlement agreements in this case, accounts for the price premium that it charges over other online retailers? . . . THE WITNESS: I didn't try to decompose the sources of the price premium quantitatively.”)).

2065. Dr. Athey could not quantify which causes explained the differences in prices between 1-800 Contacts and other online retailers. (Athey, Tr. 2074).

2066. [REDACTED]

(Athey, Tr. 2072-73 [REDACTED])

CX 9043 (Athey, Dep. at 215 (“Q. Did you do any empirical analysis to determine whether the price premium charged by 1-800-CONTACTS compared to other online retailers is explained by a service-quality differential? A. No. I relied on other case materials.”); CX 9043 (Athey, Dep. at 252-53)).

2067. [REDACTED]

[REDACTED] (Athey, Tr. 941-46; CX 1343-036).

2068. [REDACTED]

[REDACTED]

[REDACTED] (Athey, Tr. 826-27; CX 1343-036).

2069. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Athey, Tr. 944-46).

2070. Dr. Athey conceded that the price perceptions of the gap between Vision Direct and 1-800 Contacts are more accurate than the same price perceptions of the gap between ECPs and 1-800 Contacts. (Athey, Tr. 945-46).

2071. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Athey, Tr. 946; CX 1343).

***E. Complaint Counsel Have Not Proven Harm In Any Advertising Market***

***1. Complaint Counsel's Focus On Advertising Alone Is Economically Flawed***

2072. Dr. Evans did not define any relevant antitrust market for any type of advertising. (Evans, Tr. 1818; CX 9042 (Evans, Dep. at 34)).

2073. Whether any injury suffered by advertisers results from anticompetitive conduct depends on the effect of that conduct in the market for the product or service being advertised. (RX 739-0037, -0038 (Murphy Report); Murphy, Tr. 4174-76; CX 9048 (Murphy, Dep. at 248-50)).

2074. It is economically incorrect to infer harm to competition in a market for an advertised product or service simply because a restraint has reduced advertising for that product or service by some amount. (RX 739-0039 (Murphy Report); Murphy, Tr. 4174-76).

2075. Since firms compete on multiple dimensions, a reduction in advertising on one dimension could induce firms to compete more aggressively on other dimensions. (RX 739-0039 (Murphy Report)).

2076. Establishing that trademark restrictions reduced some amount of advertising, without more, simply shows that the restrictions were effective. (RX 739-0039 (Murphy Report); Murphy Tr. 4175; CX 9048 (Murphy, Dep. at 43-44, 69)).

2077. Most of any revenue that the search engines may have lost if the settlement agreements reduced 1-800 Contacts' cost-per-click on ads displayed in response to searches for its own trademark reflects a transfer of profits from 1-800 Contacts' trademark. (RX 739-0072 (Murphy Report)).

2078. By allowing 1-800 Contacts' rivals to display ads in response to searches for 1-800 Contacts' trademark, search engines can earn more revenue if the additional ads shift clicks by users who conduct that search from 1-800 Contacts' organic link to its paid ads. (RX 739-0072 (Murphy Report)).

2079. Any revenue that search engines would earn from a shift in clicks by users who search for 1-800 Contacts' trademark from 1-800 Contacts' organic link to its paid ad reflects a transfer of profits from 1-800 Contacts' trademark. (RX 739-0072-0073 (Murphy Report)).

***2. Analyzing Effects On Search Engines Is A Complex Problem***

2080. Modeling paid search advertising in a counterfactual world without the settlement agreements is very complex. (CX 9046 (Ghose, Dep. at 44)).

2081. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED] (RX 704-0006 (Iyer Decl.) ¶ 20).

2082. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 704-0006 (Iyer Decl.) ¶ 20).

2083. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (RX 704-0006 (Iyer Decl.) ¶ 21).

2084. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(RX 704-0006 (Iyer Decl.) ¶ 21).

2085. [REDACTED]

[REDACTED]

[REDACTED] (RX 704

(Iyer Decl.) ¶ 23).

2086. According to Hal Varian, chief economist at Google, “any effort to determine what advertisers ‘would have paid’ under a different set of circumstances requires a complex and highly

individualized analysis of advertiser behavior for each particular ad that was placed.” (RX 701 (Varian Decl.) ¶ 6).

2087. Adding bidders to an auction will change the behavior of existing bidders. (CX 9043 (Athey, Dep. at 135)).

2088. Analyzing the effects on search engines of restraints on advertising in response to searches for 1-800 Contacts’ trademarks requires analysis of any substitution effects related to other search terms. (RX 739-0067, -068; Murphy, Tr. 4176-77).

2089. If consumers searching for 1-800 Contacts’ trademarks are looking for information on prices charged by other online retailers, consumers would have incentives to substitute to other ways of finding the information if the settlements prevented them from finding that information. (RX 739-0067 (Murphy Report)).

2090. Dr. Athey does not account for any consumer substitution to other searches. (RX 739-0082 (Murphy Report)).

2091. Dr. Evans does not account for any consumer substitution to other searches. (RX 739-0067 (Murphy Report)).

2092. If consumers substituted to other ways of finding information on prices charged by other online retailers as a result of the settlement agreements, contact lens retailers would have an incentive to substitute their advertising to searches other than searches for 1-800 Contacts’ trademarks. (RX 739-0067 (Murphy Report); CX 9046 (Ghose, Dep. at 135-36, 196-97); RX 733-0067 (Ghose Report)).

2093. If the settlement agreements led to higher prices for contact lenses, paid search advertising would be more profitable and the settling parties would have incentives to substitute to search terms other than 1-800 Contacts’ trademarks, even if their advertising budgets were completely flexible. (RX 739-0067, -0068 (Murphy Report)).

2094. [REDACTED]

[REDACTED] (Ghose Report, RX 733-0096; CX 9046 (Ghose, Dep. at 35, 156-58)).

2095. Dr. Athey does not account for any advertiser substitution to other searches. (RX 739-0082 (Murphy Report); RX 733-0067 (Ghose Report)).

2096. Dr. Athey did not analyze any effects on advertising in response to generic queries unaffected by the settlement agreements. (RX 733-0066, 0067 (Ghose Report)).

2097. Dr. Evans does not account for any advertiser substitution to other searches. (RX 739-0067 , -0068 (Murphy Report)).

**3. *Dr. Athey's Model Of The Counterfactual World Is Unreliable***

2098. Dr. Athey did not know whether respondents in the comScore data set that she used were representative of the U.S. population, the contact lens-wearing population or customers of 1-800 Contacts. (Athey, Tr. 850; CX 9043 (Athey, Dep. at 109)).

2099. Dr. Athey based her counterfactual model of ads in response to searches for 1-800 Contacts' trademarks on data regarding the results of searches for generic terms. (CX 8007-030 (Athey Report) ("I use ad layouts of generic searches to inform counterfactual layouts on 1-800 Contact-related searches.")).

2100. Dr. Athey assumed for purposes of her model that all of the difference in the actual world between the number of ads displayed in response to searches for certain generic terms related to contact lenses and the number of ads displayed in response to searches for 1-800 Contacts' trademarks is attributable to the challenged settlement agreements. (CX 9043 (Athey, Dep. at 131-32)).

2101. Dr. Athey did not examine whether search engines generally show more ads for searches for generic terms than for trademarked terms. (CX 9043 (Athey, Dep. at 121-22)).

2102. Dr. Athey did not conduct any analysis of whether the behavior of any firm bidding on 1-800 Contacts' trademark in a world without the settlement agreements would be the same as its behavior in bidding on generic terms in the actual world. (CX 9043 (Athey, Dep. at 138-39)).

2103. Dr. Athey's model of the counterfactual world predicts that search engines would display ads for advertisers not bound by the settlement agreements even though such ads did not appear in the actual world. (RX 733-0066, 0067 (Ghose Report)).

2104. Dr. Athey's multinomial logit model does not employ econometric techniques that account for user heterogeneity. (RX 733-0066, 0068 (Ghose Report)).

2105. For these reasons, Dr. Athey's model of the counterfactual world is unreliable and entitled to no weight.

**4. *Dr. Evans' Model Of The Counterfactual World Is Unreliable***

2106. Dr. Evans' model of the counterfactual world relies entirely on data regarding advertising by Memorial Eye. (CX 8006-079, -096 to -105 (Evans Report)).

2107. According to Google data, while Memorial Eye averaged 227,473 impressions per month in response to searches for 1-800 Contacts' trademarks, no other retailer averaged more than 30,000 impressions per month in response to such searches. (RX 733—070, 0105 (Ghose Report)).

2108. Dr. Evans did not offer any explanation for why he extrapolated data for Memorial Eye to predict behavior by other retailers despite this significant disparity in their behavior in the actual world. (RX 733-0070 to -0071 (Ghose Report)).

2109. For these reasons, it is unreasonable for Dr. Evans to rely entirely on data for Memorial Eye. (CX 9046 (Ghose, Dep. at 166-67); RX 733-0069 to -0071 (Ghose Report)).

2110. According to Dr. Athey, a model that incorporates data regarding multiple advertisers was the “right choice.” (CX 9043 (Athey, Dep. at 167-169)).

2111. Dr. Athey’s model incorporated data regarding multiple advertisers. (CX 9043 (Athey, Dep. at 167-69)).

2112. Dr. Athey did the analysis that she thought was best. (CX 9043 (Athey Dep.) at 169).

2113. Dr. Evans’ theory that the settlement agreements harmed search engines by reducing the revenue paid for clicks on ads in response to searches for 1-800 Contacts’ trademarks assumes that a firm whose ad was shown in the second position would have bid a higher price in a world without the settlement agreements than the firm whose ad was shown in second position in the actual world. (CX 9042 (Evans, Dep. at 267)).

2114. Dr. Evans could not identify any firm that would have bid more for 1-800 Contact’s trademarks in the counterfactual world than in the actual world. (CX 9042 (Evans, Dep. at 267)).

2115. Depending on a firm’s website’s quality score, a firm whose ad appears in fourth position could have bid more than the firm whose ad appears in third position. (Athey, Tr. 954-55).

2116. Dr. Evans did not make any determination as to what the quality score of any firm’s website would be or what any firm would bid to display an ad in response to a search for 1-800 Contacts in a world without the settlement agreement. (Evans, Tr. 1827-28).

2117. For these reasons, Dr. Evans’ model of the counterfactual world is unreliable and entitled to no weight.



**CONCLUSIONS OF LAW**

**I. BURDEN OF PROOF**

1. The parties' burdens of proof are governed by Federal Trade Commission Rule 3.43(a), Section 556(d) of the Administrative Procedure Act ("APA"), and case law.

2. Pursuant to Commission Rule 3.43(a), "[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto." 16 C.F.R. § 3.43(a).

3. Under the APA, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d).

4. The APA, "which is applicable to administrative adjudicatory proceedings unless otherwise provided by statute, establishes ' . . . the traditional preponderance-of-the evidence standard.'" *In re Rambus Inc.*, 2006 FTC LEXIS 101, at \*45 (Aug. 20, 2006) (quoting *Steadman v. SEC*, 450 U.S. 91, 95-102 (1981)); *see also In re Chicago Bridge & Iron Co.*, 138 F.T.C. 1024, 1027 n.4 (2005) ("[W]e take it as settled law that regardless of the standard under which a reviewing court must accept the Commission's findings of fact, the Commission (and the Administrative Law Judge ("ALJ")) normally must base findings upon a 'preponderance of the evidence.')" (citing *Carter Prods., Inc. v. FTC*, 268 F.2d 461, 487 (9th Cir. 1959)); *In re Automotive Breakthrough Sciences, Inc.*, 1998 FTC LEXIS 112, at \*37 n.45 (Sept. 9, 1998) (holding that each finding must be supported by a preponderance of the evidence in the record); *In re Adventist HealthSystem/West*, 1994 FTC LEXIS 54, at \*28 (Apr. 1, 1994) ("Each element of the case must be established by a preponderance of the evidence.").

5. Unfair methods of competition under Section 5 of the FTC Act include any conduct that would violate Section 1 of the Sherman Act. *See, e.g., California Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999).

6. Principles of antitrust law developed under the Sherman Act apply to Commission cases alleging restraints of trade or unfair competition. *E.g., Fashion Originators' Guild, Inc. v.*

*FTC*, 312 U.S. 457, 463-64 (1941); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 451-52 (1986).

7. Accordingly, it is appropriate to rely upon Sherman Act jurisprudence in determining whether the challenged conduct violated Section 5 of the FTC Act. *E.g.*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005) (“[T]he analysis under § 5 of the FTC Act is the same . . . as it would be under § 1 of the Sherman Act.”).

**II. THE SETTLEMENT AGREEMENTS DO NOT GIVE RISE TO ANTITRUST LIABILITY.**

**A. *Settlement Agreements Taking Commonplace Forms Do Not Give Rise to Antitrust Liability***

8. The challenged agreements are settlements of litigation brought or threatened by 1-800 Contacts.

9. If 1-800 Contacts had prevailed in the litigations that were settled and obtained relief equivalent to the settlement terms, 1-800 Contacts would not be subject to antitrust liability for the agreements.

10. “If anticompetitive harm is caused by the decision of a court, even though granted at the request of a private party, no private restraint of trade occurs because the intervening government action breaks the causal chain.” *Andrx Pharm., Inc. v. Biovail Corp. Int’l*, 256 F.3d 799, 818 (D.C. Cir. 2001); *see also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (“[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint.”) (quotation marks omitted).

11. The settlements prohibit causing advertising to be displayed in response to searches for 1-800 Contacts’ trademarks, a standard non-use injunction that is “the order of the day” in infringement actions. *SunAmerica Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1336 (11th Cir. 1996); *see also* 5 McCarthy on Trademarks and Unfair Competition § 30:1 (4th ed.) (“A permanent injunction is the usual and normal remedy once trademark infringement has

been found in a final judgment.”); Restatement (Third) of Unfair Competition § 35 (1995) (“In cases of . . . trademark infringement, or trademark dilution, a prevailing plaintiff is ordinarily awarded injunctive relief to protect both the plaintiff and the public from the likelihood of future harm.”).

12. In one of the litigations giving rise to the challenged agreements, a court issued an injunction providing for the same relief agreed to in the challenged settlement agreements. RX0401 (*1-800 Contacts, Inc. v. Vision Direct, Inc.*, No. 08-1949, Dkt. 27 (S.D.N.Y. May 15, 2009)).

13. Courts across the country have issued similar injunctions barring entities from using another’s trademark in the specific context of paid internet searches. *See, e.g., Glob. Tel-Link Corp. v. Jail Call Servs., LLC*, No. 14-1557, 2015 WL 1936502, at \*9 (E.D. Va. Apr. 28, 2015); *Louis Vuitton Malletier, S.A. v. Abags.co.UK*, No. 14-30288, 2015 WL 11197741, at \*4 (S.D. Fla. Feb. 27, 2015); *Rolex Watch U.S.A., Inc. v. Hernandez*, No. 1:13-cv-20643, Order at 4 (Dkt. 14) (S.D. Fl. Aug. 20, 2013); *Partners for Health and Home, LP v. Yang*, No. 2:09-cv-7849, Dkt. 146, at 2 (C.D. Cal. June 21, 2012); *Select Mgmt. Res., Inc., et. al v. D & D Mktg., Inc. et. al*, No. 2:10-cv-10008, Dkt. 39 (C.D. Cal. July 15, 2011); *Quidgeon v. Olsen*, No. 10-1168, 2011 WL 1480537 (C.D. Ill. Apr. 19, 2011); *World Entm’t, Inc. v. Brown*, No. 09-5365, 2011 WL 2036686 (E.D. Pa. May 20, 2011); *Skydive Ariz., Inc. v. Quattrocchi*, No. 05-2656, 2010 WL 1743189 (D. Ariz. Apr. 29, 2010); *Transamerica Corp. v. Moniker Online Servs. LLP*, No. 09-60973, 2010 WL 1416979, at \*7 (S.D. Fla. Apr. 7, 2010); *MasterCard Int’l Inc. v. Trehan*, 629 F. Supp. 2d 824, 833 (N.D. Ill. 2009); *Orion Bancorp, Inc. v. Orion Residential Fin., LLC*, No. 07-1753, 2008 WL 816794, at \*3 (M.D. Fla. Mar. 25, 2008).

14. Complaint Counsel have 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.” RX0679A.

15. Though Complaint Counsel deny “that such relief would have been appropriate or supported under either trademark law 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,” RX0679A, that simply reflects a dispute about whether 1-800 Contacts would have won its trademark litigations, not whether the relief would have been appropriate if it did prevail.

16. As such, the relief provided for in the settlement agreements is the same kind of relief that 1-800 Contacts could obtain if it had prevailed in the litigations that the agreements resolved.

17. “[L]itigation,” however, “breeds a litany of direct and indirect costs, ranging from attorney and expert fees to the expenses associated with discovery compliance.” *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1075 (11th Cir. 2005).

18. Public policy therefore strongly supports private settlements of legal disputes to reduce litigation costs and conserve judicial resources. *See Williams v. First Nat’l Bank*, 216 U.S. 582, 595 (1910) (“Compromises of disputed claims are favored by the courts.”); *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 656 (1898) (“[S]ettlements of matters in litigation or in dispute without recourse to litigation are generally favored.”); *see also TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (noting “paramount policy of encouraging settlements”).

19. “[S]ettlement agreements are to be upheld whenever possible.” *Am. Sec. Vanlines, Inc. v. Gallagher*, 782 F.2d 1056, 1060 (D.C. Cir. 1986). “Few public policies are as well established as the principle that courts should favor voluntary settlements of litigation by the parties to a dispute.” *Id.*

20. In particular, “trademark agreements are favored in the law as a means by which parties agree to market products in a way that reduces the likelihood of consumer confusion and avoids time-consuming litigation.” *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 60 (2d Cir. 1997); *see also, e.g., T & T Mfg. Co. v. A. T. Cross Co.*, 587 F.2d 533, 539 (1st Cir. 1978) (noting

the “judicial policy of encouraging extra-judicial settlement of trademark litigation”); *adidas-America, Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1080-81 (D. Or. 2008); *Fuddrucker, Inc. v. Fudpucker’s, Inc.*, 436 F. Supp. 2d 1260, 1265 (N.D. Fla. 2006) (“Trademark agreements, in which two parties agree on their respective rights in a mark are favored under the law.”) (internal quotation marks and citations omitted).

21. Parties to a trademark settlement agreement “are in the best position to determine what protections are needed and how to resolve disputes concerning earlier trademark agreements between themselves.” *Clorox Co.*, 117 F.3d at 60. And “it is usually unwise for courts to second-guess such decisions. In the absence of evidence to the contrary it is reasonable to presume that such arms-length agreements are pro-competitive.” *Id.*

22. “Where large competitors each represent their respective trademark interests, unless one party is irrational, the result should accord with how the parties view their respective rights.” *Clorox Co.*, 117 F.3d at 61.

23. As noted in the Court’s findings of fact, Complaint Counsel’s expert concedes, and the testimony from the settling parties shows, that the settling parties acted rationally in weighing the costs and benefits of further litigation.

24. Accordingly, “in the absence of any evidence that the provisions relating to trademark protection are auxiliary to an underlying illegal agreement between competitors . . . and absent exceptional circumstances, we believe the parties’ determination of the scope of needed trademark protections is entitled to substantial weight.” *Clorox Co.*, 117 F.3d at 60.

25. Consistent with these principles, “traditional” and/or “commonplace” settlements are not “subject to antitrust liability.” *FTC v. Actavis, Inc.*, 133 S.Ct. 2223, 2233 (2013); *see also King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp.*, 791 F.3d 388, 402 (3d Cir. 2015) (*Actavis* holding “should not be read to subject to antitrust scrutiny ‘commonplace forms’ of settlement.”); *In re Lipitor Antitrust Litig.*, 46 F. Supp. 3d 523, 537 (D.N.J. 2014) (“The Supreme Court provided two types of ‘commonplace forms’ of settlement that are not subject to *Actavis* scrutiny.”); *In re Lamictal Direct Purchaser Antitrust Litig.*, 18 F.Supp.3d 560, 567

(D.N.J. 2014) (“[Actavis] explains that there is ‘something quite different’ about reverse payment settlements, as opposed to ‘traditional’ and ‘commonplace forms’ of settlement, which is why only the former are subject to antitrust scrutiny.”), *vacated and remanded on other grounds by King Drug Co.*, 791 F.3d 388; *see also In re Loestrin 24 Fe Antitrust Litigation*, 814 F.3d 538, 544 n.4 (1st Cir. 2016) (“The court noted that it did not intend to disturb commonplace settlement forms.”).

26. The Commission itself has argued that there is no reason for antitrust concern where “an agreement . . . fits comfortably within traditional understandings of the way in which private litigation is generally settled.” *FTC v. Actavis*, No. 12-416, Br. for Pet’r, 2013 WL 267027, at \*27 (U.S. Jan. 22, 2013).

27. A contrary rule that every settlement agreement is subject to antitrust scrutiny would chill settlement because parties seeking to eliminate the uncertainty of their present litigation would have to take on the uncertainty of future antitrust litigation. Thus, absent suspicious circumstances, “to prevent a cloud from being cast over the settlement process a third party should not be permitted to haul the parties to the settlement over the hot coals of antitrust litigation.” *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 992 (N.D. Ill. 2003); *accord In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 205, 208 (2d Cir. 2006), *abrogated on other grounds by Actavis*, 133 S.Ct. 2223.

28. No features of the challenged settlement agreements are unusual or provide reason for antitrust suspicion that the parties to them were engaged in a collusive attempt to split monopoly profits from reduced competition. *Actavis*, 133 S.Ct. at 2236.

29. As set forth in the Court’s findings of fact, the settlement agreements challenged by Complaint Counsel are not auxiliary to some other agreement. Rather, the settlement agreements reflect only an agreement to restrict allegedly infringing use of trademarks and URLs and do not reflect or constitute an agreement to limit output, to fix prices, to restrict the amounts that are bid or paid for advertising, or to achieve any other purpose.

30. 1-800 Contacts' settlements were standard non-use agreements whereby a party agreed not to use the other's trademark, a form of settlement routinely used to resolve trademark disputes. *See, e.g.*, 3 McCarthy on Trademarks & Unfair Competition § 18:82 (4th ed. 2016 update) ("An agreement not to use or register a mark, usually entered into to settle an infringement dispute, is not against public policy and is an enforceable promise."); *MWS Wire Indus., Inc. v. Cal. Fine Wire Co.*, 797 F.2d 799, 802 (9th Cir. 1986) (upholding a non-use trademark settlement agreement as consistent with the "overriding public interest in settling and quieting litigation") (internal quotation marks and citation omitted).

31. The Lanham Act itself envisages and authorizes non-use trademark agreements. *See, e.g.*, *Wells Cargo, Inc. v. Wells Cargo, Inc.*, 606 F.2d 961, 965 (C.C.P.A. 1979); *see also SunAmerica Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1336 (11th Cir. 1996) ("complete injunctions against the infringing party are the order of the day" in infringement actions); 5 McCarthy on Trademarks and Unfair Competition § 30:1 (4th Ed. 2016 update).

32. The Supreme Court in *Actavis* pointed to non-use trademark settlements as an example of a "commonplace" settlement. *Actavis*, 133 S.Ct. at 2233 (citing *Metro-Goldwyn Mayer, Inc. v. 007 Safety Prods., Inc.*, 183 F.3d 10 (1st Cir. 1999)) (party agreed to pay damages to a trademark holder, to not use a registered trademark, and to abandon a pending application for his competing trademark).

33. As noted in the Court's findings of fact, court records indicate that parties have frequently settled disputes regarding the use of trademarks in paid search advertising by prohibiting paid search advertising in response to searches for the plaintiff's trademark.

34. In addition, the challenged settlement agreements here, unlike the settlements in *Actavis*, provided for relief within the range of what a court could have ordered. *Compare Actavis*, 133 S.Ct. at 2231.

35. The record evidence shows that settlements of trademark cases involving paid search advertising generally prohibit the defendant from purchasing the plaintiff's trademark as a keyword and require the defendant to use negative keywords.

36. Complaint Counsel did not present any evidence of any trademark settlement agreement in any case involving paid search advertising that did not contain such provisions. As noted in the Court's findings of fact, Ms. Tushnet's testimony to the contrary lacks any basis and is not reliable: she has never settled a trademark case, did not review the challenged settlement agreements and did not review any settlements agreements other than those on which Mr. Hogan based his opinions.

37. Also as noted in the Court's findings of fact, it is irrelevant whether *some* of the agreements relied upon by Mr. Hogan were executed in cases where the plaintiff did not expressly assert a claim based on paid search advertising in response to searches for its trademark; if anything, this makes the settlement agreements here more narrowly tailored and therefore less suspect.

38. Since the settlement agreements here take commonplace forms and contain no provisions that suggest a collusive attempt to split monopoly profits from reduced competition, they cannot give rise to antitrust liability.

**B. *Even if the Settlements Are Not Commonplace, None of the Actavis Factors Supports Potential Antitrust Liability***

39. Even if Complaint Counsel could demonstrate that the form of the challenged settlements is unusual or not commonplace, the "general legal policy favoring settlement of disputes" forecloses antitrust liability for the settlement agreements unless several additional considerations are present. *Actavis*, 133 S.Ct. at 2226.

40. The first *Actavis* consideration is whether the "specific restraint at issue has the 'potential for genuine adverse effects on competition.'" 133 S.Ct. at 2234 (quoting *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986)).

41. Here, there is little risk that a trademark settlement would be used to divide monopoly profits because "trademarks are by their nature non-exclusionary.

42. A trademark, unlike other intellectual property rights, does not confer a legal monopoly on any good or idea; it confers rights to a name only." *Clorox Co.*, 117 F.3d at 56.



43. Further, unlike the patents at issue in *Actavis*, the trademark rights in this case are not buttressed by a regulatory framework that governs competition in the market.

44. Thus, for these and other reasons described further below and in the Court's findings of fact, the restraints imposed by the settlement agreements do not create a potential for genuine adverse effects on competition.

45. The second *Actavis* consideration is whether any anticompetitive consequences associated with the settlements at issue "will at least sometimes prove unjustified." 133 S.Ct. at 2235-36. Complaint Counsel have not satisfied this factor with respect to 1800 Contacts' settlements.

46. This Court need not address whether, as a theoretical matter, some settlements related to keyword search advertising will sometimes be unjustified. To obtain the disruptive post hoc injunctive relief they are seeking in this enforcement action, Complaint Counsel are required under this factor to show that 1800 Contacts' settlements, in particular, are unjustified. They have not done so here.

47. As the Court in *Actavis* explained, an agreement will sometimes amount to "no more than a rough approximation of the litigation expenses saved through the settlement." *Id.* at 2236. When a restraint "reflects traditional settlement considerations, such as avoided litigation costs, or fair value for services, this is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement." *Id.*

48. As noted in the Court's findings of fact, the settling parties testified, and Complaint Counsel's own expert, Dr. Evans, essentially conceded, that the settlements here reflected rational decisions to avoid litigation costs. Accordingly, the Court has no "concern" that the settlements were designed to enable 1-800 Contacts and the settling parties to share "monopoly profits."

49. The third *Actavis* consideration is that "where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice." *Actavis*, 133 S.Ct. at 2236.

50. Trademarks, however, only protect names and not goods or services, so trademark settlements without substantial monetary payments provide no indication of market power. *See Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1346 (9th Cir. 1987) (“Market power, if any, is derived from the product, not from the name or symbol as such.”).

51. Further, as described in the findings of fact and elsewhere in these conclusions of law, the settling parties lack the power to bring about anticompetitive harm by reducing output or raising prices and Complaint Counsel have failed to present credible evidence to demonstrate otherwise.

52. The fourth *Actavis* factor addresses the administrative feasibility of antitrust challenges to reverse payment settlements.

53. Whereas in *Actavis* “the size of the unexplained payment can provide a workable surrogate for a patent’s weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself,” *Actavis*, 133 S.Ct. at 2236-37, here, there is no shortcut that makes the “antitrust game . . . worth th[e] litigation candle,” *id.* at 2234, as reflected in Complaint Counsel’s belabored attempt to litigate the merits of 1-800 Contacts’ trademark claims.

54. Indeed, the Commission has stated that “[a]n after-the-fact inquiry by the Commission into the merits of the underlying litigation is not only unlikely to be particularly helpful, but also likely to be unreliable.” *Schering-Plough*, 136 F.T.C. 956, 997 (2003).

55. The Commission, instead, has placed its “focus on the state of the world as it was perceived by the parties at the time that they entered into the settlement agreement, when they could not be sure how the litigation would turn out.” 136 F.T.C. at 995. As noted in the Court’s findings of fact, the settling parties expressed uncertainty about their ability to defend against 1-800 Contacts’ trademark claims.

56. The Commission has also noted “the serious uncertainties that would confront parties who seek to settle patent litigation if the Commission undertook to examine the underlying merits itself later on, and gave them conclusive weight.” 136 F.T.C. at 995. The same

uncertainties would exist if the Court undertook to examine the merits of 1-800 Contacts' trademark claims.

57. Indeed, given that there is no aspect of the challenged settlement agreements comparable to a large, unexplained payment by the plaintiff to a defendant, the only way to demonstrate that the challenged settlement agreements at issue here are not *bona fide* settlements would be to litigate the merits of the underlying claims in each of the cases giving rise to a challenged settlement agreement. This would not be feasible or even possible to do given the passage of time and the lack of complete discovery.

58. Thus, the antitrust challenge brought here by Complaint Counsel is not administratively feasible.

59. Moreover, the evidence that has been adduced shows that the settlement was within the scope of the relief available to Respondent if it had prevailed in the underlying actions and that the settlement was justified by the cost of litigation and the uncertainty and probability of the outcome had the litigation proceeded through trial and appeal.

60. Finally, the Court in *Actavis* reasoned that subjecting large, unjustified reverse payments to antitrust scrutiny "does not prevent litigating parties from settling their lawsuit because they could "settle in other ways.'" *Actavis*, 133 S.Ct. at 2237.

61. Mr. Howard Hogan testified unrebutted as a practitioner that subjecting non-use trademark settlements to antitrust scrutiny would significantly limit the latitude of parties to a trademark dispute to settle their claims, and Complaint Counsel have not presented evidence of any alternative form of settlement that would have provided relief to Respondent for the scope of the infringement that it alleged occurred.

62. A settlement prohibiting only paid search advertisements that used 1-800 Contacts' mark in the text of the ad would not fully protect 1-800 Contacts' potential trademark rights. *See, e.g., Hearts on Fire Co., LLC v. Blue Nile, Inc.*, 603 F. Supp. 2d 274, 288 (D. Mass. 2009); *Fair Isaac Corp. v. Experian Info. Sols. Inc.*, 645 F. Supp. 2d 734, 760–61 (D. Minn. 2009).

63. Nor have Complaint Counsel presented any evidence that requiring labeling would eliminate any potential for confusion giving rise to an infringement claim. *Cf. Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1243 (10th Cir. 2006) (“heavy burden” to prove that altering the allegedly infringing materials “would significantly reduce the likelihood of consumer confusion”); *Weight Watchers Int’l, Inc. v. Luigino’s, Inc.*, 423 F.3d 137, 143–44 (2d Cir. 2005).

64. In sum, none of the factors that led the Supreme Court in *Actavis* to hold that unusual settlements do not necessarily enjoy the law’s traditional deference to settlements suggests that the settlements here pose a sufficient risk of anticompetitive harm to warrant antitrust scrutiny. The settlement agreements therefore cannot give rise to antitrust liability.

**III. THE SETTLEMENT AGREEMENTS ARE NOT INHERENTLY SUSPECT.**

65. The challenged settlement agreements are not inherently suspect or presumptively anticompetitive.

66. “[A]bandonment of the ‘rule of reason’ in favor of presumptive rules (or a ‘quick-look’ approach) is appropriate only where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” *Actavis, Inc.*, 133 S.Ct. at 2237.

67. “The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of the restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.” *Cal. Dental Ass’n*, 526 U.S. at 781.

68. A restraint is inherently suspect only if “it is obvious from the nature of the challenged conduct that it will likely harm consumers.” *Polygram Holding, Inc.*, 416 F.3d at 35. Only “[i]f, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition” can “the restraint [be] presumed unlawful. . . .” *Id.* at 36.

**A. *The Settlement Agreements Are Not Obviously Anticompetitive***

69. Trademark settlement agreements are not inherently suspect because “it is reasonable to presume that such arms-length agreements are pro-competitive.” *Clorox Co.*, 117 F.3d at 60.

70. Indeed, as noted, “because the antitrust laws protect competition, not competitors, and trademarks are non-exclusionary, it is difficult to show that an unfavorable trademark agreement raises antitrust concerns.” *Clorox Co.*, 117 F.3d at 57 (citation omitted).

71. Rather, “[n]ational protection of trademarks is desirable . . . because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.” *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985).

72. “[T]rademark law, by preventing others from copying a source-identifying mark, ‘reduce[s] the customer’s costs of shopping and making purchasing decisions for it quickly and easily assures a potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.” *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995).

73. “At the same time, the law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product. The law thereby encourage[s] the production of quality products, and simultaneously discourages those who hope to sell inferior products by capitalizing on a consumer’s inability quickly to evaluate the quality of an item offered for sale.” *Qualitex Co.*, 514 U.S. at 164 (internal citation and quotation marks omitted) (citing, *inter alia*, Landes & Posner, *The Economics of Trademark Law*, 78 T.M. Rep. 267, 271–72 (1988)).

74. For these reasons, trademark law incentivizes procompetitive interbrand competition and protects against anticompetitive harm from a reduction in such activity. *See* S. REP. 100-515, 4, 1988 U.S.C.C.A.N. 5577, 5580 (“Trademarks encourage competition, promote economic growth and can raise the standard of living of an entire nation.”); 1 McCarthy on Trademarks and Unfair Competition § 2:3 (4th ed. 2004) (“if freely permitted,” trademark

confusion “would eventually destroy the incentive of trademark owners to make the investments in quality control, promotion and other activities necessary to establishing strong marks and brand names. It is this result that would have severe anticompetitive consequences.”).

75. Relatedly, “[e]fforts to protect trademarks, even aggressive ones, serve the competitive purpose of furthering trademark policies.” *Clorox Co.*, 117 F.3d at 61.

76. Even settlement agreements involving alleged payments by an intellectual property owner to competitors to stay out of the market must be evaluated under the rule of reason. *Actavis, Inc.*, 133 S.Ct. at 2237. The settlements here did not involve anything resembling such an agreement to keep a competitor from offering a competing product and dividing the incumbent’s monopoly profits.

77. For these reasons, even if a commonplace settlement agreement is subject to antitrust scrutiny, a trademark settlement agreement that is “common, and favored, under the law” has procompetitive potential and should be analyzed under the rule of reason. *Clorox Co.*, 117 F.3d at 55.

78. There are numerous others. “The plausibility of competing claims about the effects of” challenged “advertising restrictions rules out the indulgently abbreviated review” advocated by Complaint Counsel. *Cal. Dental Ass’n*, 526 U.S. at 778.

79. Inherently suspect treatment is not appropriate where “advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition.” *Cal. Dental Ass’n*, 526 U.S. at 771.

80. As noted in the Court’s findings of fact, restraining paid search ads for other retailers when consumers search for 1-800 Contacts has well-documented potential to benefit consumers by, for example, reducing their search costs and limiting confusion.

81. While Complaint Counsel have challenged the extent of those benefits and contend that they do not outweigh the harm, in the context of the complex and evolving paid search advertising at issue in this case, evaluating the balance of consumer effects is “a question

susceptible to empirical but not *a priori* analysis,” *Cal. Dental Ass’n*, 526 U.S. at 774, as reflected in the parties’ presentation of survey and other empirical evidence.

82. As the Supreme Court has explained, “before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.” *Cal. Dental Ass’n*, 526 U.S. at 775 n.12.

83. Inherently suspect treatment is inappropriate because the “economic learning and the experience of the market” with paid search advertising is relatively limited. *Polygram Holding, Inc.*, 416 F.3d at 36.

84. According to Complaint Counsel’s own experts, search engines are “[t]wo-sided markets were first clearly identified in the early 2000s.” *United States v. Am. Express Co.*, 838 F.3d 179, 186 n.3 (2d Cir. 2016).

85. Courts have scarcely applied the economics of two-sided markets in antitrust cases or applied antitrust analysis to paid search advertising.

86. Further, in light of the myriad complexities and many factors involved in measuring effects on search engine algorithms set forth in the Court’s findings of fact, “an observer with even a rudimentary understanding of economics” could not “conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” *Actavis, Inc.*, 133 S.Ct. at 2237.

87. The challenged agreements must be judged under the rule of reason.

**B. *Complaint Counsel’s Argument that the Settlements Are Overbroad Does Not Establish that the Settlement Agreements Were Inherently Suspect***

88. Complaint Counsel are wrong that the settlements are inherently suspect because they “exceed the scope of any property right that 1-800 Contacts may have in its trademarks.” Cmplt., ¶ 32.

89. Before analyzing Complaint Counsel’s attempt to litigate the merits of 1-800 Contacts’ trademark litigation, the Court notes that the challenges associated with doing so ten years after the fact as to multiple advertisements by multiple parties over multiple years confirms the Commission’s view that “[a]n after-the-fact inquiry by the Commission into the merits of the underlying litigation is not only unlikely to be particularly helpful, but also likely to be unreliable.” *Schering-Plough*, 136 F.T.C. at 997.

90. As noted, that counsels against recognizing antitrust claims premised on trademark settlement agreements that take commonplace forms.

91. Complaint Counsel’s overbreadth argument fails at the threshold because they “cannot make a case under the antitrust laws unless it demonstrates that the [settlement agreement] may significantly harm competition as a whole, *regardless of whether the agreement is entirely necessary to protect [the defendant’s] trademark rights.*” *Clorox Co.*, 117 F.3d at 57 (emphasis added).

92. Indeed, in the context of applying antitrust law to patent settlements, the Commission itself has “agree[d] the antitrust analysis of a Hatch-Waxman settlement should not turn on a judicial assessment of the strength or scope of the *particular* patent involved in the case.” *FTC v. Actavis*, No. 12-416, Reply Br. for Pet’r, 2013 WL 1099171, at \*6 (U.S. Mar. 18, 2013).

93. So, too, the antitrust analysis of the parties’ trademark settlements here should not turn on the application of trademark law to particular paid search advertisements.



94. Complaint Counsel's argument that the settlement agreements exceed the scope of 1-800 Contacts' property rights also fails because trademark law recognizes the claims that 1-800 Contacts filed.

95. 1-800 Contacts alleged, among other things, that various retailers of contact lenses infringed its trademark by purchasing paid search advertisements that appear when users search for its trademark or confusingly similar variants thereof.

96. To establish a claim for trademark infringement, a plaintiff must prove that it has a protectable ownership interest in the mark and that the defendant's unauthorized use of the mark in commerce is likely to cause consumer confusion. *E.g., Airs Aromatics, LLC v. Opinion Victoria's Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595, 599 (9th Cir. 2014); 15 U.S.C. §§ 1125(a), 1127.

97. There is no dispute that 1-800 Contacts has a protectable interest in the trademarks and variants thereof asserted in the litigations that it settled and that are protected by the settlement agreements.

98. A transaction involving the purchase of keywords that are trademarked by another firm is a use in commerce subject to the Lanham Act. *See Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1145 (9th Cir. 2011); *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123 (2d Cir. 2009); *Australian Gold, Inc.*, 436 F.3d at 1239; *Edina Realty, Inc. v. TheMLSonline.com*, No. CIV. 04-4371JRTFLN, 2006 WL 737064, at \*3 (D. Minn. Mar. 20, 2006).

99. Accordingly, the issue implicated by the trademark claims settled by the challenged agreements is whether 1-800 Contacts could prove that paid search ads displayed in response to searches for its trademarks were likely to cause consumer confusion. *See Rescuecom Corp.*, 562 F.3d at 130-31.

100. Displaying advertisements in response to a search for another firm's trademark can cause initial interest confusion, which occurs "when a consumer seeks a particular trademark

holder's product and instead is lured to the product of a competitor by the competitor's use of the same or a similar mark." *Australian Gold, Inc.*, 436 F.3d at 1238.

101. Actionable initial interest confusion can arise when, for example, "a consumer enters a query for '1-800 Contacts' on Google; sees a screen with an ad for [a rival retailer such as] Lens.com that is generated because of Lens.com's purchase of one of the nine Challenged Keywords; becomes confused about whether Lens.com is the same source as, or is affiliated with, 1-800; and therefore clicks on the Lens.com ad to view the site." *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1244 (10th Cir. 2013).

102. In the context of paid search advertising, the likelihood of confusion is "an inherently factual issue that depends on the facts and circumstances in each case." *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 153 (4th Cir. 2012).

103. Courts in different Circuits apply different multi-factor tests to determine whether advertisements that appear in response to searches for a firm's trademark are likely to confuse consumers. *See Checkpoint Sys., Inc. v. Check Point Software Techs.*, 269 F.3d 270, 280 (3d Cir. 2001); *Edible Arrangements, LLC v. Provide Commerce, Inc.*, No. 3:14-CV-00250, 2016 WL 4074121, at \*6 (D. Conn. July 29, 2016); *Zerorez Franchising Sys., Inc. v. Distinctive Cleaning, Inc.*, 103 F. Supp. 3d 1032, 1041 (D. Minn. 2015); *Lens.com*, 722 F.3d at 1244; *Network Automation, Inc.*, 638 F.3d at 1148-49; *Rosetta Stone*, 676 F.3d at 154-55.

104. The traditional multi-factor tests are applied flexibly in the keyword advertising context, with no one factor considered determinative. *See Network Automation*, 638 F.3d at 1154; *Checkpoint Sys.*, 269 F.3d at 280 (no single factor is "determinative").

105. "The weight of any given factor can depend very much on context" and there is a "the danger of applying the factors mechanically without attention to context." *Lens.com*, 722 F.3d at 1243-44.

106. Courts have rejected fair use as the appropriate framework in which to analyze paid search advertising trademark disputes. *E.g.*, *Network Automation*, 638 F.3d at 1152.

107. Other courts that have considered nominative fair use in the context of trademark infringement claims for the use or sale of trademarks as keywords declined to endorse it as a substitute for a multi-factor likelihood of confusion test. *Rosetta Stone Ltd.*, 676 F.3d at 155 (“We hasten to add that we are not adopting a position about the viability of the nominative fair use doctrine as a defense to trademark infringement or whether this doctrine should formally alter our likelihood-of-confusion test in some way”).

108. Complaint Counsel are incorrect that the law is clear that a paid search advertisement can only infringe if it includes the trademark in the text of the ad. *E.g.*, *Hearts on Fire Co., LLC*, 603 F. Supp. 2d at 288; *Fair Isaac Corp.*, 645 F. Supp. 2d at 760–61.

109. Courts have denied motions to dismiss claims for trademark infringement based on paid search advertising in response to a search for a firm’s trademark in cases in which the ads themselves did not contain the mark. *See, e.g.*, *LBF Travel, Inc. v. Fareportal, Inc.*, No. 13 CIV. 9143 LAK GWG, 2014 WL 5671853, at \*9 (S.D.N.Y. Nov. 5, 2014); *Hearts on Fire Co., LLC*, 603 F. Supp. 2d at 288 (“While these advertisements may not have displayed the mark itself, the surrounding context supplies a sufficient basis to support allegations of consumer confusion at this early stage of the litigation.”); *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, No. C 03-05340 JF, 2005 WL 832398, at \*7 (N.D. Cal. Mar. 30, 2005).

110. Courts also have denied motions for summary judgment on such claims, in at least one case expressly rejecting the argument that “as a matter of law, no infringement occurred given that none of the[] sponsored search advertisements actually include [the plaintiff’s] trademarks in the text.” *Fair Isaac Corp.*, 645 F. Supp. 2d at 760–61; *see also, e.g.*, *Pensacola Motor Sales v. E. Shore Toyota, LLC*, No. 3:09CV571/RS-MD, 2010 WL 3781552, at \*3 (N.D. Fla. Sept. 23, 2010); *Rosetta Stone Ltd.*, 676 F.3d at 160.

111. The cases upon which Complaint Counsel rely for their proposed single-factor test for paid search advertising cases—whether the trademark appears in the text of the advertisement—do not reach that conclusion, but suggest instead that given the specific factual circumstances presented to the court, advertisements that are sufficiently clearly labeled in the

surrounding context of the entire search engine webpage may not give rise to a likelihood of initial interest confusion. *See Network Automation*, 638 F.3d at 1153-54 (“the labeling and appearance of the advertisements as they appear on the results page includes more than the text of the advertisement, and must be considered as a whole”); *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 938 (9th Cir. 2015) (in the Amazon sales page context, the fact that “Amazon clearly labels each of the products for sale by brand name and model number accompanied by the photograph of the item,” in combination with other factors, makes it “unreasonable to suppose that a reasonably prudent consumer accustomed to shopping online would be confused about the source of the goods”); *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d at 1245 (noting that the inference of confusion is unnatural where a link both “clearly identifies [its] source” and is “clearly labeled *as an advertisement*”) (emphasis added).

112. Indeed, in *Network Automation*, the court did not determine whether the advertisements were likely to cause consumer confusion but instead remanded the case back to the district court with instructions to consider the four “most relevant factors” to the analysis in the paid search advertising context, which include “(1) the strength of the mark; (2) the evidence of actual confusion; (3) the type of goods and degree of care likely to be exercised by the purchaser; and (4) the labeling and appearance of the advertisements and the surrounding context on the screen displaying the search results page.” *Network Automation*, 638 F.3d at 1154.

113. Complaint Counsel presented no evidence regarding the nature or effect of how paid search advertisements are labeled.

114. As noted in the Court’s findings of fact, however, the Commission has expressed concerns that search engines have not labeled paid search advertisements with sufficient clarity. (*See* RX0512 ((Letter from Mary K. Engle, FTC, Bureau of Consumer Protection (June 24, 2013)); RX0599 (Letter from H. Hipsley, FTC, Division of Advertising Practices, to Mr. Gary Ruskin (June 27, 2002)).

115. Further, there is legal uncertainty regarding whether the purchase by a defendant of a generic keyword term that results in the display of advertisements in response to search queries

for the plaintiff's trademarks constitutes a use in commerce of the trademark, though there is some authority suggesting that this, too, is potentially actionable infringement. *See Buying for the Home, LLC v. Humble Abode, LLC*, 459 F. Supp. 2d 310, 322 (D.N.J. 2006) (finding that the "purchase and/or sale of keywords that trigger advertising constitutes the type of 'use' contemplated by the Lanham Act" where an advertisement may have appeared because plaintiff purchased as a keyword the generic term "bedroom"); *I-800Contacts, Inc. v. Memorial Eye, P.A.*, No. 2:08-cv-983 TS, 2010 WL 988524, at \*5 (D. Utah Mar. 15, 2010).

116. At least two courts held, as Complaint Counsel concede, that 1-800 Contacts' trademark claims were not sham. *See I-800Contacts, Inc. v. Mem'l Eye, P.A.*, 2010 WL 988524, at \*6; *Lens.com v. I-800 Contacts, Inc.*, No. 2:12CV00352 DS (D. Utah Mar. 3, 2014), ECF No. 91, at 2.

117. Complaint Counsel have not demonstrated that 1-800 Contacts' trademark claims were "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993).

118. Complaint Counsel have not demonstrated that any lawsuit asserting that any form of conduct prohibited by the settlement agreement constituted trademark infringement would be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Prof'l Real Estate Inv'rs, Inc., Inc.*, 508 U.S. at 60.

119. As noted in the Court's findings of fact, 1-800 Contacts introduced evidence from Dr. Goodstein and Dr. Van Liere, among others, that consumers who searched for 1-800 Contacts were likely to be confused by advertisements for other retailers.

120. Dr. Van Liere's finding of confusion among approximately 20% (15% if weighted according to Complaint Counsel's approach) of the relevant population of consumers would be sufficient to establish likelihood of confusion for trademark infringement purposes. *See BellSouth Corp. v. Internet Classifieds of Ohio*, No. 1:96-CV-0769-CC, 1997 WL 33107251, at \*20 (N.D. Ga. Nov. 12, 1997); *Mut. of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 400 (8th Cir. 1987); *RJR*

*Foods, Inc. v. White Rock Corp.*, 603 F.2d 1058, 1061 (2d Cir. 1979); 6 McCarthy on Trademarks and Unfair Competition § 32:188 (4th ed.) (“Where other evidence is supportive, courts have found a likelihood of confusion when survey results are between 10% and 20%”).

121. Dr. Van Liere conducted his survey with respect to the current time frame and did not attempt to replicate conditions that existed at the time the events giving rise to the underlying litigation occurred. This was entirely proper. It would not have been possible to have replicated those past conditions or to have conducted a survey of today’s consumers that would have accurately represented their understanding of various paid advertisements as of earlier time periods.

122. However, what Dr. Van Liere’s survey and the testimony of Dr. Goodstein did persuasively show was that 1-800 Contacts would have been able to present evidence to a trier of fact that could reasonably have persuaded the trier of fact that the conduct of the settling parties at issue in the underlying litigations had created a likelihood of confusion such that 1-800 Contacts was entitled to relief such as the relief it obtained in the settlement agreements.

123. Complaint Counsel’s expert Dr. Jacoby did not find significant confusion based on his survey, and criticized Dr. Van Liere’s survey. The Court did not find Dr. Jacoby’s testimony to be credible and does not credit his survey, as explained in the preceding findings of fact. Further, the Court does not agree with Dr. Jacoby’s criticisms of Dr. Van Liere’s survey.

124. Even if the Court did give weight to Dr. Jacoby’s testimony and his survey, it could not find that it should disregard entirely the survey and testimony of Dr. Van Liere or that it should disregard the testimony of Dr. Goodstein. The Court still would find that a triable issue regarding the likelihood of confusion could have been presented in each of the underlying litigations—and could be presented in a litigation today if the settlements were not in effect—and thus that the trier of fact in those cases might have found a likelihood of confusion sufficient to support the relief that 1-800 Contacts was seeking.

125. It also is important to note that Dr. Jacoby’s survey and stimuli did not sufficiently replicate market conditions.

126. This was improper, as courts have recognized in discrediting Dr. Jacoby's work. *See Simon Prop. Grp. L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1043 (S.D. Ind. 2000) (rejecting "survey [that] does not ask respondent to view actual search engine results containing hyperlinks to these sites in a way that might actually occur in the marketplace"); *Smith v. Wal-Mart Stores, Inc.*, 537 F. Supp. 2d 1302, 1327-29 (N.D. Ga. 2008) (criticizing Jacoby for artificially manipulating respondents' interest in a particular internet link, which "did not sufficiently reflect actual marketplace conditions or typical consumer shopping behavior").

127. At most, Dr. Jacoby's survey and his testimony supports the conclusion that 1-800 Contacts might not have prevailed on summary judgment in the underlying litigations, *i.e.*, that the defendant in each case might have been able to present trial issues of material fact.

128. In sum, giving credit to the survey and testimony of Dr. Jacoby, which the Court would not do, and also giving credit to the survey of Dr. Van Liere and the testimony of Dr. Van Liere and Dr. Goodstein, the Court concludes that Complaint Counsel have failed to establish that 1-800 Contacts could not have presented evidence in the underlying cases that would have satisfied the likelihood of confusion standard.

129. Moreover, even in the absence of any survey testimony such as Dr. Van Liere's, 1-800 Contacts could have prevailed in the underlying litigations. "Surveys do not measure the degree of actual confusion by real consumers making mistaken purchases. Rather, surveys create an experimental environment from which we can get useful data from which to make informed inferences about the likelihood that actual confusion will take place." 6 McCarthy on Trademarks and Unfair Competition § 32:184 (4th ed.) (citing Jacoby, Trademark Surveys, § 3.70 (ABA 2014) ("Even at their very best, trademark surveys are unlike the real world marketplace in a number of key respects.")).

130. Survey evidence of actual confusion is not necessary to prevail on a trademark infringement claim. *See, e.g., Sabinsa Corp. v. Creative Compounds, LLC*, 609 F.3d 175, 190 (3d Cir. 2010); *Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll v. Smack Apparel Co.*, 550 F.3d 465, 483 (5th Cir. 2008); *Visible Sys. Corp. v. Unisys Corp.*, 551 F.3d 65, 74 (1st Cir. 2008);

*Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed Cir. 2002); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 842 (9th Cir. 2002); 15 U.S.C. § 1114(1)(a).

131. Likewise, courts uphold findings of infringement absent consumer surveys demonstrating actual confusion. *See, e.g., Borinquen Biscuit Corp. v. M.V. Trading Corp.*, 443 F.3d 112, 120 (1st Cir. 2006); *Montgomery v. Noga*, 168 F.3d 1282, 1302 (11th Cir. 1999); *Smack Apparel Co.*, 550 F.3d at 483; *A.J. Canfield Co. v. Vess Beverages, Inc.*, 796 F.2d 903, 908 (7th Cir. 1986); *see also* Robert C. Bird & Joel H. Steckel, *The Role of Consumer Surveys in Trademark Infringement: Empirical Evidence from the Federal Courts*, 14 U. Pa. J. Bus. L. 1013, 1035 (2012) (“no evidence that surveys are used by a majority or even a large plurality of litigants to prove likelihood of confusion in federal court”).

132. While “the parties to trademark disputes frequently as here hire professionals in marketing or applied statistics to conduct surveys of consumers,” in fact “[t]he battle of experts that ensues is frequently unedifying.” *Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. P’ship.*, 34 F.3d 410, 414–15 (7th Cir. 1994) (Posner, J.), *abrogated on other grounds by Ad. Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796 (7th Cir. 2014).

133. The salient point for this antitrust case is not which party’s expert more effectively used the “tricks of the survey researcher’s black arts,” *Indianapolis Colts, Inc.*, 34 F.3d at 416, but that the claims that 1-800 Contacts settled involved *bona fide* trademark disputes that would require a fact-finder to assess evidence of confusion, taking into account the specific circumstances and context of the paid search advertising at issue.

134. Dr. Goodstein’s testimony would have created such an issue of fact.

135. Further, as set forth in the findings of fact, 1-800 Contacts did adduce evidence in the underlying actions of actual confusion that was not based on survey evidence but rather was based on contemporaneous events and documents. Had each of the underlying cases proceeded through discovery and to trial, 1-800 Contacts might have developed additional evidence of actual confusion that would have been sufficient to persuade a trier of fact that the requisite likelihood of confusion had been shown. Complaint Counsel made no effort to show otherwise.



136. In sum, 1-800 Contacts might have prevailed in each of the underlying litigations had they proceeded through trial.

137. As such, even if Complaint Counsel's position that the settlement agreements were unreasonably broad vis-à-vis the scope of trademark protection were relevant, Complaint Counsel are wrong that the settlement agreements are categorically broader than any clear demarcation in trademark law.

138. Even if the settlement agreements were broader than necessary to protect 1-800 Contacts' rights under federal trademark law, and the Court finds that they were not, Complaint Counsel failed to show, or to offer any evidence, that they were broader than necessary to protect 1-800 Contacts' rights under state and other federal laws.

139. In the underlying litigations, in addition to claims for trademark infringement, 1-800 Contacts also asserted various additional claims, including claims for unfair competition, false advertising, misappropriation, and unjust enrichment. *See, e.g.*, RX0072 (*1-800 Contacts, Inc. v. Memorial Eye, P.A.*); CX1617 (*1-800 Contacts, Inc. v. EZ Contacts USA*); CX1615 (*1-800 Contacts, Inc. v. Coastal Contacts, Inc.*); CX1618 (*1-800 Contacts, Inc. v. Lensfast, Inc.*); CX1620 (*1-800 Contacts, Inc. v. Walgreens, Inc.*); CX1621 (*1-800 Contacts, Inc. v. Web Eye Care, Inc.*); RX1821 (*1-800 Contacts, Inc. v. Standard Optical Company, Inc.*); RX1822 (*1-800 Contacts, Inc. v. Empire Vision Center, Inc.*); CX0638 (*1-800 Contacts, Inc. v. Tram Data, LLC*).

140. In this context, claims for unfair competition, false advertising, misappropriation, and unjust enrichment were viable. Indeed, courts regularly deny motions to dismiss these causes of action in litigations involving keyword advertising. *See, e.g.*, *Morningware, Inc. v. Hearthware Home Prods., Inc.*, 673 F. Supp. 2d 630, 639 (N.D. Ill. 2009) (denying defendant advertiser's motion to dismiss deceptive trade practices and unfair competition claims, among others); *Google Inc. v. Am. Blind*, 2005 WL 832398, at \*7 (denying Google's motion to dismiss false representation and unfair competition claims, among others); *Gov't Employees Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700, 703–04 (denying Google's motion to dismiss false representation and unfair competition claims, among others); *Am. Airlines, Inc. v. Google, Inc.*, No. 4:07-CV-487-A

(N.D. Tex. Oct. 24, 2007) (D.E. 19) (denying Google’s motion to dismiss claims for false representation, misappropriation, and unfair competition, among others); *CNG Fin. Corp. v. Google, Inc.*, No. 1:06-cv-040 (S.D. Ohio Nov. 21, 2006) (D.E. 35) (denying Google’s motion to dismiss claims of false representation and misappropriation, among others).

141. Complaint Counsel have not demonstrated that 1-800 Contacts’ claims for unfair competition, false advertising, misappropriation, or unjust enrichment were “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *Prof’l Real Estate Inv’rs, Inc.*, 508 U.S. at 60.

142. Complaint Counsel have not demonstrated that any lawsuit asserting that any form of conduct prohibited by the settlement agreement constituted unfair competition, false advertising, misappropriation, or unjust enrichment would be “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *Prof’l Real Estate Inv’rs, Inc., Inc.*, 508 U.S. at 60.

143. In the underlying litigations, in addition to claims under federal law, 1-800 Contacts also asserted claims under Utah Code An. § 13-5a-102 for “unfair competition.” *See, e.g., CX1620-009 (1-800 Contacts, Inc. v. Walgreens, Inc.); CX1618-011 (1-800 Contacts, Inc. v. Lensfast); CX1621-009 (1-800 Contacts, Inc. v. Web Eye Care, Inc.)*.

144. In Utah, “unfair competition” is defined under Utah’s Unfair Competition Act as “an intentional business act or practice that: (i)(A) is unlawful, unfair, or fraudulent; and (B) leads to a material diminution in value of intellectual property; and (ii) is one of the following: (A) malicious cyber activity; (B) infringement of a patent, trademark, or trade name; (C) a software license violation; or (D) predatory hiring practices.” Utah Code An. § 13-5a-102.

145. Utah’s unfair competition regime is broader than the federal regime because the defendant’s activity is implicated under the statute if it is “unlawful, unfair, or fraudulent”; it need not be likely to cause confusion or misrepresent the nature or quality of goods or services. Utah Code An. § 13-5a-102.

146. For this reason, Utah courts have described unfair competition as an “open-ended” category that encompasses a number of different torts, noting that “nameless forms of unfair competition may be recognized at any time for the protection of commercial values.” *Proctor & Gamble Co. v. Haugen*, 947 F. Supp. 1551, 1554, 1554 n.4 (D. Utah 1996).

147. Complaint Counsel have not demonstrated that 1-800 Contacts’ claims for unfair competition under Utah law were “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *Prof’l Real Estate Inv’rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993).

148. Complaint Counsel have not demonstrated that any lawsuit asserting that any form of conduct prohibited by the settlement agreement constituted unfair competition under Utah law would be “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *Prof’l Real Estate Inv’rs, Inc., Inc.*, 508 U.S. at 60 (1993).

149. Yet, even if the settlement agreements did in some respect restrain conduct that might not, standing alone, infringe on 1-800 Contacts’ property rights, that does not mean that the agreements would harm competition.

150. It is quite common for the scope of settlement agreements to exceed the scope of the infringing conduct for reasons of administrative efficiency and to ensure that similar infringing conduct does not occur in the future. Mr. Hogan offered unrebutted testimony that trademark owners seek clear settlement provisions that minimize the risk of recurring disputes.

151. Any overbreadth of the settlement agreements was justified by the need to make the settlements administratively feasible and to ensure that future violations would be clearly prohibited so that future litigation would likely be avoided.

152. Courts decline to limit trademark relief to prohibit only advertisements proven to be “confusing” because they “require[] the defendant to guess at what kind of conduct would be deemed trademark infringement.” *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 667 & 669 (8th Cir. 1987); *see also Harley-Davidson, Inc. v. Morris*, 19 F.3d 142, 146 (3d Cir. 1994) (rejecting reading of consent decree that “would require the district court . . . to

make determinations on . . . whether there was likelihood of confusion arising from any of [defendant]’s acts”); *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 984; 5 McCarthy on Trademarks and Unfair Competition § 30:13 (“An injunction which merely forbids a defendant from . . . ‘infringing upon plaintiff’s trademarks and trade secrets’ adds nothing to what the law already requires. If an injunction is so worded, then the factual elements of what exactly is . . . ‘trademark infringement’ must be re-hashed all over again in a contempt hearing.”).

153. Further, “an infringer, once caught, must expect some fencing in,” and “a court can frame an injunction which will keep a proven infringer safely away from the perimeter of future infringement.” *Tamko Roofing Prod., Inc. v. Ideal Roofing Co.*, 282 F.3d 23, 40 (1st Cir. 2002) (quoting 5 McCarthy on Trademarks and Unfair Competition § 30:4, at 30–12 (4th ed. 2002)); *see also, e.g., Internet Specialties W., Inc. v. Milon-DiGiorgio Enterprises, Inc.*, 559 F.3d 985, 993 (9th Cir. 2009) (rejecting argument that defendant “should not be prohibited from using it to market its other services which did not prompt [plaintiff]’s lawsuit”); *PRL USA Holdings, Inc. v. U.S. Polo Ass’n, Inc.*, 520 F.3d 109, 118 (2d Cir. 2008) (“safe distance” rule “useful in contempt proceedings” for “relieving the reviewing court of the need to retry the entire range of issues that may be relevant in an infringement action for each small variation the defendant makes to the enjoined mark”).

154. It cannot be that 1-800 Contacts has no leeway in protecting its cognizable trademark rights when the Commission “is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past” but can engage in some “fencing in.” *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 39 (1965).

155. Condemning a settlement agreement as inherently suspect whenever “an alternative would be less restrictive of competition no matter to how small a degree” “would place an undue burden on the ordinary conduct of business.” *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1995).

156. Unduly burdening trademark protection that the Supreme Court has clearly recognized as procompetitive would “chill the very conduct the antitrust laws are designed to

protect.” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004).

157. “The cost of false positives counsels against an undue expansion of [antitrust] liability.” *Trinko*, 540 U.S. at 414.

**IV. COMPLAINT COUNSEL DID NOT MEET THEIR BURDEN UNDER THE RULE OF REASON TO PROVE THE SETTLEMENTS HARM CONSUMERS.**

158. As noted, “because the antitrust laws protect competition, not competitors, and trademarks are non-exclusionary, it is difficult to show that an unfavorable trademark agreement raises antitrust concerns.” *Clorox Co.*, 117 F.3d at 57 (citation omitted).

159. The standard framework for analyzing an action’s anticompetitive effects on a market is the rule of reason. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (“The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1.”); *see also Agnew v. NCAA*, 683 F.3d 328, 335-36 (7th Cir. 2012).

160. Under this framework, Complaint Counsel bore the burden of showing that the challenged settlement agreements produce significant anticompetitive effects within a relevant market. *See Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 830 (3d Cir. 2010).

161. Complaint Counsel thus had to show anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods or services. *United States v. Brown Univ.*, 5 F.3d 658, 668-69 (3d Cir. 1993).

162. As a threshold matter, Complaint Counsel had to prove market power in a relevant market—*i.e.*, the ability to raise prices significantly without going out of business—without which 1-800 Contacts could not cause anticompetitive effects. *See Agnew*, 683 F.3d at 335-36; *see also Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004).

163. Complaint Counsel therefore had to identify and prove the relevant market. *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 962 (6th Cir. 2004).

164. “Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition.” *Southeast Missouri Hosp. v. C.R. Bard, Inc.*, 642 F.3d

608, 613 (8th Cir. 2011); *see also Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 320 (7th Cir. 2006).

165. Complaint Counsel failed to meet their burden under the rule of reason.

**A. *1-800 Contacts Does Not Have Market Power***

166. “The first requirement in every suit based on the Rule of Reason is market power, without which the practice cannot cause those injuries (lower output and the associated welfare losses) that matter under the federal antitrust laws. Any given firm may cut its own output, but rivals will increase production in response.” *Menasha Corp.*, 354 F.3d at 663.

167. Complaint Counsel have not proven that 1-800 Contacts has market power for two reasons: (1) the relevant market is all retail sales of contact lenses, in which 1-800 Contacts’ market share is only 10% and 1-800 Contacts and the settling parties together make less than 20% of sales, and (2) even if the relevant market is limited to online sales of contact lenses, there are no barriers to expansion or entry that would enable 1-800 Contacts to exercise market power.

**B. *The Relevant Market is All Retail Sales of Contact Lenses in the U.S.***

168. “To demonstrate competition in an antitrust case, the plaintiff must provide an economic analysis of the relevant market.” *Reifert*, 450 F.3d at 320.

169. “The goal in defining the relevant market is to identify the market participants and competitive pressures that restrain an individual firm’s ability to raise prices or restrict output.” *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004); *see also Am. Express Co.*, 838 F.3d at 199 (“If the sales of other producers substantially constrain the price-increasing ability of the hypothetical cartel, these others are part of the market.”); *In re Lorazepam & Clorazepate Antitrust Litig.*, 467 F. Supp. 2d 74, 81 (D.D.C. 2006).

170. The relevant market is defined as all products reasonably interchangeable by consumers for the same purposes, because the ability of consumers to switch to a substitute restrains a firm’s ability to raise prices above the competitive level. *Geneva Pharms. Tech. Corp.*, 386 F.3d at 496 (quotation marks omitted); *see also FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 219 n.4

(D.C. Cir. 1986); *Satellite Television & Associated Res., Inc. v. Cont'l Cablevision of Va., Inc.*, 714 F.2d 351, 356 (4th Cir. 1983).

171. Thus, “[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

172. “‘Interchangeability’ implies that one product is roughly equivalent to another for the use to which it is put; while there might be some degree of preference for the one over the other, either would work effectively.” *Allen-Myland, Inc. v. Int’l Bus. Machs. Corp.*, 33 F.3d 194, 206 (3d Cir. 1994).

173. Accordingly, “products or services need not be identical to be part of the same market.” *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999); *see also United States v. Cont’l Can Co.*, 378 U.S. 441, 449 (1964); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 399 (1956) (cellophane in same market as other flexible wrapping because “despite cellophane’s advantages it has to meet competition from other materials in every one of its uses”); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 563d at 389 (3d. ed. 2007) (“Areeda”) (“Most courts correctly define the presumptive market to include similar products, though differentiated by brand or features.”).

174. “An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other.” *E. I. du Pont de Nemours & Co.*, 351 U.S. at 400; *see also Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1313 (10th Cir. 2017) (“If two products share a high cross-elasticity of demand—in that an increase in the price of one product causes consumers to switch to the other, and vice versa—then those products likely are interchangeable and may properly be considered part of the same product market.”); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 469 (1992) (defining “cross-elasticity of demand” as “the extent to which consumers will change their consumption of one product in response to a price change in another”).

175. However, “[i]nterchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to recognize competition where, in fact, competition exists.” *Cont’l Can Co.*, 378 U.S. at 453 (quotation marks omitted).

176. Ultimately, the determination of the relevant market is “a matter of business reality—[ ]of how the market is perceived by those who strive for profit in it.” *Cardinal Health, Inc.*, 12 F. Supp. 2d at 46.

177. “The basic principle is that the relevant market definition must encompass the realities of competition.” *Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994) (internal quotation marks omitted); *see also Eastman Kodak Co.*, 504 U.S. at 482 (“proper market definition . . . can be determined only after a factual inquiry into the commercial realities faced by consumers”) (quotation marks omitted).

178. Here, as noted in the Court’s findings of fact, evidence of the commercial realities of the contact lens industry point strongly to the conclusion that ECPs and other offline retailers constrain 1-800 Contacts from raising prices and that all of these sellers compete in a market for retail contact lens sales.

179. For market definition purposes, “we assume that economic actors usually have accurate perceptions of economic realities.” *Rothery Storage & Van Co.*, 792 F.2d at 218 n.4.

180. As noted in the Court’s findings of fact, 1-800 Contacts’ entire business model and value proposition are based on attracting customers from ECPs, to whom customers must return periodically for prescriptions, and 1-800 Contacts sets its prices at a discount to ECPs. Thus, only a “broader national market . . . reflects the reality of the way in which [the party to the challenged conduct] built and conduct their business.” *United States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966).

181. Also as noted in the Court’s findings of fact, Congress and the Commission also appeared to recognize meaningful competition between ECPs and other retailers, including online retailers, when they enacted the Fairness to Contact Lens Consumers Act, Pub. L. 108–164, 117



Stat. 2024, codified at 15 U.S.C. § 7601 et seq., and promulgated the Contact Lens Rule, 16 C.F.R. Part 315.

182. In addition, the contact lens manufacturers' decision to institute retail price maintenance reflects an economic reality of competition between ECPs and online retailers, for resale price maintenance assumes, and seeks to reduce, "competition among retailers selling the same brand." *Leegin Creative Leather Prods., Inc.*, 551 U.S. at 890.

183. Further, consistent with these economic realities, Dr. Murphy's application of the SSNIP test defined a market that included both 1-800 Contacts and ECPs.

184. Complaint Counsel point to Dr. Evans' "critical loss" analysis as proof of a market limited to online sales of contact lenses. But that analysis is flawed as a matter of law.

185. Critical loss analysis is used most often to define antitrust markets in merger cases. Daniel P. O'Brien, Abraham L. Wickelgren, *A Critical Analysis of Critical Loss Analysis*, 71 Antitrust L.J. 161 (2003); *see generally id.* at 166; *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 34-35 (D.D.C. 2015). Accordingly, it has limited utility outside of the merger context.

186. Regardless, as noted in the Court's findings of fact, because a critical loss analysis seeks to determine whether firms in a candidate market acting as a single monopolist would find it profitable to increase prices, it is important to calculate the diversion ratio based on data regarding consumer behavior in response to a likely price increase.

187. Indeed, Dr. Evans identified a survey conducted in other circumstances that sought to ascertain how consumers would respond to a price increase as a good example of the type of survey that could and should be done in order to determine what the diversion ratio would be for purposes of a critical loss analysis. Evans, Tr. 1777-78. Dr. Evans did not conduct such a survey in this case, nor did Complaint Counsel present evidence of any such survey.

188. Dr. Evans thus did not calculate the diversion ratio based on information about whether consumers would switch from 1-800 Contacts to online retailers if 1-800 Contacts raised prices.

189. Instead, as noted in the Court’s findings of fact, Dr. Evans relied on a survey of only a few hundred consumers who reported they were unlikely to buy from 1-800 Contacts about where they would buy instead. Dr. Evans did not know the question that the respondents were asked or whether they were representative.

190. A critical loss analysis based on a “miniscule” sample of the “entire universe” of customers is unreliable, particularly where it “does not indicate whether the customers . . . are representative of the entire universe.” *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 191-92 (D.D.C. 2001).

191. Further, a critical loss analysis, like Dr. Evans’, which is based on surveys or data about “switching” in general rather than switching based on a price increase is unreliable because consumers can switch for reasons other than prices. *See Sysco Corp.*, 113 F. Supp. 3d at 36-37 (declining to rely on FTC expert’s critical loss analysis based on switching data that did not “describe[e] whether [defendants] lost a customer for a price-based reason or some reason having nothing to do with price”); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 69-71 (D.D.C. 2011) (declining to rely on critical loss analysis based on survey about switching, “not diversion based solely on a price change”).

192. Even where, unlike here, the data about switching in general consists of a comprehensive database of millions of consumers maintained by the government, a critical loss analysis based on upon it is not “conclusive.” *H & R Block, Inc.*, 833 F. Supp. 2d at 65 (expressing doubt about reliability of critical loss analysis of market for tax preparation based on IRS database of all taxpayers’ returns). Nor is Dr. Evans’s analysis.

193. Also, Dr. Evans’ application of the critical loss analysis only to online retailers despite evidence that more 1-800 Contacts customers switch to ECPs is inconsistent with the Commission’s Merger Guidelines. *See Merger Guidelines*, § 4.1.1 (“if the market includes a second product, the Agencies will normally also include a third product if that third product is a closer substitute for the first product than is the second product. The third product is a closer

substitute if, in response to a SSNIP on the first product, greater revenues are diverted to the third product than to the second product.”).

194. At any rate, even if Dr. Evans’ critical loss analysis is reliable, it cannot sustain Complaint Counsel’s online-only market because, as Dr. Murphy showed, a critical loss analysis also would define a market in which 1-800 Contacts competes with ECPs.

195. “[T]he fact that the test could still confirm multiple relevant markets means that the Court must rely on additional evidence in reaching the single, appropriate market definition.” *H & R Block, Inc.*, 833 F. Supp. 2d at 64; *see also FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 41 (D.D.C. 2009) (relying on “real-world evidence” rather than critical loss analysis). That is particularly true where the Court lacks any information to determine the reliability of the surveys underlying the parties’ competing diversion ratio estimates.

196. Finally, as noted in the Court’s findings of fact, Dr. Evans’ UPP analysis purporting to define a market limited to online sales shows nothing of the kind.

197. For all of these reasons, the relevant market is the market for the retail sale of contact lenses in the United States.

198. It is undisputed that 1-800 Contacts’ share of all retail contact lens sales in the United States is approximately 10%.

199. It is undisputed that, together, 1-800 Contacts and the other settling parties make less than 20% of all retail contact lens sales in the United States.

200. That market share is insufficient as a matter of law to support a conclusion that 1-800 Contacts has market power. “[W]hile high market shares may give rise to presumptions of market power, a market share of less than 20% is woefully short under any metric from which to infer market power.” *Cohlma v. St. John Med. Ctr.*, 693 F.3d 1269, 1283 (10th Cir. 2012); *see also Retina Associates, P.A. v. Southern Baptist Hosp. of Florida, Inc.*, 105 F.3d 1376, 1384 (11th Cir. 1997); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir. 1987) (“Market share analyses in section 1 cases have led to conclusions that approximately 70%-75% of market share constitutes market power, and that a 20%-25% market share or less does not

constitute market power”) (internal citations omitted); *Minnesota Ass’n of Nurse Anesthetists v. Unity Hosp.*, 5 F. Supp. 2d 694, 708 (D. Minn. 1998).

**C. *Even if the Relevant Market is Limited to Online Sales, 1-800 Contacts Still Does Not Have Market Power***

201. Even if Complaint Counsel were correct that there is a separate market for online sales of contact lenses, 1-800 Contacts does not have market power in that market.

202. The fact that 1-800 Contacts and the other settling parties account for a very high share of online contact lens sales “is just the starting point for assessing market power. A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant’s inability to control prices or exclude competitors.” *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) (quotation marks and citations omitted).

203. “Market power comes from the ability to cut back the market’s total output and so raise price; consumers bid more in competing against one another to obtain the smaller quantity available.” *Ball Mem’l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986).

204. However, “the ability to control output and prices . . . depends largely on the ability of other firms to increase their own output in response to a contraction by the defendants.” *Ball Mem’l Hosp., Inc.*, 784 F.2d at 1336.

205. “If firms are able to enter, expand, or import sufficiently quickly, that may counteract a reduction in output by existing firms. And if current sales are not based on the ownership of productive assets . . . the existing firms may have no power at all to cut back the market’s output.” *Ball Mem’l Hosp., Inc.*, 784 F.2d at 1335. Thus, “the lower the barriers to entry, and the shorter the lags of new entry, the less power existing firms have.” *Id.*

206. Accordingly, “[t]o show market power, a plaintiff must establish that the defendant’s sales loom so large in relation to rivals’ sales and production capacity that a reduction in output by the defendant could not quickly be made up by other firms’ increased output.” *L.A.P.D., Inc. v. Gen. Elec. Corp.*, 132 F.3d 402, 405 (7th Cir. 1997).

207. For that reason, “it is usually best to derive market share *from* ability to exclude other sources of supply.” *Ball Mem’l Hosp., Inc.*, 784 F.2d at 1336.

208. The upshot is that “[u]nless barriers to entry prevent rivals from entering the market at the same cost of production, even a very large market share does not establish market power.” *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 672 n. 3 (7th Cir. 1985); *see also Allen-Myland, Inc.*, 33 F.3d at 209 (“Notwithstanding the extent of an antitrust defendant’s market share, the ease or difficulty with which competitors enter the market is an important factor in determining whether the defendant has true market power—the power to raise prices.”); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 n.15 (1986) (“It is also important to examine the barriers to entry into the market, because without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.”) (quotations omitted); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 983 (2d Cir. 1984) (reversing finding of market power where defendant had 50% market share but entry was easy).

209. Complaint Counsel therefore had the burden not only to “(1) define the relevant market,” and “(2) show that the defendant owns a dominant share of that market” but also to “(3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run.” *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995); *see also Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petrol. Corp.*, 79 F.3d 182, 197 (1st Cir. 1996).

210. More specifically, Complaint Counsel “ha[d] the burden of establishing barriers to entry into a properly defined relevant market” and “must not only show that barriers to entry protect the properly defined . . . market, but that those barriers are ‘significant.’” *United States v. Microsoft Corp.*, 253 F.3d 34, 82 (D.C. Cir. 2001).

211. “‘Entry barriers’ are factors (such as certain regulatory requirements) that prevent new rivals from timely responding to an increase in price above the competitive level.” *Microsoft Corp.*, 253 F.3d at 51.

212. Complaint Counsel have failed to prove that there are any significant barriers to entry or expansion in the business of selling online contact lenses. They have not adduced any evidence that the major retailers such as Walmart and Costco that already sell contacts online could not expand their business, or that other major retailers such as Amazon could not enter the business, if 1-800 Contacts raised prices.

213. Complaint Counsel's and Dr. Evans' suggestion that brand awareness is a barrier to entry is incorrect as a matter of law. *See Clorox Co.*, 117 F.3d at 58 (“[E]stablished buyer preferences . . . will not ordinarily be a serious entry barrier.”) (quoting 2 Philip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 409d, at 302 (1978)); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (Breyer, J.) (“Of course, virtually every seller of a branded product has *some* customers who especially prefer its product. But to permit that fact alone to show market power is to condemn ties that are bound to be harmless, including some that may serve some useful social purpose.”); *Waste Mgmt., Inc.*, 743 F.2d at 983-84 (reversing finding of market power where Court “fail[ed] to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition”); *Borden, Inc.; Proposed Order Modification With Statement To Aid Public Comment*, 48 FR 9023-02, 1983 WL 169978, at 9026 (Commission erroneously “assumed that consumer preference for [Respondent] necessarily constituted an anticompetitive barrier protecting [Respondent’s] monopoly position from erosion by new entrants”).

214. “Market power is a necessary ingredient in every case under the Rule of Reason. Unless the defendants possess market power, it is unnecessary to ask whether their conduct may be beneficial to consumers. Firms without power bear no burden of justification.” *Ball Mem’l Hosp., Inc.*, 784 F.2d at 1334–35; *see also Menasha Corp.*, 354 F.3d at 663.

215. That is because “[f]irms lacking substantial market power act against their own self-interest when they raise prices, reduce output, or otherwise restrain trade. The marketplace itself will discipline such misguided efforts as buyers switch to substitutes or new sources of

supply enter the market.” *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 546 (2d Cir. 1993).

216. Having failed to prove market power, Complaint Counsel cannot meet their burden under the rule of reason because, absent market power, 1-800 Contacts could not have harmed consumers by raising prices or restricting output as a result of the settlement agreements. *See Clorox Co.*, 117 F.3d at 58 (plaintiff failed to prove harm to competition where “[n]othing here suggests that the other large companies that produce cleaning products are incapable of successfully investing their resources, in the form of capital and brand name equity, to enter the markets [the defendant’s] products allegedly dominate”).

**D. *Complaint Counsel Have Not Proven Any Anticompetitive Effects in the Market for the Sale of Contact Lenses.***

217. Complaint Counsel also failed to prove that the challenged settlements actually harmed consumers.

**1. *No Proof of Lower Output***

218. “[O]utput is a sound general measure of anticompetitive effect, and several Supreme Court decisions have emphasized it.” *Areeda*, at ¶ 1503b(1); *see California Dental Ass’n*, 526 U.S. at 776 (asking “whether the limitation on advertisements obviously tends to limit the total delivery of dental services”).

219. “The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem.” *Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 95 F.3d 593, 597 (7th Cir. 1996); *see also Rebel Oil Co.*, 51 F.3d at 1433 (“[A]n act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality.”).

220. Complaint Counsel, however, did not introduce any evidence that the settlement agreements resulted in lower output of contact lenses. To the contrary, applying their own

expert's (Dr. Athey's) model of the counterfactual world suggests that removing the settlement agreements would cause output of online sales to go down.

**2. No Proof of Higher Prices**

221. Proof of supracompetitive prices also can suffice to prove harm to competition in some circumstances. *See, e.g., SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 432-33 (4th Cir. 2015); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003); *United States v. Brown Univ. in Providence in State of R.I.*, 5 F.3d 658, 668 (3d Cir. 1993).<sup>1</sup>

222. Complaint Counsel also failed to meet their burden. There is no evidence that the settlement agreements enabled 1-800 Contacts or any other contact lens retailer to raise contact lens prices.

223. Complaint Counsel's case is insufficient under the rule of reason as a matter of law because Complaint Counsel failed to prove that output was reduced or that contact lens prices were higher across the market as a result of the challenged settlement agreements. *See Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (no proof of anticompetitive harm where plaintiff alleged "potentially" higher prices, but did not demonstrate that prices were actually higher across the market or that quality had actually decreased); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127-28 (2d Cir. 1995) (no proof of harm to competition absent "empirical demonstration concerning the adverse effect of the defendants' arrangement on price or quality") (internal quotation marks and alterations omitted).

**E. Complaint Counsel's Alternative Theories Fail As a Matter of Law**

224. Both of Complaint Counsel's alternative theories of anticompetitive harm fail as a matter of law.

**(a) Fewer Ads**

225. Complaint Counsel contend that the challenged agreements reduced the information available to consumers. That is speculation because Complaint Counsel have not

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<sup>1</sup> 1-800 Contacts preserves the argument that proof of reduced output is required.



introduced any evidence about the effect of the challenged agreements on advertising on search terms other than 1-800 Contacts' trademarks, which may have increased if advertisers substituted to advertising in response to other searches.

226. As noted in the Court's findings of fact, Complaint Counsel also have not introduced any evidence that any consumer was unable to, or did not, obtain from other sources any information restricted by the settlement agreements.

227. To the extent that Dr. Athey or Dr. Evans offered opinions to the contrary, they are unreliable and unsupported by the record.

228. At any rate, under Supreme Court precedent, the measure of anticompetitive harm from a restraint on advertising is the effect on the output of the product being advertised (here, contact lenses), not the amount of advertising that allegedly did not occur. *Cal. Dental Ass'n*, 526 U.S. at 776 ("The question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of dental services."); *see also Clorox Co.*, 117 F.3d at 59.

229. As noted, Complaint Counsel failed to show that the settlement agreements reduced retail sales, or online retail sales, of contact lenses.

**(b) Search Engine Revenue**

230. Complaint Counsel contend that the challenged settlement agreements harmed search engines by reducing the cost-per-click in bidding auctions for paid search advertising. Again, Complaint Counsel have not adduced sufficient evidence regarding the complex calculations required to determine the effect of the challenged agreements on the search engines' revenue, including by accounting for any substitution to advertising in response to searches not covered by the agreement.

231. Complaint Counsel's theory of search engine harm also fails as a matter of law.

232. Complaint Counsel have not defined any market for paid search advertising, which is not legally cognizable. *See Lasoff v. Amazon.com Inc.*, No. C16-151 BJR, 2017 WL 372948, at

\*9 (W.D. Wash. Jan. 26, 2017); *Person v. Google, Inc.*, No. C06-7297 JF(RS), 2007 WL 1831111, at \*5 (N.D. Cal. June 25, 2007), *aff'd*, 346 F. App'x 230 (9th Cir. 2009).

233. Complaint Counsel's focus only on revenue from advertisements in response to searches for 1-800 Contacts also is improper because "[p]roduct markets are not defined in terms of one trademark or another; trademarks simply identify the origin of a product." *Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 977 (7th Cir. 1999); *see also Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 480 (3d Cir. 1992) ("Except in rare circumstances, courts reject market definitions consisting of one supplier's products where other brands compete."); *Seidenstein v. Nat'l Med. Enters., Inc.*, 769 F.2d 1100, 1106 (5th Cir. 1985) ("absent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market.").

234. Finally, under the rule of reason, agreements among buyers of inputs that lack market power in the downstream output market do not cause anticompetitive harm but merely transfer profits on the inputs from the sellers of the inputs to the buyers of them.

235. Any agreement by contact lens retailers limiting paid search advertising would reflect monopsony, a "market situation in which there is a single buyer or a group of buyers making joint decisions." *United States v. Syufy Enters.*, 903 F.2d 659, 663 n.4 (9th Cir. 1990).

236. The common "consequence of monopsony power is reduced output on the monopsonist's selling side: that is, since the monopsonist reduces its buying price by purchasing less, it must ordinarily sell less." Areeda, at ¶ 575 (emphasis in original); *see also Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1203 (W.D.N.Y. 1995). In other words, the concern with restraints by buyers of advertising (an input) is reduced output of the product being advertised (the output).

237. However, "if the monopsonist resells in a competitive market, price and output in the output market will be unaffected by the exercise of monopsony power." Areeda, at ¶ 575; *see also Addamax Corp. v. Open Software Found., Inc.*, 888 F. Supp. 274, 280 (D. Mass. 1995) (noting that "[o]nly with control of a downstream market can the monopsonist decrease output and

raise prices”); *Kamine/Besicorp Allegany L.P.*, 908 F. Supp. at 1203; Areeda at ¶ 2011 (sellers’ loss is a “mere wealth transfer that the antitrust laws were not designed to remedy.”).

238. Since 1-800 Contacts lacks market power in the sale of contact lenses, the only effect of a restraint on advertising inputs to competition for those sales is to redistribute revenue from advertising based on 1-800 Contacts’ trademark from Google to 1-800 Contacts. In the case of advertising on 1-800 Contacts’ trademark, there is nothing problematic about 1-800 Contacts capturing revenue from the sale of services using its own trademark.

239. Complaint Counsel have failed to prove that the settlement agreements caused any legally cognizable harm to consumers as required to prevail under the rule of reason.

**V. COMPLAINT COUNSEL’S LESS RESTRICTIVE ALTERNATIVES ARE NOT SUPPORTED BY EVIDENCE AND ARE LEGALLY FLAWED.**

240. Even if Complaint Counsel had met their burden under the rule of reason to prove anticompetitive harm, that would merely shift the burden to 1-800 Contacts to prove that the settlement agreements had procompetitive benefits. *See Am. Express Co.*, 838 F.3d at 195; *Deutscher Tennis Bund*, 610 F.3d at 830; *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 388 (8th Cir. 2007); *Microsoft Corp.*, 253 F.3d at 95–96.

241. 1-800 Contacts introduced significant evidence that the settlement agreements benefitted consumers in a number of ways, including by reducing litigation costs, minimizing consumers’ search costs, limiting consumer confusion, protecting incentives for procompetitive activity created by trademark protection, and channeling rivals’ activities into interbrand competition rather than free-riding.

242. Accordingly, under the rule of reason, the burden shifted back to Complaint Counsel to prove that the settlement agreements were not reasonably necessary to achieve their procompetitive benefits and that 1-800 Contacts could achieve those benefits through reasonably less restrictive means. *See Am. Express Co.*, 838 F.3d at 195; *Deutscher Tennis Bund*, 610 F.3d at 830; *Craftsmen Limousine, Inc.*, 491 F.3d at 388; *Schering-Plough Corp.*, 402 F.3d at 1065; *Microsoft Corp.*, 253 F.3d at 95–96.

243. Complaint Counsel failed to meet their burden to prove a reasonably less restrictive alternative.

244. Complaint Counsel's proposed alternative settlement that would restrict only paid search ads that use 1-800 Contacts' trademarks in ad text would not fully protect 1-800 Contacts' trademarks because courts have rejected the proposition that "as a matter of law, no infringement occurred given that none of the[] sponsored search advertisements actually include [the plaintiff's] trademarks in the text." *Fair Isaac Corp.*, 645 F. Supp. 2d at 760–61.

245. Complaint Counsel's other proposed alternative settlement prohibiting only ads that are not clearly labeled also fails as a matter of law and lacks evidentiary support.

246. A party challenging the scope of trademark relief that contends that a disclaimer would be sufficient has a "heavy burden" to prove that altering the allegedly infringing materials "would significantly reduce the likelihood of consumer confusion." *Australian Gold, Inc.*, 436 F.3d at 1243; *see also Weight Watchers Int'l, Inc.*, 423 F.3d at 143–44 ("Where, as here, an infringer attempts to avoid a substantial likelihood of consumer confusion by adding a disclaimer, it must establish the disclaimer's effectiveness.").

247. Complaint Counsel, however, did not introduce any evidence that labeling ads in response to searches for 1-800 Contacts would reduce consumer confusion. *See CFE Racing Prods., Inc. v. BMF Wheels, Inc.*, 793 F.3d 571, 596 (6th Cir. 2015) (reversing trademark injunction where "the district court pointed to no evidence that a disclaimer would be effective in eliminating the risk of confusion"); *Australian Gold, Inc.*, 436 F.3d at 1243 (where "Defendants offer only conclusory allegations that 'if there were any evidence of a likelihood of confusion, it could be remedied by a simple disclaimer,'" injunction not limited to disclaimers was "not overly broad"); *Home Box Office, Inc. v. Showtime/The Movie Channel Inc.*, 832 F.2d 1311, 1315-17 (2d Cir. 1987) (vacating injunction requiring disclaimers for lack of evidence) (citing Jacoby & Raskoff, *Disclaimers as a Remedy for Trademark Infringement Litigation: More Trouble Than They Are Worth?*, 76 Trademark Rept. 35 (1986)).

248. Even if Complaint Counsel could identify some other conceivable way in which 1-800 Contacts could protect its trademarks by other means, that would not meet Complaint Counsel's burden under the rule of reason.

249. An alternative that requires additional litigation costs is not, as it must be, "virtually as effective in serving the legitimate objective *without significantly increased cost.*" *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001).

250. Complaint Counsel presented no evidence that any other form of protection of 1-800 Contacts' property rights would effectively provide protection. For instance, they presented no evidence that different forms of disclosure would be effective. Nor did they conduct a survey to show that other disclosures or other forms of remedy would eliminate the confusion that was identified by various witnesses, including Dr. Van Liere and Dr. Goodstein.

251. A challenged restraint need only be "reasonably necessary." *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967), *overruled on other grounds*, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *see also Anderson v. American Auto. Ass'n*, 454 F.2d 1240, 1246 (9th Cir. 1972).

252. Indeed, as noted, "the availability of an alternative means of achieving the asserted business purpose renders the existing arrangement unlawful if that alternative would be less restrictive of competition no matter to how small a degree" "would place an undue burden on the ordinary conduct of business." *American Motor Inns, Inc.*, 521 F.2d at 1249.

253. Complaint Counsel themselves highlighted through cross-examination of Mr. Hogan that parties to trademark cases agree to settle on terms that prohibit paid search advertising in response to searches for trademark terms even in cases that do *not* involve express claims based upon that practice. It therefore cannot have been unreasonable for 1-800 Contacts and the settling parties to settle cases that *did* involve claims based on that practice by agreeing to the same prohibitions.

**VI. NO REMEDY IS WARRANTED**

254. No relief is warranted because Complaint Counsel have failed to prove that 1-800 Contacts violated the FTC Act.

255. Even if Complaint Counsel had proved a violation, the First Amendment to the U.S. Constitution bars relief limiting 1-800 Contacts' ability to enforce its trademark rights, including through litigation.

256. Complaint Counsel have averred that "the only acts or practices challenged by the Complaint are Respondent's *agreements* with its rivals." Complaint Counsel's Reply in Support of Its Motion for Partial Summary Decision (Nov. 25, 2016), at 1.

257. Absent proof that 1-800 Contacts' litigation was sham, the First Amendment protects 1-800 Contacts' right to file that litigation. *Prof'l Real Estate Inv'rs, Inc.*, 508 U.S. 49; *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *E. Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961).

258. Good faith pre-litigation activities, including sending cease-and-desist letters and making threats to sue, are similarly protected by the First Amendment under the *Noerr-Pennington* doctrine. See *Sweet St. Desserts, Inc. v. Chudleigh's Ltd.*, 2016 WL 3924239, at \*4 (3d Cir. Jul. 21, 2016) (unpublished); *Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.*, 745 F.3d 343 (9th Cir. 2013); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923 (9th Cir. 2006); *Globetrotter Software v. Elan Computer Grp.*, 362 F.3d 1367 (Fed. Cir. 2004); *Coastal States Mktg. v. Hunt*, 694 F.2d 1358 (5th Cir. 1983) (same).

259. The Commission may not enjoin a future lawsuit unless that lawsuit is both objectively baseless and brought for a subjectively anticompetitive purpose. Cf. *BE & K Construction Co. v. NLRB*, 122 S.Ct. 2390, 2398-2400 (2002); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741-744 (1983) (same).

260. As noted, trademark law recognizes the claims that 1-800 Contacts filed and two courts have held, as Complaint Counsel concede, that 1-800 Contacts' litigations were not sham.

261. The Court therefore cannot prevent 1-800 Contacts from exercising its rights to petition the courts order relief for those claims and protect its trademark rights. *Prof'l Real Estate Inv'rs, Inc.*, 508 U.S. 49.

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Respectfully submitted,

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***Counsel for Respondent 1-800 Contacts, Inc.***



# APPENDIX 1

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

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In the Matter of )  
 )  
 ) DOCKET NO. 9372  
1-800 Contacts, Inc., )  
a corporation )  
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JOINT STIPULATION REGARDING  
SEARCH ENGINE MECHANICS AND GLOSSARY OF TERMS

At the Court’s request, the parties are submitting a Joint Stipulation Regarding Search Engine Mechanics and Glossary of Terms.

This joint stipulation is merely intended to provide convenient descriptions of terms and search engine mechanics found in trial testimony and exhibits, and is not intended to supersede the more detailed descriptions of these and other relevant terms found in the parties’ respective proposed findings of fact and in the trial testimony and documentary evidence.

GLOSSARY OF TERMS

**Ad Group** – A collection of advertisements that contains one or more ads which target a set of keywords.

**Ad Rank** – A value used to determine whether an advertiser’s ad will appear on the search engine results page, the ad position (where the ad is shown on a page), and (combined with other information) the CPC for the ad.

**Affiliate** – A Person other than the company that attempts to generate sales for the Company in exchange for a commission on such online sales.

**Algorithm** – A process or set of rules to be followed in solving a problem or accomplishing some end, especially by a computer. Search engines use algorithms to rank the search results and advertisements.

**Campaign** – A set of ad groups (ads, keywords, and bids) that share a budget, location targeting, and/or other settings.

**Click through rate (CTR)** – The number of clicks an ad receives divided by the number of times the ad is shown.

**Impression** – One instance of an ad being shown by the search engine on a search engine results page.

**Keyword** – Words or phrases an advertiser chooses to help determine whether the advertiser’s ad can appear in response to an internet search by an end user.

**Negative Keyword** – A type of keyword that prevents an advertiser’s ad from being triggered by certain words or phrases.

**Keyword Match Type** – Applied to keywords by the advertiser to control which searches can trigger an ad. Broad Match, Broad Match Modifier, Phrase Match, and Exact Match are keyword match types.

**Bid** – An amount the advertiser sets for each keyword that is the highest amount the advertiser is willing to for a click on its ad.

**Search Engine** – A computer program, available to the public, to search for, and identify, items in a database that correspond to terms or characters specified by the user, used especially for finding sites on the World Wide Web.

**Search Engine Optimization (SEO)** – The process of maximizing the number of visitors to a particular website by trying to achieve a higher ranking for the website in a search engine’s organic results.

**Search Engine Results Page (SERP)** – The page displayed by a search engine in response to a query by a user. The search engine results page contains organic search results and may also contain advertisements and other information.

**Query** – Text entered into a Search Engine by the end user to conduct a search.

**Conversion** – Usually a sale, although advertisers can indicate to Google and Bing what user action they want to identify as a conversion.

**Conversion rate** – The number of times a conversion occurs divided by the total number of ad clicks. Can be calculated at the level of the ad, keyword, ad group, campaign, or advertiser.

**Broad Match** – Broad match allows an ad to be matched to relevant variations of the ad’s keywords, including synonyms, singular or plural forms, possible misspellings, stemmings (such as *floor* and *flooring*), related searches, and other relevant variations.

**Modified Broad Match** – Modified broad match allows the advertiser to specify that certain broad match keyword terms, or their close variants, must appear to trigger the ad. For instance, the modified keyword “+women’s +hats” would match to a search for “hats for women.”

**Phrase Match** – Phrase match allows an ad to be matched to searches that include the ad’s exact keyword and close variants of the exact keyword, with additional words before or after.

**Exact match** – Exact match allows an ad to be matched to searches that include the ad’s exact keyword, or close variants of the exact keyword, exclusively.

**Search Advertisements (Paid Search)** – Text advertisements that appear on the search engine results page.

**Organic Search Results (Natural Search Results, Algorithmic Search Results)** – Links to websites that the search engine has identified as relevant to the user’s query. Organic search results include a link to the website and a short snippet of information from the website.

**Landing Page** – The first web page to which a user is taken when the user clicks on an ad.

**Click Through Rate** – The number of times an ad is clicked divided by the number of impressions.

**Predicted Click Through Rate** – One of the three quality signals that Google uses to identify relevant ads. Predicted click through rate is a measure of how likely it is that the advertiser’s ad will be clicked when shown for the particular keyword.

**Landing Page Experience** – One of three “quality signals” that Google uses to determine Ad Rank. Landing page experience is Google’s measure of how relevant and/or useful the initial page that a user sees after clicking on an ad will be to the user.

**Ad Relevance (Creative Quality)** – One of three “quality signals” that Google uses to determine Ad Rank. Ad relevance is Google’s measure of how closely related the text of the ad is to the search query.

**Cost-per-click (CPC)** – The price that an advertiser pays each time its advertisement is clicked. Advertisers bid a maximum cost-per-click they are willing to pay, and Google and Bing charge an actual cost-per-click based on the outcome of a generalized second price auction process that considers the Ad Ranks of the participants in the auction.

**Pay-per-click** – A method of charging for advertising where the advertiser pays for each click its ad receives, and not for each time its ad is shown.

**Customer Relationship Management (CRM)** – Systems used by companies to maintain customer relationships, which may include scheduled email communications and other contact efforts.

**Website** – A collection of web pages. A particular destination on the World Wide Web, such as the 1-800 Contacts website, “www.1800contacts.com”.

**Web page** – One part of a website, such as the 1-800 Contacts web page describing its selection of Air Optix Colors lenses.

**URL** – The address of a web page. Users type a URL into the URL bar of their internet browser to access a particular website. “www.1800contacts.com” is an example of a URL.

**Domain name** – The part of a URL that identifies the broader website a certain webpage is a part of. In the URL “www.1800contacts.com/lens/air-optix-colors,” the domain name is “1800contacts.com.”

**Eye Care Professional (ECP)** – Optometrists and ophthalmologists licensed to prescribe contact lenses.

**Second-Price Auction** – Google and Bing use a second-price auction to determine the price each advertiser will pay if its ad is clicked. In the second-price auctions that search engines use, each advertiser’s price is the minimum amount required to maintain an Ad Rank greater than next highest Ad Rank of the ad in the auction or, if there is none, the minimum bid set by the search engine.

**Toric Lenses** – A special type of contact lens for wearers with astigmatism. Toric lenses require additional parameters to define the prescription, and thus require a greater number of stock keeping units (SKUs).

**Geotargeting** – Advertisers use geotargeting in search engine advertising to target their advertisements to searchers who appear to be located in a particular geographic area. There are options for geotargeting in the Google AdWords and Bing Ads advertiser interfaces.

**Ad Position** – The position on the search engine results page that an ad achieves relative to other ads.

**Internet browser** – The computer program that allows users to access the World Wide Web.


**Bookmark** – Internet browsers allow users to save bookmarks to websites for easy return access. Bookmarks help users access websites without having to use a search engine or remember the URL.

**Site Traffic** – The number of users that visit a particular website in a certain time period.

**Interface** – The way that advertisers interact with the Google AdWords or Bing Ads systems. A website that allows advertisers to give instructions to the search engine about their advertising.

**STIPULATION REGARDING SEARCH ENGINE MECHANICS**

**A. Search Engines**

1. Search engines allow their users to usefully access the vast amount of information on the internet. Search engines employ complex algorithms to match the end user's request with parts of the web that may contain relevant responses.
2. Users can access search engines through desktop computers, tablets, and mobile phones.
3. Estimates of the market shares of these search engines vary across sources, but it is generally recognized that Google accounts for 82 percent of spending on search advertising.
4. In response to a user search query, search engines present a search engine results page ("SERP") showing the user a list of "organic" results, and sometimes advertisements related to the query.
5. In general, organic results are ranked in order of relevance, with the most relevant result at the top of the list.
6. The relevance of organic results is determined by algorithms that are proprietary to each search engine.
7. Search engines are free for users. Search engine revenue comes from the sale of advertising.
8. Advertisements are displayed above, below, and (on some search engines) to the side of the organic results.
9. Google and Bing, for instance, will display  at the top of the page, above the organic results.
10. Search engine advertisements are text and do not include images.

11. Search engine advertisements consist of a blue headline, followed by the word “Ad” (for Google, in a green box; for Bing, in gray bold text) and the actual URL of the site being advertised, followed by the ad copy, which is text that the advertiser provides to Google.

12. Search engines operate on a “cost-per-click” basis, which means that advertisers do not pay the search engine for an “impression” on the SERP; they only pay when an ad is clicked.

13. By design, Google and Bing reward relevant, high quality ads by affording them prominent placement on the SERP at a lower cost-per-click.

14. Google and Bing aim to select the most relevant advertisements to appear on the SERP.

15. Google and Bing seek to identify and block any ads that are poor quality or completely irrelevant. These ads are not eligible to be shown even if the advertiser offers a very high bid.

### **B. Keyword Advertising – The Google AdWords Auction**

16. Google’s paid search platform is called AdWords.

17. For each user query on which ads are shown, Google runs a real-time auction based on advertiser bids, as well as its multi-signal Ads Quality algorithm.

18. Advertisers indicate which auctions they would like to enter using “keywords.”

19. Keywords are words or phrases the advertiser believes potential customers are likely to use when searching for products or services provided by the advertiser. The advertiser matches the keywords with an ad or ads in an “Ad Group.”

20. An advertiser’s ad may be shown when the ad’s keywords “match” a user’s search query.

21. Advertisers frequently bid on hundreds or thousands of keywords. Keywords may consist of a single word (e.g., “contacts”), a set of words (e.g., “contacts,” “Accuvue,” and “coupon”), a phrase (e.g., “contact lens”), or a combination of words and phrases.

22. There are several “match types” or “matching options” in AdWords.

**i. Broad Match**

23. Broad match allows an ad to be matched to relevant variations of the ad’s keywords, including synonyms, singular or plural forms, possible misspellings, stemmings (such as *floor* and *flooring*), related searches, and other relevant variations.

24. Broad match is a “semantic” match type; it seeks to match with the meaning of the user’s search, rather than focusing on the text of any particular keyword that the advertiser selects. For example, if an advertiser purchases the keyword “low-carb diet plan” and selects broad match, Google may select that advertiser’s ad in response to searches “carb-free foods” or “Mediterranean diets,” even though the advertiser did not bid on those particular keywords.

**ii. Modified Broad Match**

25. Modified broad match allows the advertiser to specify that certain broad match keyword terms, or their close variants, must appear to trigger the ad.

26. Modified broad match keywords are indicated by a “+” symbol. For instance, the modified keyword “+women’s +hats” would match to a search for “hats for women.”

**iii. Phrase Match**

27. Phrase match allows an ad to be matched to searches that include the ad’s exact keyword and close variants of the exact keyword, with additional words before or after.

28. Phrase match keywords are indicated by quotation marks. For example, for the phrase match keyword “tennis shoes,” ads may be shown on searches for “red leather tennis



shoes” or “buy tennis shoes on sale.” But such ads will not be shown on searches for “shoes for tennis” or “tennis sneakers laces.”

**iv. Exact Match**

29. Exact match allows an ad to be matched to searches that include the ad’s exact keyword, or close variants of the exact keyword, exclusively.

30. Exact match keywords are indicated by square brackets. For instance, the exact match keyword “[tennis shoes]” may be matched to searches for “tennis shoes” but not for “red tennis shoes.”

**v. Negative Keywords**

31. Advertisers can indicate which auctions they do not want to enter by using negative keywords.

32. Negative keywords also have match types associated with them.

33. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

34. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

35. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**C. Ad Rank and Its Components**

36. In AdWords, which ads and the order in which an ad appears on a page (the Ad Position) is determined by a formula called Ad Rank.

37. Google’s three quality signals, Predicted Click Through Rate (CTR), Ad Relevance, and Landing Page Experience help determine the Ad Rank.

38. Ad Rank is a score that is based on the advertiser’s bid, auction-time measurements of expected CTR (click-through rate), ad relevance, landing page experience, and the expected impact of extensions and other ad formats.

**i. Predicted Click Through Rate (CTR)**

39. The first quality signal is called the “predicted click through rate” (CTR).

40. Predicted CTR is a measurement of how likely it is that the advertiser’s ads will get clicked when shown for the particular keyword.

41. [REDACTED]

42. Google’s algorithms calculate predicted CTR based on [REDACTED]

[REDACTED]

[REDACTED] In addition, [REDACTED]

[REDACTED]

[REDACTED]

43. Predicted CTR is not [REDACTED]

[REDACTED] Rather, [REDACTED] (CX9019 (Juda, Dep. 31).) The assessment is based on [REDACTED]

[REDACTED]

44. To predict CTR for new ads the system uses [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

45. Google uses the Predicted CTR signal because click-through rate is a good proxy for whether an ad will be relevant to the user.

46. [REDACTED]

[REDACTED]

**ii. Ad Relevance**

47. The second quality signal is called “ad relevance.” The ad relevance signal measures how relevant the ad copy, or ad text, is to the user’s search query.

48. In the AdWords algorithms, ad relevance is based on [REDACTED]

[REDACTED]

[REDACTED]

**iii. Landing Page Experience**

49. The third quality signal is called “landing page experience.” Landing page experience is a measure that AdWords uses to estimate how relevant and useful the initial page that a user sees after clicking on an advertiser’s ad will be to people who click on the ad.

50. In the AdWords algorithms, landing page experience is based on [REDACTED]

[REDACTED]

51. [REDACTED]

[REDACTED]

52. For landing page experience, the AdWords algorithms also [REDACTED]

[REDACTED]

53. Google considers the landing page experience in its ad selection because [REDACTED]

[REDACTED]

**C. Ranking Ads on The Search Engine Results Page (SERP)**

54. In AdWords, each advertiser specifies a bid for each keyword, which is the maximum the advertiser will pay for a click on its ad. This amount is the “maximum cost-per click” or “max. CPC.”

55. To rank in a high position on the SERP, advertisers must have strong assessments from Google on the three quality signals compared to other auction participants, *and* must have high bids relative to other participants on a keyword related to the user’s search.

56. Ads must have an Ad Rank greater than zero to be eligible to be shown. If there are no ads with an Ad Rank greater than zero, the AdWords system will not show any ads in response to the particular user query.

57. Google requires

[REDACTED]

58. In general, the lower the quality of the ad, the higher the minimum bid necessary to qualify to be shown, but no ads below a certain quality will be shown regardless of the amount bid.

59. Ads are positioned on the search results page based on Ad Rank; the ad with the highest Ad Rank is placed at the top of the page.

60. The actual amount an advertiser pays for a click, or “actual CPC,” depends on the outcome of the auction process.

Dated: June 14, 2017

Respectfully submitted,

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# **APPENDIX 2**

APPENDIX 2

RESPONDENT'S POST-TRIAL EXHIBIT INDEX PURSUANT TO RULE 3.46(b)

Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX0010	Letter from Peter Clarkson to Roy Montclair re letter of June 28, 2005	6/28/2005	ACLENS-00000261	ACLENS-00000261	JX2 5/12/17		CX1759, RX0052		
RX0019	E-mail from Nick Stanley to Nicole Bean re Projects	9/28/2015	ACLENS-00023497	ACLENS-00023507	JX2 5/12/17		CX1760		
RX0020	E-mail from Nick Stanley to Bob Drumm re Comparison Shopping	9/18/2015	ACLENS-00023508	ACLENS-00023508	JX2 5/12/17		CX1761		
RX0023	E-mail from Robert Drumm to Peter Clarkson and Brian Frank re E-mail to 1800Contacts	9/26/2006	ACLENS-00000365	ACLENS-00000366	JX2 5/12/17	330:1; 376:12	CX1762		
RX0024	E-mail from Brian Frank to Robert Drumm; Philip Dietrich; Peter Clarkson re 1800Contact Trademark Infringement	9/26/2006	ACLENS-00000363	ACLENS-00000364	JX2 5/12/17		CX1105, CX1763		
RX0026	AC Lens Affiliate Program web page AC Lens PPC Policy by Bob Drumm	4/30/2010	N/A	N/A	JX2 5/12/17				
RX0027	AC Lens Affiliate Program Should You Allow Affiliates to Bid on Competitor TM's Chuck Hamrick and Bob Drumm	4/5/2005	N/A	N/A	JX2 5/12/17				
RX0028	Settlement Agreement between 1-800 Contacts and Arlington Contact Lens Service	3/10/2010	1-800F_00080826	1-800F_00080833	JX2 5/12/17	363:28	CX0317, RX1146, CX0005, CX0147	NH	
RX0029	AC Lens UPP Contacts Margin Impact (August - December 2014)	12/00/2014	ACLENS-00000227	ACLENS-00000227	JX2 5/12/17				
RX0030	AC Lens UPP Contracts Margin Impact 2015 Summary	00/00/2015	ACLENS-00000227	ACLENS-00000227	JX2 5/12/17				
RX0031	AC Lens UPP Contacts Margin Impact (2016 Summary)	00/00/2016	ACLENS-00000227	ACLENS-00000227	JX2 5/12/17				
RX0032	E-mail from Nick Stanley to Peter Clarkson cc Bob Drumm; Brian Frank re Lens Profitability Test	3/29/2016	ACLENS-00020236	ACLENS-00020241	JX2 5/12/17		CX1764		
RX0033	E-mail from Nick Stanley to Bob Drumm re PPC - Competitor Negatives	6/29/2015	ACLENS-00022004	ACLENS-00022004	JX2 5/12/17		CX1090, CX1765		
RX0036	E-mail from Robert Drumm to Philip Dietrich re Diligence	1/15/2014	ACLENS-00021983	ACLENS-00021998	JX2 5/12/17		CX1766		
RX0037	E-mail from Nick Stanley to Bob Drumm re PPC	12/4/2015	ACLENS-00022103	ACLENS-00022114	JX2 5/12/17				
RX0038	E-mail from Robert Drumm to Brian Frank cc Peter Clarkson re Fiscal Shipped to Date	4/20/2016	ACLENS-00020250	ACLENS-00020252	JX2 5/12/17		CX1767, RX1151		
RX0039	E-mail from Robert Drumm to Peter Clarkson; Brian Frank re Contact Lens Pricing	5/20/2016	ACLENS-00020267	ACLENS-00020272	JX2 5/12/17		RX1156		
RX0040	E-mail from Jay Makadia to Peter Clarkson; Reade Fahs; Bruce Steffey; Chuck Criscillis; Mitchell Goodman cc Randy Peeler; Howard Singer re 1-800Contacts	2/22/2012	ACLENS-00020373	ACLENS-00020377	JX2 5/12/17	304:10			
RX0041	E-mail from Reade Fahs to Peter Clarkson; Bruce Steffey; Chuck Criscillis; Mitchell Goodman cc Joan Swanberg re Deck for This Afternoon's Call	4/21/2012	ACLENS-00020734	ACLENS-00020790	JX2 5/12/17		CX1748		
RX0042	E-mail from Reade Fahs to Peter Clarkson re 1-800 materials for tomorrow's meeting	4/22/2012	ACLENS-00020791	ACLENS-00020793	JX2 5/12/17				
RX0043	E-mail from Peter Clarkson to Paul Rivenburgh cc stefani.silverstein@barclays.com; kurt.anthony@barclays.com re E-Commerce Section of Management Presentation	11/24/2013	ACLENS-00021834	ACLENS-00021840	JX2 5/12/17				



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Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX0050	Letter from Peter Clarkson re 1-800 Contacts "pop-up" ads		ACLENS-00000378	ACLENS-00000378	JX2 5/12/17	319:19			
RX0052	E-mail from Peter Clarkson to Phil Dietrich re 800 Letter (attached)	7/6/2005	ACLENS-00000260	ACLENS-00000261	JX2 5/12/17		CX1759, CX0010		
RX0054	Letter from Peter Clarkson to Mark Miller re discountcontactlenses.com cease & desist	2/4/2010	ACLENS-00000303	ACLENS-00000303	JX2 5/12/17		CX1768		
RX0055	Letter from Peter Clarkson to Mark Miller re sponsored advertisements on Google and other search engines	2/2/2010	ACLENS-00000385	ACLENS-00000386	JX2 5/12/17				
RX0056	E-mail from Peter Clarkson to Melissa Smith re 1-800 Contacts response	5/2/2010	ACLENS-00000406	ACLENS-00000408	JX2 5/12/17				
RX0064	E-mail from Mark Miller to Matthew R. Jenkins, Esq. re Lenses for Less and 1-800 Contacts	2/16/2010	1-800F_00081723	1-800F_00081724	JX2 5/12/17		RX0255		
RX0066	Letter from Mark Miller to Matthew Jenkins re April 15, 2010 Letter/Settlement Agreement with Lenses for Less	4/22/2010	1-800F_00084108	1-800F_00084109	JX2 5/12/17				
RX0067	Letter from Arshil Abdulla (LensDiscounters.com Inc.) to B. Pratt re removal of sponsored ads	9/23/2005	1-800F_00084017	1-800F_00084023	JX2 5/12/17				
RX0072	Complaint 1-800 Contacts, Inc. v. Memorial Eye, PA	12/23/2008	1-800F_00082023	1-800F_00082067	JX2 5/12/17	1924:13; 2530:11	CX1619	NH	
RX0074	Letter from Mark Miller to Kevin M. Drucker re Settlement Agreement	5/17/2010	1-800F_00023598	1-800F_00023608	JX2 5/12/17				
RX0100	Letter from Vision Direct re search affiliate	1/22/2004	1-800F_00036759	1-800F_00036760	JX2 5/12/17				
RX0102	E-mail from Daniel Daugherty to Josh Aston re Adwords	1/29/2004	1-800F_00036765	1-800F_00036766	JX2 5/12/17		CX0791		
RX0109	E-mail from Kevin McCallum to Josh Aston re 1-800 Contacts checking in and attaching article and Fairness to Contact Lens Consumers Act	12/2/2003	1-800F_00036709	1-800F_00036725	JX2 5/12/17				
RX0115	AdWords Help article re: Using broad match	12/6/2016	N/A	N/A	JX2 5/12/17				
RX0116	AdWords Help article re: Using phrase match	12/6/2016	N/A	N/A	JX2 5/12/17				
RX0117	AdWords Help article re: Using exact match	12/6/2016	N/A	N/A	JX2 5/12/17				
RX0118	AdWords Help article re: Negative keywords	12/6/2016	N/A	N/A	JX2 5/12/17				
RX0119	Keywords to the Wise - Google Best Practices		N/A	N/A	JX2 5/12/17				
RX0120	AdWords Help article re: Ad Rank	12/6/2016	N/A	N/A	JX2 5/12/17				
RX0121	Google Search Quality Rating Program - General Guidelines	3/28/2016	N/A	N/A	JX2 5/12/17	1225:1	RX0627		
RX0122	AdWords Help article re: Understanding landing page experience	12/6/2016	N/A	N/A	JX2 5/12/17				
RX0124	What is 'Quality Score' and how is it calculated?		GOOG-LENSE-00003533	GOOG-LENSE-00003582	JX2 5/12/17				

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RX0125	Ads Quality Communication Document - Search (Draft)	2/22/2002	GOOG-LENSE-00004082	GOOG-LENSE-00004089	JX2 5/12/17		CX1170, RX1641		
RX0126	AdWords Help article re: How Google search results differ from ads	00/00/2016	N/A	N/A	JX2 5/12/17				
RX0132	Eye Tracking Report Google MSN and Yahoo Compared, Prepared by Gord Hotchkiss, Enquiro	11/00/2006	GOOG-LENSE-00004670	GOOG-LENSE-00004884	JX2 5/12/17				
RX0133	CCI-DG Report Chapter 5.2: Bidding on Trademarks as Keywords		GOOG-LENSE-00000864	GOOG-LENSE-00000869	JX2 5/12/17				GRANTED 4/4/2017
RX0138	E-mail from Rose Hagan to Prashant Fuloria re Trademarks - usability study discussion	1/11/2004	GOOG-LENSE-00000933	GOOG-LENSE-00000934	JX2 5/12/17				GRANTED 4/4/2017
RX0139	AdWords Trademark Policy Update - Reseller and Information Site Policies		GOOG-LENSE-00003928	GOOG-LENSE-00003928	JX2 5/12/17				
RX0140	Google SEC Form S-1 Registration Statement	4/29/2004	N/A	N/A	JX2 5/12/17				
RX0142	Advertising Policies Help - Trademarks	12/6/2016	N/A	N/A	JX2 5/12/17				
RX0143	Advertising Policies Help - Misrepresentation	12/6/2016	N/A	N/A	JX2 5/12/17				
RX0147	International Vision Direct ("IVD") Sales FY2013 through 1Q2015		N/A	N/A	JX2 5/12/17				
RX0148	International Vision Direct referral visitors		WALG00002237	WALG00002237	JX2 5/12/17				GRANTED 4/4/2017
RX0149	Vision Direct Business Overview June 2011	06/00/2011	N/A	N/A	JX2 5/12/17		CX1805		DENIED 4/4/2017
RX0151	Vision Direct One Pager	9/22/2013	N/A	N/A	JX2 5/12/17				GRANTED 4/4/2017
RX0152	Vision Direct Baseline Usability Study October 2012	10/00/2012	WAG-0000232	WAG-0000249	JX2 5/12/17	434:14			GRANTED 4/4/2017
RX0153	Walgreens Optical Business Update	3/20/2014	WAG-00000028	WAG-00000028	JX2 5/12/17	470:12	RX1840, RX1841		GRANTED 4/12/2017
RX0154	E-mail from Tim Roush to Amy Larson re Marketing History	10/3/2013	1-800F_00102906	1-800F_00102907	JX2 5/12/17		RX1140, CX1775, RX0589		
RX0155	Case Study: Stella Service Helps Keep Customers Onsite for 1-800 Contacts	00/00/2014	1-800F_00106569	1-800F_00106570	JX2 5/12/17				
RX0158	E-mail from Kevin McCallum to Clint Schmidt and Josh Aston re Strategy	2/13/2004	1-800F_00102785	1-800F_00102786	JX2 5/12/17		RX1135, RX0588, RX1133		
RX0159	E-mail from Josh Aston to Kevin McCallum, Joe Zeidner, Clint Schmidt re Google Trademark Policy (attached)	4/9/2004	1-800F_00102777	1-800F_00102781	JX2 5/12/17	2897:24	CX1785, RX0448		
RX0160	E-mail from Joe Zeidner to Clint Schmidt, Kevin McCallum re our agreement	7/26/2004	1-800F_00036912	1-800F_00036912	JX2 5/12/17		CX0840		
RX0161	E-mail from Clint Schmidt to Joe Zeidner re 1-800 contacts showing up on keyword search for "Vision Direct"	10/21/2004	1-800F_00036997	1-800F_00036998	JX2 5/12/17				
RX0162	E-mail from Joe Zeidner to Kevan Hancock, Clint Schmidt, Kevin McCallum re 1-800 contacts showing up on keyword search for "Vision Direct"	10/21/2004	1-800F_00037005	1-800F_00037007	JX2 5/12/17				

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RESPONDENT'S POST-TRIAL EXHIBIT INDEX PURSUANT TO RULE 3.46(b)

Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX0163	E-mail from Duerr (drugstore.com) to Clint Schmidt, Brandon Dansie re new trademark infringements	12/20/2004	1-800F_00045765	1-800F_00045767	JX2 5/12/17				
RX0199	E-mail from Laura Schmidt to Gibson re Cross target your competitor's website visitors - Cross Pixel Media Test	12/20/2011	1-800F_00039656	1-800F_00039665	JX2 5/12/17				
RX0200	E-mail from Craven re First Page Bid Suggestions - Ready to Implement?	5/3/2011	1-800F_00029918	1-800F_00029920	JX2 5/12/17				
RX0242	Web article: Eye Health and Eye Exam Visionworks	1/21/2017	N/A	N/A	JX2 5/12/17				
RX0243	Advertisement: Davis Vision to Launch New Contact Lens Website		N/A	N/A	JX2 5/12/17				
RX0244	Return Policy Visionworks Contacts	10/20/2016	VISIONWORKS00000752	VISIONWORKS00000753	JX2 5/12/17				
RX0245	Keywords Report 2015 (2015/01/01 - 2015/12/31)	12/31/2015	N/A	N/A	JX2 5/12/17				GRANTED 4/4/2017
RX0247	Keywords Report 2009 (2009/01/01 - 2009/12/31)	12/31/2009	N/A	N/A	JX2 5/12/17				
RX0249	Website: Frequently Asked Questions Visionworks Contacts	1/17/2017	N/A	N/A	JX2 5/12/17				
RX0250	E-mail from Joe Zeidner to Bethers, Coon re DSCM counter proposal - input needed	5/24/2004	1-800F_00036860	1-800F_00036863	JX2 5/12/17	2741:25	CX0058		
RX0253	Letter from Miller to Standard Optical re settlement agreement	9/21/2010	1-800F_00083447	1-800F_00083448	JX2 5/12/17				
RX0258	E-mail from Clint Schmidt to Joe Zeidner re 1-800 contacts showing up on keyword search for "Vision Direct"	10/21/2004	1-800F_00037003	1-800F_00037004	JX2 5/12/17				
RX0310	October 2016 Search Engine Results Pages for 1 800 Contacts, 1800 Contacts, 1800Contacts, 1-800-Contacts and 1-800 Contacts	10/6/2016	N/A	N/A	JX2 5/12/17			NH	
RX0311	November 2016 Search Engine Results Pages for 1 800 Contacts, 1800 Contacts, 1800Contacts, 1-800-Contacts and 1-800 Contacts	11/2/2016	N/A	N/A	JX2 5/12/17			NH	
RX0312	December 2016 Search Engine Results Pages for 1 800 Contacts, 1800 Contacts, 1800Contacts, 1-800-Contacts and 1-800 Contacts	12/1/2016	N/A	N/A	JX2 5/12/17	1305:4		NH	
RX0313	January 2017 Search Engine Results Pages for 1 800 Contacts, 1800 Contacts, 1800Contacts, 1-800-Contacts and 1-800 Contacts	1/3/2017	N/A	N/A	JX2 5/12/17			NH	
RX0314	February 2017 Search Engine Results Pages for 1 800 Contacts, 1800 Contacts, 1800Contacts, 1-800-Contacts and 1-800 Contacts	2/1/2017	N/A	N/A	JX2 5/12/17	3128:20		NH	
RX0315	October 2016 Search Engine Results Pages for Contacts, Contact Lens, Contact Lenses	10/6/2016	N/A	N/A	JX2 5/12/17	1321:14		NH	
RX0316	November 2016 Search Engine Results Pages for Contacts, Contact Lens, Contact Lenses	11/2/2016	N/A	N/A	JX2 5/12/17			NH	
RX0317	December 2016 Search Engine Results Pages for Contacts, Contact Lens, Contact Lenses	12/1/2016	N/A	N/A	JX2 5/12/17			NH	

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RX0318	January 2017 Search Engine Results Pages for Contacts, Contact Lens, Contact Lenses;	1/3/2017	N/A	N/A	JX2 5/12/17	454:4		NH	
RX0319	February 2017 Search Engine Results Pages for Contacts, Contact Lens, Contact Lenses	2/1/2017	N/A	N/A	JX2 5/12/17			NH	
RX0320	Search Engine Results Pages (Amazon - Google)	1/16/2017	N/A	N/A	JX2 5/12/17			NH	
RX0321	Search Engine Results Pages (Costco - Google Search)	1/16/2017	N/A	N/A	JX2 5/12/17			NH	
RX0322	Search Engine Results Pages (Home Depot - Google Search)	1/16/2017	N/A	N/A	JX2 5/12/17			NH	
RX0323	Search Engine Results Pages (Walmart - Google Search)	1/16/2017	N/A	N/A	JX2 5/12/17			NH	
RX0324	Search Engine Results Pages (Staples - Google Search)	1/16/2017	N/A	N/A	JX2 5/12/17			NH	
RX0325	Search Engine Results Pages (Zappos - Google Search)	1/16/2017	N/A	N/A	JX2 5/12/17			NH	
RX0326	Search Engine Results Pages (Bloomingdales - Google Search)	1/16/2017	N/A	N/A	JX2 5/12/17			NH	
RX0327	Search Engine Results Pages (Walgreens - Google Search)	1/16/2017	N/A	N/A	JX2 5/12/17			NH	
RX0328	Search Engine Results Pages (Target - Google Search)	1/16/2017	N/A	N/A	JX2 5/12/17			NH	
RX0331	Search Engine Results Pages (Memorial Eye and Shipmycontacts Google Search)	10/7/2016	N/A	N/A	JX2 5/12/17			NH	
RX0332	Search Engine Results Pages (Memorial Eye and shipmycontacts - Google Search)	3/3/2017	N/A	N/A	JX2 5/12/17			NH	
RX0333	Search Engine Results Pages (expedia - Google Search)	2/7/2017	N/A	N/A	JX2 5/12/17			NH	
RX0334	Search Engine Results Pages (Expedia.com - Google Search)	2/7/2017	N/A	N/A	JX2 5/12/17			NH	
RX0335	Search Engine Results Pages (Expedia - Yahoo Search Results)	2/7/2017	N/A	N/A	JX2 5/12/17			NH	
RX0336	Search Engine Results Pages (Expedia.com - Yahoo Search Results)	2/7/2017	N/A	N/A	JX2 5/12/17			NH	
RX0337	Search Engine Results Pages (Expedia - Bing)	2/7/2017	N/A	N/A	JX2 5/12/17			NH	
RX0338	Search Engine Results Pages (Expedia.com - Bing)	2/7/2017	N/A	N/A	JX2 5/12/17			NH	
RX0339	Search Engine Results Pages (1800 Contacts - Google Search) Page 1	3/6/2017	N/A	N/A	JX2 5/12/17			NH	
RX0340	Search Engine Results Pages (1800 Contacts - Google Search) Page 2	3/6/2017	N/A	N/A	JX2 5/12/17			NH	
RX0346	Google Search Engine Results Page for www.kayak.com	3/8/2017	N/A	N/A	JX2 5/12/17			NH	
RX0347	Yahoo! Search Engine Results Page for www.kayak.com	3/8/2017	N/A	N/A	JX2 5/12/17			NH	

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Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX0348	Bing Search Engine Results Page for www.kayak.com	3/8/2017	N/A	N/A	JX2 5/12/17			NH	
RX0349	Google Search Engine Results Page for cheapoair.com	3/8/2017	N/A	N/A	JX2 5/12/17			NH	
RX0350	Yahoo! Search Engine Results Page for cheapoair.com	3/8/2017	N/A	N/A	JX2 5/12/17			NH	
RX0351	Bing Search Engine Results Page for cheapoair.com	3/8/2017	N/A	N/A	JX2 5/12/17			NH	
RX0352	Declaration of Lisa A. Clark	3/13/2017	N/A	N/A	JX2 5/12/17	3131:15			
RX0354	Google Search Engine Results Page for "walmart" and "contact lenses"	3/8/2017	N/A	N/A	JX2 5/12/17			NH	
RX0356	Google Search Engine Results Page for "hubble contacts"	3/9/2017	N/A	N/A	JX2 5/12/17			NH	
RX0408	Settlement Agreement (Standard Optical)	2/4/2011	N/A	N/A	JX2 5/12/17		CX0325	NH	
RX0415	Complaint and Jury Demand with Exhibits (Lens.com)	8/13/2007	N/A	N/A	JX2 5/12/17		CX0447	NH	
RX0424	E-mail from Nathan Blair to Neil Weiloch re: TM/non TM Numbers by week and attached Organic Report by week (2013/08/18 - 2014/07/19)	7/30/2014	1-800F_00052855	1-800F_00052856	JX2 5/12/17				
RX0425	E-mail from Laura Schmidt to Tim Roush re Search Impression Data and attached Impression Data Trends Report	9/5/2014	1-800F_00054092	1-800F_00054269	JX2 5/12/17				GRANTED 4/4/2017
RX0426	E-mail from Tim Roush to dhaber@thl.com re Marketing Due Diligence Deck and attached: Marketing & eCommerce Due Diligence; List of Core Users; Total Conversion Rate 2008-2013; Conversion Rate 2008 - 2013	10/4/2013	1-800F_00055406	1-800F_00055410	JX2 5/12/17				
RX0427	E-mail from Sami Nazif to Brian Bethers; Douglas Haber; Francois Hure; Carlo Bronzini Vender re 1-800 Management Presentation and attached 1-800 Contacts Management Presentations	9/27/2015	1-800F_00056111	1-800F_00056172	JX2 5/12/17	2393:4			GRANTED 4/4/2017
RX0428	E-mail from Sami Nazif to Brian Bethers; Jeff Swenson; Joshua Nelson; HJ Kim; Douglas Haber; Rob Hunter; John Graham; Scott Osmond; Tim Roush re Updated Management Presentation and attached 1-800 Contacts Management Presentations	9/25/2015	1-800F_00056173	1-800F_00056231	JX2 5/12/17	3561:21; 3797:10			GRANTED 4/4/2017
RX0430	E-mail from Tim Roush to Laura Schmidt re Marketing forecast amount and attached Marketing Expense - Monthly Budget Plan 2015; 2014-2015 Marketing Calendar	4/21/2015	1-800F_00056912	1-800F_00056915	JX2 5/12/17				
RX0445	E-mail from Amber Powell to Marketing, Brian Bethers, et al. re Web Channel Trend and attached Weekly Website Overview (week 46); Web Channel Trend report	12/19/2011	1-800F_00094280	1-800F_00094284	JX2 5/12/17				

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Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX0446	E-mail from Steve Evans to Antoine Fraikin; Brady Roundy; Brent Jensen; Chris Rushton; Dallan Rees; Derek Anderson; Emily Glover; Jesse Brimhall; Justin Olson; Justin Smith; Kevin Jensen; Kevin Owens; Matthew Klitgaard; Nathan Blair; Spencer Griffin; Stev	1/5/2016	1-800F_00096386	1-800F_00096387	JX2 5/12/17				
RX0448	E-mail from Josh Aston to Kevin McCallum re Sorry - here's the attachment; E-mail from Daniel Daugherty to Josh Aston re Follow Up to TM email; Trademark Complaint procedure	4/9/2004	1-800F_00102777	1-800F_00102781	JX2 5/12/17		CX1785, RX0159		
RX0449	E-mail from Betsy Kelleher to Laura Schmidt re: research; 1-800 Contacts Contact Lens Market Segmentation Q1 2007 Confidential Presentation; Contact Lens Alliance: Walmart & 1-800 Contacts October 2008; Industry Data/Alliance Comparison September 2009; Co	11/22/2010	1-800F_00102787	1-800F_00102899	JX2 5/12/17				
RX0451	E-mail from Paul Light to Jason Copley; Douglas Haber; Rob Hunter re Bain CL Industry Research and attached The Vision Council Research Consumer Barometer March 2013 presentation; Total Market/Contact Lens Usage December 2012; Contact Lenses in the US -	6/20/2014	1-800F_00104872	1-800F_00104976	JX2 5/12/17		CX1783		GRANTED 4/4/2017
RX0452	Google Web Page, About Negative Keywords - Adwords Help		N/A	N/A	JX2 5/12/17				
RX0453	AdWords Help article re: Add Negative Keywords to Search Network Campaigns		N/A	N/A	JX2 5/12/17		CX1169		
RX0456	AdWords Help article re: Edit, remove, or download negative keywords		N/A	N/A	JX2 5/12/17				
RX0458	How to add keywords that won't trigger my ads (Negative keywords) (Bing)		N/A	N/A	JX2 5/12/17				
RX0460	Learn about using negative keywords to get to the right customers (Bing)		N/A	N/A	JX2 5/12/17				
RX0464	AdWords Help article re: Negative Keywords		N/A	N/A	JX2 5/12/17				
RX0483	Add negative keywords to your campaign, Google AdWords Help	2/16/2016	N/A	N/A	JX2 5/12/17				
RX0501	Hal Varian, Quality scores and ad auctions, Google Official Blog, October 15, 2008	10/15/2008	N/A	N/A	JX2 5/12/17				
RX0502	AdWords Help article re: Impressions	2/25/2016	N/A	N/A	JX2 5/12/17				
RX0561	Our Company home page 1-800 CONTACTS	1/13/2014	1800F_00106571	1800F_00106571	JX2 5/12/17				
RX0566	Federal Register Part VI Federal Trade Commission 16 CFR Parts 315 and 456 Contact Lens Rule; Ophthalmic Practice Rules; Proposed Rule and Final Rule	2/4/2004	N/A	N/A	JX2 5/12/17				
RX0568	Federal Register Vol. 69, No. 78 April 22, 2004 Notices	4/22/2004	N/A	N/A	JX2 5/12/17				

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Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX0569	Federal Trade Commission Report: The Strength of Competition in the Sale of Rx Contact Lenses: An FTC Study February 2005	02/00/2005	N/A	N/A	JX2 5/12/17				
RX0572	Federal Trade Commission Report: Effects of a Bristol Windows Advertisement with an "Up To Savings Claim on Consumer Take-Away and Beliefs" by Manoj Hastak and Dennis Murphy	06/00/2012	N/A	N/A	JX2 5/12/17				
RX0573	Order granting 1-800 Contacts, Inc. Motion to Dismiss (1-800 Contacts v. Lens.com)	3/3/2014	N/A	N/A	JX2 5/12/17			NH	
RX0575	Federal Trade Commission Report: FTC Consumer Protection Staff Updates Agency's Guidance to Search Engine Industry on the Need to Distinguish Between Advertisements and Search Results	6/25/2013	N/A	N/A	JX2 5/12/17				
RX0586	1-800 Contacts, Inc., vs. Lensworld.com, Inc., Order Awarding Attorney's Fees and Costs	11/21/2008	N/A	N/A	JX2 5/12/17			NH	
RX0587	1-800 Contacts, Inc. vs. Lensworld.com, Inc., Order	9/9/2008	N/A	N/A	JX2 5/12/17			NH	
RX0590	J.D. Power and Associations Call Center Certification Report Prepared for 1-800 Contacts April 2007	04/00/2007	1800F_00106572	1800F_00106577	JX2 5/12/17	2397:6	RX1143		
RX0593	E-mail from Amber Powell to Bdansie@1800contacts.com; wvanflee@1800contacts.com re Your SPR - 1800Contacts Browse subscription (id 10252) is attached and attached Satisfaction Performance Report (SPR) October 24, 2010 - October 30, 2010	11/1/2010	1-800F_00059535	1-800F_00059537	JX2 5/12/17				
RX0596	Report to Congress Trademark Litigation Tactics and Federal Government Services to Protect Trademarks and Prevent Counterfeiting April 2011	04/00/2011	N/A	N/A	JX2 5/12/17				
RX0597	Letter from Mary Engle to Federal Trade Commission re 2002 Search Engine Letter	6/24/2013	N/A	N/A	JX2 5/12/17				
RX0598	FTC letter to search engines (2002)	6/27/2002	N/A	N/A	JX2 5/12/17		RX0622		
RX0599	Letter to Gary Ruskin from Heather Hipsley re Complaint Requesting Investigation of Various Internet Search Engine Companies for Paid Placement and Paid Inclusion Programs	6/27/2002	N/A	N/A	JX2 5/12/17				
RX0611	Google Website Hal Varian Chief Economist, Google Insights on the AdWords Auction		N/A	N/A	JX2 5/12/17		CX1807		
RX0612	Video: Insights on the Adwords Auction		N/A	N/A	JX2 5/12/17		CX1807		
RX0612A	Transcript of Varian Video: Insights on the Adwords Auction		N/A	N/A	JX2 5/12/17				
RX0619	Buying Contact Lenses FDA webpage <a href="http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/HomeHealthandConsumer">http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/HomeHealthandConsumer</a>	2/14/2017	N/A	N/A	JX2 5/12/17				
RX0620	Federal Trade Commission article: The Contact Lens Rule: A Guide for Prescribers and Sellers	2/14/2017	N/A	N/A	JX2 5/12/17				

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Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX0622	Letter from Heather Hippsley re: Commercial Alert Complaint Requesting Investigation of Various Internet Search Engine Companies for Paid Placement and Paid Inclusion Programs	6/27/2002	N/A	N/A	JX2 5/12/17	2411:14	RX0598		
RX0626	Google's Best Practice: Keywords to the Wise Cultivating Demand with Keyword Strategies		N/A	N/A	JX2 5/12/17				
RX0640	Trademark Study - Data Entry Template, Analysis Sheet, and Questions		GOOG-LENSE-00001020	GOOG-LENSE-00001020	JX2 5/12/17				
RX0658	Bing Search Quality Insights Minimizing Answer Defects (Bing Search Blog)	8/20/2012	N/A	N/A	JX2 5/12/17				
RX0660	Search User Behavior at SMX (Bing Search Blog)	2/10/2009	N/A	N/A	JX2 5/12/17				
RX0673	Putting Disclosures to the Test, an FTC Workshop Staff Summary November 2016	11/00/2016	N/A	N/A	JX2 5/12/17				
RX0678	Complaint Counsel's Amended Objections and Responses to Respondent's First Set of Requests for Admission	10/27/2016	N/A	N/A	JX2 5/12/17				
RX0679	Complaint Counsel's Amended Objections and Responses to Respondent's Requests for Admission Nos. 17, 19, 22 35	2/10/2017	N/A	N/A	JX2 5/12/17				
RX0679A	Complaint Counsel's Amended Objections and Responses to Respondent's Requests for Admission Nos. 17, 19, 22 35	2/10/2017	N/A	N/A	JX2 5/12/17				
RX0680	Complaint Counsel's Amended Responses and Objections to Respondent's First Set of Interrogatories (1-14)	11/8/2016	N/A	N/A	JX2 5/12/17				
RX0681	Complaint Counsel's Objections and Responses to Respondent's First Set of Requests for Admission	10/3/2016	N/A	N/A	JX2 5/12/17				
RX0682	Complaint Counsel's Objections and Responses to Respondent's Second Set of Requests for Admission	1/24/2017	N/A	N/A	JX2 5/12/17				
RX0683	Complaint Counsel's Responses and Objections to Respondent's Document Requests to the Bureau of Consumer Protection and Office of Policy Planning	1/27/2017	N/A	N/A	JX2 5/12/17				
RX0684	Complaint Counsel's Responses and Objections to Respondent's First and Second Sets of Requests for the Production of Documents	10/18/2016	N/A	N/A	JX2 5/12/17				
RX0685	Complaint Counsel's Responses and Objections to Respondent's First Set of Interrogatories (1-14)	10/11/2016	N/A	N/A	JX2 5/12/17				
RX0686	Complaint Counsel's Responses and Objections to Respondent's Second Set of Interrogatories (15-25)	1/13/2017	N/A	N/A	JX2 5/12/17				
RX0687	Complaint Counsel's Privilege Log - Docket No. 9372	10/18/2016	N/A	N/A	JX2 5/12/17				
RX0688	E-mail from Amber Powell to Junhyon Park, Joan Blackwood, and Amy Larson re web customer attrition and attached Website Conversion Summary	5/1/2012	1-800F_00093265	1-800F_00093268	JX2 5/12/17		RX1132		
RX0690	E-mail string from Mark Miller to Dan Harkins re Empire Vision trademark keywords with Exhibit 1 (Empire Vision Center Trademark Keywords) and Draft Settlement Agreement between 1-800 Contacts and Empire Vision Center, Inc.;	4/19/2010	1-800F_00081046	1-800F_00081064	JX2 5/12/17		CX1789		



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Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX0691	E-mail from Mark Miller to Neal Slifkin re Contact Lens King settlement agreement and attached Draft Settlement Agreement between 1-800 Contacts, Inc. and Contact Lens King, Inc.	3/26/2010	1-800F_00080908	1-800F_00080920	JX2 5/12/17		CX1790, RX0263		
RX0700	1 800 webpage re return policy	2/21/2017	1-800F_00106578	1-800F_00106579	JX2 5/12/17				
RX0701	Declaration of Hal Varian in Support of Defendant Google Inc.'s Opposition to Class Certification	4/11/2011	N/A	N/A	JX2 5/12/17	1819:10			
RX0702	Federal Trade Commission article: The Contact Lens Rule (16 C.F.R. Part 315) and the Eyeglass Rule (16 C. F. R. Part 456)	10/22/2004	N/A	N/A	JX2 5/12/17				
RX0703	Federal Trade Commission article: FTC Issues Warning Regarding the Agency's Contact Lens Rule	4/7/2016	N/A	N/A	JX2 5/12/17				
RX0704	Declaration of Rukmini Iyer	2/6/2017	N/A	N/A	JX2 5/12/17				GRANTED 4/4/2017
RX0715	Google Inside Adwords Blog Postings	7/14/2005	N/A	N/A	JX2 5/12/17				
RX0716	AdWords Help article: About ad position and Ad Rank	00/00/2016	N/A	N/A	JX2 5/12/17				
RX0721	Official Google Blog: Introducing the Knowledge Graph Things not Strings	5/16/2012	N/A	N/A	JX2 5/12/17				
RX0722	Google Mobile Ads Blog: Find Information Faster with Mobile Ad Site Links	10/7/2010	N/A	N/A	JX2 5/12/17				
RX0723	Google Company History	2/6/2017	N/A	N/A	JX2 5/12/17				
RX0724	Official Google Webmaster Central Blog: Penguin is Now Part of Our Core Algorithm	9/23/2016	N/A	N/A	JX2 5/12/17				
RX0725	Search Help: Suggest a Change to a Knowledge Graph Card		N/A	N/A	JX2 5/12/17				
RX0727	Data Dictionary (Van Liere survey)	2/22/2017	N/A	N/A	JX2 5/12/17				
RX0728	Expert Report of Kent Van Liere, Ph.D. - Exhibit A (Biography and C.V)	2/23/2017	N/A	N/A	JX2 5/12/17				
RX0729	Expert Report of Kent Van Liere, Ph.D. - Exhibit B (Documents Relied Upon List)	2/23/2017	N/A	N/A	JX2 5/12/17				
RX0730	Expert Report of Kent Van Liere, Ph.D. - Exhibit C (Survey Materials)	2/23/2017	N/A	N/A	JX2 5/12/17	2984:8			
RX0731	Expert Report of Kent Van Liere, Ph.D. - Exhibit D (Van Liere 1-800 Contacts Survey Data)	2/23/2017	N/A	N/A	JX2 5/12/17				
RX0732	Expert Report of Howard S. Hogan - Exhibits	2/23/2017	N/A	N/A	JX2 5/12/17	3450:16			
RX0733	Expert Report of Dr. Anindya Ghose and Appendices	2/23/2017	N/A	N/A	JX2 5/12/17	846:8; 3889:25; 4238:5			
RX0734	Expert Report of Howard S. Hogan	2/23/2017	N/A	N/A	JX2 5/12/17	3263:20			

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Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX0735	Expert Report of Kent Van Liere, Ph.D.	2/23/2017	N/A	N/A	JX2 5/12/17	3000:4			
RX0736	Expert Report of Ronald C Goodstein (corrected)	2/23/2017	N/A	N/A	JX2 5/12/17	2366:18			
RX0737	Expert Report of Dr. William M. Landes	2/23/2017	N/A	N/A	JX2 5/12/17				
RX0738	Final Van Liere Data	2/22/2017	N/A	N/A	JX2 5/12/17				
RX0739	Expert Report of Kevin M. Murphy	2/23/2017	N/A	N/A	JX2 5/12/17	1664:14; 4102:3; 4192:21			
RX0740	1-800 Contacts One-Pager (2016)	00/00/2016	1-800F_00106532	1-800F_00106532	JX2 5/12/17				
RX0741	1-800 Contacts 2000 Specimen	00/00/2000	1-800F_00106533	1-800F_00106533	JX2 5/12/17				
RX0742	1-800 Contacts 2008 Specimen 2	00/00/2008	1-800F_00106534	1-800F_00106535	JX2 5/12/17				
RX0743	1-800 Contacts 2008 Specimen	00/00/2008	1-800F_00106536	1-800F_00106537	JX2 5/12/17				
RX0744	1-800 Contacts 2009 Specimen 2	00/00/2009	1-800F_00106538	1-800F_00106538	JX2 5/12/17				
RX0745	1-800 Contacts 2009 Specimen	00/00/2009	1-800F_00106539	1-800F_00106539	JX2 5/12/17				
RX0746	1-800 Contacts 2011 Specimen of Trademark on website	00/00/2011	1-800F_00106540	1-800F_00106540	JX2 5/12/17				
RX0747	1-800 Contacts 2013 Front Desk	00/00/2013	1-800F_00106541	1-800F_00106542	JX2 5/12/17				
RX0748	1-800 Contacts Commercial 4	00/00/0000	1-800F_00106543	1-800F_00106543	JX2 5/12/17	2693:22			
RX0749	1-800 Contacts Commercial 5	00/00/0000	1-800F_00106544	1-800F_00106544	JX2 5/12/17				
RX0750	1-800 Contacts Commercial 6	00/00/0000	1-800F_00106545	1-800F_00106545	JX2 5/12/17				
RX0751	1-800 Contacts Commercial 7	00/00/0000	1-800F_00106546	1-800F_00106546	JX2 5/12/17				
RX0752	1-800 Contacts Commercial 8	00/00/0000	1-800F_00106547	1-800F_00106547	JX2 5/12/17	2694:5			
RX0753	1-800 Contacts Commercial 9	00/00/0000	1-800F_00106548	1-800F_00106548	JX2 5/12/17				
RX0754	1-800 Contacts Company Background	00/00/0000	1-800F_00106549	1-800F_00106549	JX2 5/12/17	2657:3			
RX0755	1-800 Contacts Company History (Presentation for Walmart)	00/00/0000	1-800F_00106550	1-800F_00106557	JX2 5/12/17				
RX0756	Articles of Amendment to the Articles of Incorporation of 1800 Lens-Now, Inc. (Coon)	8/26/1997	1-800F_00106558	1-800F_00106559	JX2 5/12/17				

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Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX0757	1-800 Contacts Corporate Culture - Initial Turn	00/00/0000	1-800F_00106560	1-800F_00106561	JX2 5/12/17				
RX0758	1-800 Contacts Corporate Culture - Associates First and Customer Service	00/00/0000	1-800F_00106562	1-800F_00106565	JX2 5/12/17				
RX0759	Non-Cancelable Lease Agreement for Telephone Number (Exhibit 10)	6/27/1995	1-800F_00106566	1-800F_00106568	JX2 5/12/17	2659:14			
RX0762	Memorandum Decision and Order Denying Motion to Dismiss or Transfer Venue (1-800 Contacts v. Memorial Eye)	6/4/2009	N/A	N/A	JX2 5/12/17			NH	
RX0765	Memorandum Decision and Order Granting in Part and Denying in Part Plaintiff's Motion to Dismiss/Strike Certain Counterclaims/Affirmative Defenses and for a More Definite Statement Case (1-800 Contacts v. Memorial Eye)	3/15/2010	N/A	N/A	JX2 5/12/17	2019:3		NH	
RX0766	Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment on Defendant's Fifth Affirmative Defense and Seventh Counterclaim (1-800 Contacts v. Memorial Eye)	12/13/2010	N/A	N/A	JX2 5/12/17			NH	
RX0767	Transcript: A Conference on the Economics of Drip Pricing (FTC) (Chairman's Introductory Remarks Only)	05/12/0012	N/A	N/A	JX2 5/12/17				
RX0777	E-mail from Bryce Craven to Christopher Coon cc Laura Schmidt; Dean Johnson; Jordan Judd re Deal20 Test on our Big 3 Keywords	10/31/2011	1-800F_00029489	1-800F_00029489	JX2 5/12/17				
RX0778	E-mail from Jordan Judd to Laura Schmidt; Eric Farmer re Hitwise Monthly Recap - Adtl Reports	1/13/2012	1-800F_00038879	1-800F_00038880	JX2 5/12/17				
RX0779	E-mail from Bryce Craven to Rob Hunter cc Jonathan C; Jonathan Coon VM; Angie Pace; Barbara Vega; Laura Schmidt; Christopher Coon re Marketing Review - Search Deck	8/30/2011	1-800F_00029409	1-800F_00029410	JX2 5/12/17				
RX0780	E-mail from Paige.r@google.com to Bryce Craven re [#199657382] Trademark Protection	9/27/2007	1-800F_00045153	1-800F_00045154	JX2 5/12/17		CX0211, CX0108, CX0061		
RX0781	E-mail from Brandon Dansie to Kevin McCallum re Feb 2005 Qualitative Summary	8/3/2006	1-800F_00037764	1-800F_00037774	JX2 5/12/17	2918:3	RX1225		
RX0782	E-mail from Emily Rasmussen to Aron Schwartz; Grange Johnson; Jeff McAllister; Jonathan C; Peter Lamm; Steve Key; Tim Mayhew; Debra Ogden; Lawrence Unrein; Michael Fung; Teri Davis cc Christi Champ; Clare Power; Emily Rasmussen; Jeanne Fitzpatrick; Jessica Day; John Hanlon; Kami Wilson; Rachel Thompson; Suzanne Binninger re 1-800 Contacts Board Materials	10/24/2008	1-800F_000040725	1-800F_000040846	JX2 5/12/17	2729:25			
RX0784	E-mail from Brandon Dansie to Dave Zeidner; Bryan Pratt cc Amy Larson; Bryce Craven re Other Organizations' ads on our Trademarks 04/06/07	4/9/2007	PL012334	PL012335	JX2 5/12/17				
RX0785	E-mail from Brandon Dansie to Kevin McCallum cc Amy Guymon re Price Guarantee Summary and Ad Text Test	2/21/2006	1-800F_00037663	1-800F_00037663	JX2 5/12/17				
RX0787	E-mail from Brandon Dansie to Dave Zeidner cc Bryce Craven; Jordan Judd FW: Daily TM Monitoring 01/28/08	1/28/2008	1-800F_00030709	1-800F_00030709	JX2 5/12/17				

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RX0788	E-mail from Kevin Aldridge to Joan Blackwood FW: ppt file	6/25/2010	1-800F_00034650	1-800F_00034652-001	JX2 5/12/17				
RX0789	Google AdWords Help article re: Using keyword matching options		N/A	N/A	JX2 5/12/17				
RX0790	Letter from Heather Geisler to Eric Schmidt re use of trademark terms in their ad texts even if they do not own that trademark or have explicit approval from the trademark owner to use it	8/28/2009	1-800F_000047036	1-800F_000047036	JX2 5/12/17				
RX0791	E-mail from Joe Zeidner to Mark Shurtleff; Kirk Torgensen; Ray Hintze FW: Googles decision to sell trademarks back in 2004	2/5/2008	1-800F_000047061	1-800F_000047063	JX2 5/12/17				
RX0792	E-mail from Laura Schmidt to Joan Blackwood re Google Purchase Funnel Data	8/31/2011	1-800F_00033502	1-800F_00033503	JX2 5/12/17				
RX0794	E-mail from Rick Galan to Laura Schmidt cc Tim Roush; Scott Osmond re Search Questions	10/3/2013	1-800F_00052888	1-800F_00052891	JX2 5/12/17		CX0983		
RX0795	E-mail from Daniel Daugherty to Josh Aston cc Kevin McCallum re Adwords	1/29/2004	1-800F_00080466	1-800F_00080467	JX2 5/12/17		CX1396		
RX0796	E-mail from Kevin McCallum to Josh Aston FW: TM Letter	3/17/2004	1-800F_00080718	1-800F_00080721	JX2 5/12/17		CX1026		
RX0797	E-mail from Josh Aston to Kevin McCallum re Google in January	2/9/2004	1-800F_00036779	1-800F_00036780	JX2 5/12/17		CX1054		
RX0798	E-mail from Jordan Judd to Bryce Craven re TM Monitor	11/7/2008	1-800F_00074058	1-800F_00074064	JX2 5/12/17		CX1068		
RX0800	Eye Tracking Study Search Pages		GOOG-LENSE-00004885	GOOG-LENSE-00004963	JX2 5/12/17				GRANTED 4/4/2017
RX0805	E-mail from Nick Stanley to Peter Clarkson and Bob Drumm re Google Quarterly Meeting - 7/22 attaching CEO Presentation: National Vision - Path to Profitable Growth	7/23/2015	ACLENS-00019783	ACLENS-00019822	JX2 5/12/17				
RX0806	E-mail from Robert Drumm to Peter Clarkson re Marketing Meeting Agenda; Marketing: Cost, Revenue and Orders	11/11/2015	ACLENS-00020223	ACLENS-00020224	JX2 5/12/17				
RX0807	E-mail from Nick Stanley to Bob Drumm re Lens Profitability Test attaching excerpt from Lens Profitability Test	3/29/2016	ACLENS-00020242	ACLENS-00020246	JX2 5/12/17				
RX0809	E-mail from Brian Work to Peter Clarkson and copied to Philip Dietrich and Robert Drumm re info for Consultant; ACLens Digital Marketing Overview and Offline Marketing	1/22/2014	ACLENS-00021961	ACLENS-00021982	JX2 5/12/17				
RX0810	E-mail from Robert Drumm to bdrumm@aclens.com re Current Event; AC Lens Welcome. It's Nice to See You! Event Presentation	10/6/2015	ACLENS-00022085	ACLENS-00022101	JX2 5/12/17				
RX0811	E-mail from Nidhi Bhadja to nstanlrey@aclenscorp.com; bdrumm@aclens.com and cc to Scott Kane; Julia Donlin; Wilson D'Souza re Bid Recommendations based on Match type; Bid Recommendations based on Match Type	7/25/2014	ACLENS-00023829	ACLENS-00023831	JX2 5/12/17				

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RX0812	E-mail from Christina Cebulak to Shajan Thomas; Stacey Abler; Paul Gross; alex.louw@nationalvision.com; Jennifer Roberts; Andy AuGustin; Nick Stanley; Bob Drumm; Claire Rozeman; jessica.altamirano@nationalvision.com; nancy.jellesma@nationalvision.com; and cc to Ysaswy Andavilli; Pedro Moya re National Vision Institute Google July Onsite Follow-up; Google National Vision Institute 2016 Path to Profitable Growth	7/18/2016	ACLENS-00024121	ACLENS-00024187	JX2 5/12/17				
RX0813	Compilation of AC Lens documents including: 12/17/2006 E-mail from Peter Clarkson to Bob Drumm and Brian Frank re Affiliate Policies attaching AC Lens Affiliate Program PPC Bidding Rules; Correspondence and drafts re PPC Policy; Google Alerts to Peter Clarkson for "contact lenses" dated 02/04/2015 through 10/14/2015; AdWords Placement Reports dated 09/02/2008 and 09/07/2009; E-mail from Xandra Kredlow to Peter Clarkson re Content Optimization - Need Your Input;	12/17/2006	ACLENS-00024375	ACLENS-00024429	JX2 5/12/17	333:7			
RX0814	E-mail from Brian Frank to Peter Clarkson cc Philip Dietrich re Online Eyewear Market Report; IBIS World Industry Report 0D5089 Online Eyeglasses & Contact Lens Sales in the US August 2013	7/26/2014	ACLENS-00025469	ACLENS-00025502	JX2 5/12/17				
RX0815	E-mail from Robert Drumm to Kelli Ford re Campaigns; Marketing Accounts	8/8/2013	ACLENS-00039747	ACLENS-00039751	JX2 5/12/17				
RX0816	E-mail from Beth Cale to Brian Frank and cc to Jason Sauer; Bob Drumm re Visitor Session Replay; 1 800 Contacts Case Study Clicktale's integrated workflow and actionable insights helped us better engage clients on our mission-critical web and mobile channel by creating a more convenient and friction-free user experience	2/25/2016	ACLENS-00041814	ACLENS-00041821	JX2 5/12/17				
RX0816	E-mail from Beth Cale to Brian Frank and cc to Jason Sauer; Bob Drumm re Visitor Session Replay; 1 800 Contacts Case Study Clicktale's integrated workflow and actionable insights helped us better engage clients on our mission-critical web and mobile channel by creating a more convenient and friction-free user experience	2/25/2016	ACLENS-00041814	ACLENS-00041821	JX2 5/12/17				
RX0817	E-mail from Peter Clarkson to Phil Dietrich; Brian Frank re AC Lens Points of Differentiation; AC Lens Points of Differentiation	3/27/2005	ACLENS-00044868	ACLENS-00044869	JX2 5/12/17				
RX0818	E-mail from Vrushali to pdietrich@aclens.com; daniella.p@google.com; roy.d@google.com; xandra.k@google.com; daniel.rw@google.com re New Keyword and Bid Suggestions for Your AdWords Account; AC Lens: Raise Bids for Keywords with Bids too Low to Show on First Page (Google.com); AC Lens: Keyword Suggestions from Opportunities Tab	5/10/2010	ACLENS-00046484	ACLENS-00046487	JX2 5/12/17				

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RX0820	E-mail from Robert Drumm to Jacqueline Palucci; Paresh Vadavia and cc to aclens.launch@opmpros.com; Delaine Zendran re Introduction and attaching OPMpros.com Affiliate Marketing: Launch Document Analysis & Development Plans for DiscountContactLenses.com, LensCatalogue.co.uk, DiscountGlasses.com and Frame Boutique	12/8/2015	ACLENS-00041550	ACLENS-00041639	JX2 5/12/17				
RX0844	1-800 Contacts Shipped Revenue Chart	2/13/2015	1-800F_00000059	1-800F_00000059	JX2 5/12/17		CX1741		
RX0850	Redacted e-mail to ShipMyContacts re New Contact Prescription	3/13/2010	1-800F_00020275	1-800F_00020275	JX2 5/12/17	2014:23			GRANTED 4/12/2017
RX0851	Redacted e-mail from ShipMyContacts re New Contact Prescription	3/15/2010	1-800F_00020276	1-800F_00020276	JX2 5/12/17	1953:16	RX0852, CX1324		GRANTED 4/12/2017
RX0893	Search Dashboard (2006 - 2007)	5/21/2007	1-800F_00028766	1-800F_00028766	JX2 5/12/17				
RX0894	Dashboard (2004 - 2007)	5/21/2007	1-800F_00028767	1-800F_00028767	JX2 5/12/17				
RX0895	Top 25 Dashboard (2007)	5/21/2007	1-800F_00028768	1-800F_00028768	JX2 5/12/17				
RX0896	Master Partner Dashboard (2007)	5/21/2007	1-800F_00028769	1-800F_00028769	JX2 5/12/17				
RX0897	E-mail from Rick Galan to Marketing@1800contacts.com cc Kathy Katemopoulos; Ciju Nair; Christopher Coon; Scott Osmond; Darcy Boggess; Ashley Smith; Richard Phelan re Search & Partner DB Week 16 - Ending 5/25/2012	5/29/2012	1-800F_00031651	1-800F_00031652	JX2 5/12/17				
RX0898	Partner Dashboard (2012)	5/29/2012	1-800F_00031653	1-800F_00031653	JX2 5/12/17				
RX0899	Search Dashboard (2012)	5/29/2012	1-800F_00031654	1-800F_00031654	JX2 5/12/17				
RX0900	E-mail from Amber Powell to marketing2@1800contacts.com; Brian Bethers et. al. re: Summary of Week 15 Web Results	5/14/2012	1-800F_00031674	1-800F_00031674	JX2 5/12/17				
RX0901	Weekly Core Website Overview Results for Week 15 (May 5th - May 11th 2012)	5/11/2012	1-800F_00031675	1-800F_00031677	JX2 5/12/17				
RX0902	Web Channel Trend Report (2011 - 2013)	00/00/2013	1-800F_00031678	1-800F_00031678	JX2 5/12/17				
RX0903	E-mail from Brian Bathers to John Graham; Joan Blackwood re: Essilor Management Presentation	2/24/2012	1-800F_00032130	1-800F_00032130	JX2 5/12/17				
RX0904	1-800 Contacts Management Presentation to Essilor, February 2012	02/00/2012	1-800F_00032131	1-800F_00032191	JX2 5/12/17		RX0905		
RX0906	1-800 Contacts Consumer Understanding Qualitative Research Summary	12/14/2009	1-800F_00034114	1-800F_00034116	JX2 5/12/17				
RX0907	E-mail from Bryce Booth to Kevin McCallum et. al. re: Web Report 9/29/03	9/29/2003	1-800F_00036633	1-800F_00036634	JX2 5/12/17		CX1048, RX0908		

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RX0908	Web Reporting	9/29/2003	1-800F_00036635	1-800F_00036635	JX2 5/12/17		RX0907, CX1048		
RX0911	E-Mail from Schmidt, Clinton to Coon, Jonathan copied to McCallum, Kevin re: Google Placement of Google Online Search Results	4/18/2004	1-800F_00036833	1-800F_00036834	JX2 5/12/17				
RX0912	Search Dashboard	4/12/2004	1-800F_00036835	1-800F_00036835	JX2 5/12/17				
RX0918	E-mail string from Kevin McCallum to Daniel Daugherty re TM Letter	2/13/2004	1-800F_00037080	1-800F_00037082	JX2 5/12/17				
RX0923	E-mail from Laura Schmidt to Emmy Spahr re: Google Purchase Conversion Funnel	10/3/2011	1-800F_00039950	1-800F_00039950	JX2 5/12/17				
RX0924	Google Conversion Funnel Data (2011/04/01 - 2011/07/06)	7/6/2011	1-800F_00039951	1-800F_00039951	JX2 5/12/17				
RX0926	E-mail from Bryan G. Pratt to Anthony Hong cc Dave Zeidner; Kristin Murphy; Linda Mettes re comments on settlement proposal	2/21/2009	1-800F_00045395	1-800F_00045398	JX2 5/12/17	2532:4	CX0489		
RX0929	E-mail from Bryan G. Pratt to William Thomashower re EZ Contacts	5/2/2008	1-800F_00045509	1-800F_00045509	JX2 5/12/17				
RX0939	E-mail from Bryan Pratt to William Thomashower re: Settlement Agreement	3/11/2008	1-800F_00045566	1-800F_00045569	JX2 5/12/17	2540:17			
RX0952	E-mail from Laura Schmidt to Kevin Aldridge	10/29/2014	1-800F_00047110	1-800F_00047110	JX2 5/12/17				
RX0953	Presentation re: 1-800 Contacts 2015 Core Revenue Plan Final	10/28/2014	1-800F_00047111	1-800F_00047111	JX2 5/12/17				GRANTED 4/4/2017
RX0954	1-800 CONTACTS Bank Case vs. Forecast (2013 - 2015)	00/00/2015	1-800F_00047112	1-800F_00047112	JX2 5/12/17				
RX0955	Working vs. Non-working Report (2012 - 2014)	00/00/2014	1-800F_00047113	1-800F_00047113	JX2 5/12/17			NH	
RX0956	Non-Lens Revenue (solution, product, orders, shipping) (2001 - 2014)	00/00/2014	1-800F_00047114	1-800F_00047114	JX2 5/12/17				
RX0957	E-mail from Jesse Brimhall to Scott Osmond et. al. re: Results for Core Site & Mobile Apps, Week 22	6/2/2014	1-800F_00047474	1-800F_00047475	JX2 5/12/17				
RX0958	Digital Commerce Dashboard\Digital Commerce Dashboard - CY14 Wk20	5/31/2014	1-800F_00047476	1-800F_00047476	JX2 5/12/17				GRANTED 4/4/2017
RX0959	Demand Generation Traffic Summary, Week 22 (Full and Mobile Web Summary)	6/2/2014	1-800F_00047477	1-800F_00047477	JX2 5/12/17				GRANTED 4/4/2017
RX0960	E-mail from Rick Galan to Brian Bathers re: Paid Search Costs	6/6/2013	1-800F_00047736	1-800F_00047739	JX2 5/12/17				
RX0961	Search Weekly Dashboard (2013, Week 22)	6/3/2013	1-800F_00047740	1-800F_00047740	JX2 5/12/17				
RX0962	E-mail from Rick Galan to Brian Bathers cc Phil Barrett; Jonathan Coon; Tim Roush; Jonas Newsome re Paid search costs	6/6/2013	1-800F_00047741	1-800F_00047744	JX2 5/12/17				
RX0963	E-mail from Brady Roundy to Derek Anderson re: Trademark Search	12/10/2014	1-800F_00047784	1-800F_00047785	JX2 5/12/17				

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RX0964	E-mail from Brady Roundy to Brady Roundy FW: Search DB Week 41 - Ending 10/12/2013	12/4/2014	1-800F_00047786	1-800F_00047787	JX2 5/12/17				
RX0965	PPC Dashboard	10/14/2013	1-800F_00047788	1-800F_00047788	JX2 5/12/17				
RX0966	SEO Dashboard	10/14/2013	1-800F_00047789	1-800F_00047789	JX2 5/12/17				
RX0967	E-mail from Brady Roundy to Brady Roundy re: Results for Core Site & Mobile Apps, Week 41	12/4/2014	1-800F_00047790	1-800F_00047791	JX2 5/12/17				
RX0968	Digital Commerce Dashboard - CY13, Wk 41	00/00/2013	1-800F_00047792	1-800F_00047792	JX2 5/12/17				
RX0969	Demand Generation Traffic Summary, Wk 41 (Full & Mobile Web)	10/14/2013	1-800F_00047793	1-800F_00047793	JX2 5/12/17				
RX0970	Portable Network Graphic Chart		1-800F_00047794	1-800F_00047794	JX2 5/12/17				
RX0971	Portable Network Graphic Chart/Image		1-800F_00047795	1-800F_00047795	JX2 5/12/17				
RX0972	Portable Network Graphic Chart		1-800F_00047796	1-800F_00047796	JX2 5/12/17				
RX0973	Chrome Visits - Natural Search Image		1-800F_00047797	1-800F_00047797	JX2 5/12/17				
RX0974	Chrome Visits - Typed/Bookmark Image		1-800F_00047798	1-800F_00047798	JX2 5/12/17				
RX0979	E-mail from Bryce Craven to Amy Larson cc Jordan Judd re SMX Advanced 2008 Notes	6/11/2008	1-800F_00065045	1-800F_00065053	JX2 5/12/17				
RX0981	E-mail from Jordan Judd to Mathew Purcell cc Diana Gutowski re Negative Term	4/21/2011	1-800F_00066819	1-800F_00066820	JX2 5/12/17				
RX0982	E-mail from Jyotsna Palla to Bryce Craven re Nov - Dec - Increase In 1-800 Contacts Related Queries	10/29/2010	1-800F_00075933	1-800F_00075933	JX2 5/12/17				
RX0987	E-mail from Daniel Daugherty to Josh Aston re Follow up to Trademark email	4/9/2004	1-800F_00080734	1-800F_00080737	JX2 5/12/17		CX0789, RX0454		
RX0995	Complaint (Contact Lens King)	3/8/2010	1-800F_00080846	1-800F_00080858	JX2 5/12/17		CX0461, RX0412	NH	
RX1007	Letter to Lenses for Less from Holland & Hart re trademark infringement and search engine advertisements	1/21/2010	1-800F_00081691	1-800F_00081692	JX2 5/12/17				
RX1010	Letter to Randolph Weigner from Rader, Fishman & Grauer re Demand letter	9/12/2007	1-800F_00081746	1-800F_00081749	JX2 5/12/17				
RX1011	Letter to Randolph Weigner from Rader, Fishman & Grauer re Demand letter	3/14/2008	1-800F_00081750	1-800F_00081755	JX2 5/12/17				
RX1013	E-mail string from Daniel Garriott to Mark Miller re: 1-800 Contacts v. Lensfast Discovery	10/19/2009	1-800F_00081810	1-800F_00081811	JX2 5/12/17				
RX1014	E-mail from Mark Miller to dbgariott@msn.com cc Bryan Pratt re 1-800 Contacts vs. Lensfast	10/30/2009	1-800F_00081824	1-800F_00081824	JX2 5/12/17				
RX1022	Complaint (Standard Optical Company)	7/13/2010	1-800F_00083382	1-800F_00083395	JX2 5/12/17		CX0965, RX0420	NH	
RX1028	E-mail string from Pete Wilson to Mark Miller, Cc: Bryan Pratt re 1-800 Contacts, Inc. v. Walgreen Co.	6/28/2010	1-800F_00083887	1-800F_00083891	JX2 5/12/17				



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Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX1029	E-mail from Mark Miller to Pete Wilson re 1-800 Contacts Walgreens Agreement	5/31/2011	1-800F_00083944	1-800F_00083944	JX2 5/12/17				
RX1030	E-mail string from Pete Wilson to Mark Miller re 1-800 Contacts Walgreens Agreement	5/31/2011	1-800F_00083945	1-800F_00083946	JX2 5/12/17				
RX1031	E-mail from Peter Wilson to Mark Miller FW: 1800 Contacts	4/11/2012	1-800F_00083948	1-800F_00083949	JX2 5/12/17				
RX1052	1-800 Contacts Price Matching Fiscal Week 1-39 Comparison	00/00/2016	N/A	N/A	JX2 5/12/17				
RX1053	2016 Price Match Trending	00/00/2016	1-800F_00084755	1-800F_00084755	JX2 5/12/17				GRANTED 4/4/2017
RX1078	Presentation re 1-800 & Walmart Research Compilation	2/12/2011	1-800F_00089261	1-800F_00089261	JX2 5/12/17				
RX1079	1-800 Contacts Pulse Tracker - August 2014 Results	08/00/2014	1-800F_00089422	1-800F_00089422	JX2 5/12/17				GRANTED 4/4/2017
RX1080	1-800 Contacts Pulse Tracker - August 2014 Results (Internal)	08/00/2014	1-800F_00089423	1-800F_00089423	JX2 5/12/17				GRANTED 4/4/2017
RX1081	1-800 Contacts Pulse Tracker - November 2014 Results	11/00/2015	1-800F_00089424	1-800F_00089424	JX2 5/12/17				GRANTED 4/4/2017
RX1082	1-800 Contacts Monthly Pulse Tracker April 2015 Data - Revised June 12, 2015	6/12/2015	1-800F_00089425	1-800F_00089425	JX2 5/12/17				GRANTED 4/4/2017
RX1083	1-800 Contacts Monthly Pulse Tracker April 2015 Data	04/00/2015	1-800F_00089426	1-800F_00089426	JX2 5/12/17				GRANTED 4/4/2017
RX1084	1-800 Contacts Monthly Pulse Tracker August 2015 Data	08/00/2015	1-800F_00089427	1-800F_00089427	JX2 5/12/17				GRANTED 4/4/2017
RX1085	1-800 Contacts Monthly Pulse Tracker February 2015 Data	02/00/2015	1-800F_00089428	1-800F_00089428	JX2 5/12/17				GRANTED 4/4/2017
RX1086	1-800 Contacts Monthly Pulse Tracker January 2015 Data	01/00/2015	1-800F_00089429	1-800F_00089429	JX2 5/12/17				GRANTED 4/4/2017
RX1087	1-800 Contacts Monthly Pulse Tracker July 2015 Data	07/00/2015	1-800F_00089430	1-800F_00089430	JX2 5/12/17				GRANTED 4/4/2017
RX1088	1-800 Contacts Monthly Pulse Tracker June 2015 Data	06/00/2015	1-800F_00089431	1-800F_00089431	JX2 5/12/17				GRANTED 4/4/2017
RX1089	1-800 Contacts Monthly Pulse Tracker June 2015 Data	06/00/2015	1-800F_00089432	1-800F_00089432	JX2 5/12/17				GRANTED 4/4/2017
RX1090	1-800 Contacts Monthly Pulse Tracker March 2015 Data	03/00/2015	1-800F_00089433	1-800F_00089433	JX2 5/12/17				GRANTED 4/4/2017
RX1091	1-800 Contacts Monthly Pulse Tracker May 2015 Data	05/00/2015	1-800F_00089434	1-800F_00089434	JX2 5/12/17				GRANTED 4/4/2017
RX1092	1-800 Contacts Pulse Tracker Results - April 2014 Results	04/00/2014	1-800F_00089435	1-800F_00089435	JX2 5/12/17				GRANTED 4/4/2017
RX1093	1-800 Contacts Pulse Tracker Results - June 2014 Results	06/00/2014	1-800F_00089436	1-800F_00089436	JX2 5/12/17				GRANTED 4/4/2017
RX1094	1-800 Contacts Pulse Tracker Results - May 2014 Results	05/00/2014	1-800F_00089437	1-800F_00089437	JX2 5/12/17				GRANTED 4/4/2017
RX1095	1-800 Contacts Monthly Pulse Tracker December 2015 Data	12/00/2015	1-800F_00089438	1-800F_00089438	JX2 5/12/17				GRANTED 4/4/2017

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RX1096	1-800 Contacts Monthly Pulse Tracker February 2016 Data	02/00/2016	1-800F_00089439	1-800F_00089439	JX2 5/12/17				GRANTED 4/4/2017
RX1097	1-800 Contacts Monthly Pulse Tracker March 2016 Data	03/00/2016	1-800F_00089440	1-800F_00089440	JX2 5/12/17				GRANTED 4/4/2017
RX1098	1-800 Contacts Monthly Pulse Tracker May 2016 Data	05/00/2016	1-800F_00089441	1-800F_00089441	JX2 5/12/17	2388:11			GRANTED 4/4/2017
RX1099	Customer Experience Report April 2015	04/00/2015	1-800F_00089442	1-800F_00089442	JX2 5/12/17				GRANTED 4/4/2017
RX1100	Customer Experience Report December 2014	12/00/2014	1-800F_00089443	1-800F_00089443	JX2 5/12/17				GRANTED 4/4/2017
RX1101	Customer Experience Report February 2015	02/00/2015	1-800F_00089444	1-800F_00089444	JX2 5/12/17				GRANTED 4/4/2017
RX1102	Customer Experience Report January 2015	01/00/2015	1-800F_00089445	1-800F_00089445	JX2 5/12/17				GRANTED 4/4/2017
RX1103	Customer Experience Report June 2015	06/00/2015	1-800F_00089446	1-800F_00089446	JX2 5/12/17				GRANTED 4/4/2017
RX1104	Customer Experience Report March 2015	03/00/2015	1-800F_00089447	1-800F_00089447	JX2 5/12/17				GRANTED 4/4/2017
RX1105	Customer Experience Report November 2014	11/00/2014	1-800F_00089448	1-800F_00089448	JX2 5/12/17				GRANTED 4/4/2017
RX1106	Customer Experience Report October 2014	10/00/2014	1-800F_00089449	1-800F_00089449	JX2 5/12/17				GRANTED 4/4/2017
RX1107	Customer Experience Report September 2014	09/00/2014	1-800F_00089450	1-800F_00089450	JX2 5/12/17				GRANTED 4/4/2017
RX1108	Report on July-August Post Transactional Survey		1-800F_00089451	1-800F_00089451	JX2 5/12/17				
RX1110	Market Pulse Price Perceptions Slides		1-800F_00089453	1-800F_00089453	JX2 5/12/17				
RX1111	Market Pulse Survey Results November 2014	11/00/2014	1-800F_00089454	1-800F_00089454	JX2 5/12/17				GRANTED 4/4/2017
RX1112	Market Pulse - Phase IV - Update 04/18/2016	4/18/2016	1-800F_00089455	1-800F_00089455	JX2 5/12/17				GRANTED 4/4/2017
RX1113	Fine-Tuning our Marketing Communications - Survey Report 02/20/2014	2/20/2014	1-800F_00089456	1-800F_00089456	JX2 5/12/17				GRANTED 4/4/2017
RX1114	2016 Segmentation Research - Targeting for efficiencies 08/27/2016 (draft presentation)	8/27/2016	1-800F_00089457	1-800F_00089457	JX2 5/12/17				GRANTED 4/4/2017
RX1117	2015 Q2 Product & Pricing Review July 23, 2015	7/23/2015	1-800F_00089486	1-800F_00089556	JX2 5/12/17		CX1447		GRANTED 4/4/2017
RX1130	Deadfile Customer Survey - Slides 1 through 4		1-800F_00092274	1-800F_00092274	JX2 5/12/17		CX1165		
RX1131	SKU Level Data 2004-2016	12/8/2016	1-800F_00092286	1-800F_00092286	JX2 5/12/17				GRANTED 4/4/2017
RX1136	E-mail string from Ann Harrison to Jonathan Coon; Brian Bethers; Rob Hunter; Allen Hwang; Kevin McCallum; John Murray; Dave Walker; Amy Larson; Christopher Coon; re Segmentation PowerPoint	5/14/2007	1-800F_00102900	1-800F_00102901	JX2 5/12/17		RX0156		

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RX1140	E-mail from Tim Roush to Amy Larson re Marketing History	10/3/2013	1-800F_00102906	1-800F_00102907	JX2 5/12/17		RX0154, CX1775, RX0589		
RX1149	E-mail from Reade Fahs to Peter Clarkson cc Louann Seguin Fwd: RE: Online Eyeglasses Report	3/15/2012	ACLENS-00020063	ACLENS-00020072	JX2 5/12/17				
RX1152	E-mail from Brian Frank to Peter Clarkson; Bob Drumm re Contact Lens Pricing		ACLENS-00020255	ACLENS-00020256	JX2 5/12/17				
RX1153	Contact Lens Pricing Model		ACLENS-00020257	ACLENS-00020257	JX2 5/12/17				
RX1154	E-mail string from Robert Drumm to Brian Frank; Peter Clarkson re Contact Lens Pricing		ACLENS-00020258	ACLENS-00020261	JX2 5/12/17				
RX1155	E-mail string from Robert Drumm to Peter Clarkson; Brian Frank re Contact Lens Pricing	5/20/2016	ACLENS-00020262	ACLENS-00020266	JX2 5/12/17				
RX1157	E-mail from Edward Casserley to Reade Fahs; Sam Spirn re Berkshire Alternate Team Presentation Materials	9/29/2013	ACLENS-00020311	ACLENS-00020311	JX2 5/12/17				
RX1158	NVI Re-Diligence Management Presentation	9/30/2013	ACLENS-00020312	ACLENS-00020372	JX2 5/12/17				
RX1159	E-mail from Nick Stanley to Bob Drumm re Paid Search - Lens Profitability Report	7/28/2015	ACLENS-00022046	ACLENS-00022046	JX2 5/12/17				
RX1160	E-mail from Nick Stanley to Bob Drumm Re Paid Search - Lens Profitability Report	7/28/2015	ACLENS-00022047	ACLENS-00022049	JX2 5/12/17				
RX1161	E-mail from Peter Clarkson to Brian Frank re Weekly Order Summary	7/19/2016	ACLENS-00022265	ACLENS-00022265	JX2 5/12/17				
RX1162	Metrics Report for AC Lens orders by Week (2015-2016)		ACLENS-00022266	ACLENS-00022266	JX2 5/12/17				
RX1163	E-mail from Peter Clarkson to bdrumm@aclens.com re Contact Lens Pricing	5/20/2016	ACLENS-00022569	ACLENS-00022572	JX2 5/12/17				
RX1164	PPC 2013-2014 Metrics Report NVI	00/00/2014	ACLENS-00023215	ACLENS-00023215	JX2 5/12/17				
RX1165	1-800 Comparison of 1-800 Strengths		ACLENS-00023216	ACLENS-00023217	JX2 5/12/17				
RX1166	E-mail from Robert Drumm to Danielle Wolinsky and cc to Nick Stanley re Enhanced Campaigns Follow Up	2/18/2013	ACLENS-00024237	ACLENS-00024242	JX2 5/12/17				
RX1167	Vision Watch Survey 12 Month period ending December 2011 Table 65	00/00/2011	ACLENS-00024355	ACLENS-00024355	JX2 5/12/17				
RX1168	Press Release 8/26/99 AC Lens - A Local E-Commerce Success Story	8/26/1999	ACLENS-00024356	ACLENS-00024357	JX2 5/12/17				
RX1169	Discountcontactlenses.com Banner Ad		ACLENS-00025298	ACLENS-00025298	JX2 5/12/17				
RX1170	E-mail from Alan Bleiweiss to Robert Drumm re Audit Findings	2/26/2013	ACLENS-00025924	ACLENS-00025924	JX2 5/12/17				
RX1171	ACLens - SEO Audit and Action Plan Presentation		ACLENS-00025925	ACLENS-00025944	JX2 5/12/17				
RX1172	ACLens-SEO-Data	5/20/2012	ACLENS-00025945	ACLENS-00025945	JX2 5/12/17				
RX1173	Notes regarding National Vision - AC Lens Audit Presentation	7/16/2011	ACLENS-00026347	ACLENS-00026351	JX2 5/12/17				

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RX1174	E-mail from Robert Drumm to Peter Clarkson re 1800Contacts Trademarks	2/11/2010	ACLENS-00026388	ACLENS-00026390	JX2 5/12/17	340:2			
RX1175	E-mail from Peter Clarkson to bdrumm@aclens.com and cc to pdietrich@aclens.com re Google Organic	4/5/2007	ACLENS-00031427	ACLENS-00031431	JX2 5/12/17				
RX1176	E-mail from Peter Clarkson to Phil Dietrich re Points with Dawn	7/3/2007	ACLENS-00031434	ACLENS-00031435	JX2 5/12/17				
RX1177	E-mail from Jay Makadia to Peter Clarkson, et. al. re lens.com	2/24/2012	ACLENS-00038135	ACLENS-00038136	JX2 5/12/17				
RX1178	E-mail from Nick Stanley to Bob Drumm re December Fiscal Actuals	1/5/2016	ACLENS-00038589	ACLENS-00038592	JX2 5/12/17				
RX1179	E-mail from Beth Cale to Bob Drumm Re Content Marketing	3/9/2016	ACLENS-00038859	ACLENS-00038861	JX2 5/12/17				
RX1180	E-mail from Nick Stanley to Bob Drumm re Period 4 PPC Pacing	4/28/2016	ACLENS-00038947	ACLENS-00038958	JX2 5/12/17				
RX1182	AC Lens Business Overview Presentation	3/19/2012	ACLENS-00041899	ACLENS-00041916	JX2 5/12/17				
RX1183	E-mail from Peter Clarkson to AdWords Support RE [#4758615] Please consolidate your Google AdWords accounts	11/5/2003	ACLENS-00041963	ACLENS-00041964	JX2 5/12/17				
RX1184	E-mail from Peter Clarkson to Phil Dietrich FW [#4758615] Please consolidate your Google AdWords accounts	11/5/2003	ACLENS-00041965	ACLENS-00041967	JX2 5/12/17				
RX1185	Business overview document - our primary business is the sale of contact lenses online		ACLENS-00043597	ACLENS-00043597	JX2 5/12/17				
RX1186	Draft letter from Peter Clarkson re Unauthorized use of 1-800 Contacts Inc.'s Trademarks	5/18/2009	ACLENS-00043602	ACLENS-00043602	JX2 5/12/17				
RX1187	E-mail from Brian Frank to jennifers@180solutions.com cc Philip R Dietrich; Peter Clarkson re Discount Contact Lenses Pop-ups on Zango Search Assistant	11/11/2004	ACLENS-00043607	ACLENS-00043607	JX2 5/12/17				
RX1188	E-mail from AC Lens - Marketing to AdWords Support re [#1880182]	3/19/2003	ACLENS-00043618	ACLENS-00043619	JX2 5/12/17	327:20			
RX1189	E-mail from Peter Clarkson to Phil Dietrich FW: [#2070187] Google AdWords Trademark Complaint	4/14/2003	ACLENS-00043620	ACLENS-00043620	JX2 5/12/17				
RX1190	E-mail from Peter Clarkson to Phil Dietrich FW: [#2107615] Google AdWords Trademark Complaint	4/19/2003	ACLENS-00043621	ACLENS-00043621	JX2 5/12/17				
RX1191	E-mail from Peter Clarkson to AdWords Support re [#2107615] Google AdWords Trademark Complaint	4/25/2003	ACLENS-00043622	ACLENS-00043622	JX2 5/12/17	328:23			
RX1192	Draft letter from Robert Drumm to Lensfast re trademark and trade name usage within Google AdWords and other PPC advertising networks		ACLENS-00043681	ACLENS-00043681	JX2 5/12/17	336:4			
RX1193	E-mail from Nick Stanley to Bob Drumm cc Nathan Tumblin; Michael Wittenauer re DCL Brand Term Test	2/17/2016	ACLENS-00044248	ACLENS-00044251	JX2 5/12/17				
RX1194	National Vision Google Increasing CTR A key to winning in search marketing March 2014 AM: Dani Gage	03/00/2014	ACLENS-00045580	ACLENS-00045590	JX2 5/12/17				
RX1195	E-mail from Robert Drumm to Phil Dietrich; Brian Frank; Peter Clarkson; Nick Stanley re Google Ads	2/14/2012	ACLENS-00046017	ACLENS-00046017	JX2 5/12/17				

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RX1196	E-mail from Peter Clarkson to Philip Dietrich; Brian Frank re New Keyword and Bid Suggestions for Your AdWords Account	5/10/2010	ACLENS-00046328	ACLENS-00046331	JX2 5/12/17				
RX1197	E-mail from Peter Clarkson to bdrumm@aclens.com re GFK July 2012 Soft Contact Lens Benchmark Reporting	3/8/2014	ACLENS-00046396	ACLENS-00046398	JX2 5/12/17				
RX1198	E-mail from Nick Stanley to Bob Drumm cc Nathan Tumblin re FW: New vs. Reorder	1/6/2016	ACLENS-00046630	ACLENS-00046630	JX2 5/12/17				
RX1199	E-mail from Philip Dietrich to Peter Clarkson cc Admin re Monthly Update	4/21/2016	ACLENS-00046803	ACLENS-00046803	JX2 5/12/17				
RX1200	E-mail from Nick Stanley to Brian Frank; Bob Drumm re PLA - Lens Competition	6/21/2016	ACLENS-00046828	ACLENS-00046828	JX2 5/12/17				
RX1201	Metrics of Competitor Sales, PLA - Lens Competition		ACLENS-00046829	ACLENS-00046829	JX2 5/12/17				
RX1202	E-mail from Brian Frank to Nick Stanley cc Bob Drumm re PLA - Lens Competition	6/23/2016	ACLENS-00046830	ACLENS-00046830	JX2 5/12/17				
RX1204	1-800 Lens-Now Business Plan	3/16/1995	1-800F_00106580	1-800F_00106622	JX2 5/12/17	2654:9			
RX1208	Coastal & Google 2014 Review & 2015 Opportunities Presentation by Walton, Matt; Mueller, Anne; Butler, Kristen; Rivard, Matthew	12/15/2014	COA-00000410	COA-00000446	JX2 5/12/17				GRANTED 4/4/2017
RX1209	Coastal.com The Better Way to Buy Eyewear (Presentation)		COA-00000447	COA-00000447	JX2 5/12/17		CX1710		GRANTED 4/4/2017
RX1210	Clearly Market Strategy: USA 2016 Presentation	00/00/2016	COA-00000448	COA-00000562	JX2 5/12/17				GRANTED 4/4/2017
RX1220	Clearly Market Strategy: USA 2016 (Presentation)	00/00/2016	COA-00000572	COA-00000572	JX2 5/12/17				GRANTED 4/4/2017
RX1221	Social Media Strategy Q1 2014 (unpaid)	00/00/2014	COA-00000691	COA-00000691	JX2 5/12/17				
RX1222	Advertising Performance November 2012 (Presentation)	11/00/2012	COA-00000692	COA-00000692	JX2 5/12/17				DENIED 4/4/2017
RX1225	E-mail from Brandon Danise to Kevin McCallum re Feb 2005 Qualitative Summary	8/3/2006	1-800F_00037764	1-800F_00037774	JX2 5/12/17		RX0781		
RX1228	1-800 Contacts Staff Final Update December 2015	12/00/2015	FTC-00000816	FTC-00000909	JX2 5/12/17	1568:10			GRANTED 4/4/2017; 4/12/2017
RX1250	Letter to Peter Clarkson from Amy Barrier re 2 original copies of the proposed letter agreement.	11/26/2002	FTC-PROD-0007647	FTC-PROD-0007678	JX2 5/12/17				
RX1255	DG, CCI Investigation Report Case No. 7/2012 A. Submission of CONSIM - Section 2 Bidding on Trademarks as Keywords	07/00/2012	GOOG-LENSE-00005766	GOOG-LENSE-00005873	JX2 5/12/17		RX1729		GRANTED 4/4/2017
RX1320	E-mail from Adrian Barajas to Baiju Hindocha and cc to mohitbagga@google.com; Natalia Bohm re Trademark Keywords Quality Score	11/6/2014	GOOG-LENSE-00000065	GOOG-LENSE-00000066	JX2 5/12/17		CX0576		
RX1321	E-mail from Kevin Hutchings to Natalia Bohm cc Brady Roundy; Adrian Barajas re Negative Keyword Matching	10/29/2014	GOOG-LENSE-00000067	GOOG-LENSE-00000067	JX2 5/12/17				

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RX1322	E-mail from Natalia Bohm to Adrian Barajas re Trademark Keywords Quality Score	11/10/2014	GOOG-LENSE-0000068	GOOG-LENSE-0000070	JX2 5/12/17				
RX1323	E-mail from Brady Roundy to Adrian Barajas; Natalia Bohm; gyre@google.com and cc to Kevin Hutchings re Trademark Keywords Quality Score	11/5/2014	GOOG-LENSE-0000071	GOOG-LENSE-0000071	JX2 5/12/17				
RX1324	E-mail from Brady Roundy to Adrian Barajas and cc to Natalia Bohm; Kevin Hutchings re Trademark Keywords Quality Score	11/12/2014	GOOG-LENSE-0000072	GOOG-LENSE-0000076	JX2 5/12/17				
RX1328	E-mail from Kevin Hutchings to Natalia Bohm cc Brady Roundy; Adrian Barajas re Negative Keyword Matching	10/30/2014	GOOG-LENSE-0000080	GOOG-LENSE-0000081	JX2 5/12/17		CX1155		
RX1328	E-mail from Kevin Hutchings to Natalia Bohm cc Brady Roundy; Adrian Barajas re Negative Keyword Matching	10/30/2014	GOOG-LENSE-0000080	GOOG-LENSE-0000081	JX2 5/12/17		CX1155		
RX1329	E-mail from Brady Roundy to Adrian Barajas; gyre@google.com; Kevin Hutchings re Trademark Keywords Quality Score	11/6/2014	GOOG-LENSE-0000082	GOOG-LENSE-0000082	JX2 5/12/17				
RX1330	E-mail from Baiju Hindocha to Natalie Bohm and cc to Mohit Bagga and BCC to po5@google.com re Trademark Keywords Quality Score	11/13/2014	GOOG-LENSE-0000083	GOOG-LENSE-0000090	JX2 5/12/17				GRANTED 4/4/2017
RX1334	E-mail from Adrian Barajas to Brady Roundy and Bcc to PO5@google.com; gyre@google.com re Trademark Keywords Quality Score	11/10/2014	GOOG-LENSE-0000094	GOOG-LENSE-0000095	JX2 5/12/17				
RX1335	Google Best Practices: Settling the Quality Score Using Quality Score to Guide Optimizations		GOOG-LENSE-0000096	GOOG-LENSE-00000115	JX2 5/12/17				
RX1336	E-mail from Adrian Barajas to Brady Roundy and cc to Natalia Bohm; gyre@google.com; Kevin Hutchings Bcc to PO5@google.com re Trademark Keywords Quality Score	11/6/2014	GOOG-LENSE-00000116	GOOG-LENSE-00000116	JX2 5/12/17				
RX1337	E-mail from Natalia Bohm to Brady Roundy and cc to Adrian Barajas; Kevin Hutchings re Trademark Keywords Quality Score	11/17/2014	GOOG-LENSE-00000117	GOOG-LENSE-00000123	JX2 5/12/17				
RX1341	E-mail from Baiju Hindocha to Natalia Bohm and cc Mohit Bagga and Bcc PO5@google.com re Negative Keyword Matching	10/30/2014	GOOG-LENSE-00000127	GOOG-LENSE-00000128	JX2 5/12/17				GRANTED 4/4/2017
RX1342	E-mail from Natalia Bohm to Kevin Hutchings and cc to Brady Roundy; Adrian Barajas and Bcc to po5@google.com re Negative Keyword Matching	10/30/2014	GOOG-LENSE-00000129	GOOG-LENSE-00000130	JX2 5/12/17		RX1123		
RX1343	E-mail from Baiju Hindocha to Natalia Bohm re Avg. CPC Increase	5/13/2014	GOOG-LENSE-00000262	GOOG-LENSE-00000264	JX2 5/12/17				GRANTED 4/4/2017
RX1344	Google search engine results page for 1800 contacts coupon code	5/13/2014	GOOG-LENSE-00000265	GOOG-LENSE-00000265	JX2 5/12/17				
RX1345	1-800 Contacts Trademark Terms CPC Rise - May 2014	5/13/2014	GOOG-LENSE-00000266	GOOG-LENSE-00000266	JX2 5/12/17				GRANTED 4/4/2017
RX1346	Google search engine results page for 1800 contacts coupon codes	5/13/2014	GOOG-LENSE-00000267	GOOG-LENSE-00000267	JX2 5/12/17				
RX1347	E-mail from Natalia Bohm to Baiju Hindocha; Mohit Bagga re Trademark Keywords Quality Score	11/12/2014	GOOG-LENSE-00000268	GOOG-LENSE-00000274	JX2 5/12/17				

APPENDIX 2

RESPONDENT'S POST-TRIAL EXHIBIT INDEX PURSUANT TO RULE 3.46(b)

Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX1351	E-mail from Natalia Bohm to Kevin Hutchings with Bcc po5@google.com re Negative Keyword Matching	10/30/2014	GOOG-LENSE-00000278	GOOG-LENSE-00000279	JX2 5/12/17				
RX1352	E-mail from Natalia Bohm to Baiju Hindocha; Mohit Bagga re Negative Keyword Matching	10/30/2014	GOOG-LENSE-00000280	GOOG-LENSE-00000280	JX2 5/12/17				
RX1353	E-mail from Natalia Bohm to Baiju Hindocha re Avg. CPC Increase	5/14/2014	GOOG-LENSE-00000282	GOOG-LENSE-00000284	JX2 5/12/17		CX1119		GRANTED 4/4/2017
RX1354	Google search engine results page for 1800 contacts coupon code	5/14/2014	GOOG-LENSE-00000285	GOOG-LENSE-00000285	JX2 5/12/17				
RX1355	Google search engine results page for 1800 contacts coupon code	5/14/2014	GOOG-LENSE-00000286	GOOG-LENSE-00000286	JX2 5/12/17				
RX1356	E-mail from Baiju Hindocha to Natalia Bohm and cc Mohit Bagga re Trademark Keywords Quality Score	11/13/2014	GOOG-LENSE-00000288	GOOG-LENSE-00000295	JX2 5/12/17				GRANTED 4/4/2017
RX1360	E-mail from Natalia Bohm to Kevin Hutchings cc Brady Roundy bcc po5@google.com re Avg. CPC Increase	5/14/2014	GOOG-LENSE-00000299	GOOG-LENSE-00000300	JX2 5/12/17		CX1120, RX1361		
RX1361	1-800Contacts - Auction Insights and Primary Factor Driving Rise in CPC 4/7/14-5/4/14	5/14/2014	GOOG-LENSE-00000301	GOOG-LENSE-00000301	JX2 5/12/17		CX1120, RX1360		
RX1362	E-mail from Kevin Hutchings to Natalia Bohm cc Brady Roundy; Adrian Barajas re Avg. CPC Increase	5/19/2014	GOOG-LENSE-00000302	GOOG-LENSE-00000304	JX2 5/12/17				
RX1363	E-mail from Natalia Bohm to Brady Roundy cc Adrian Barajas; Kevin Hutchings bcc po5@google.com re Trademark Keywords Quality Score	11/17/2014	GOOG-LENSE-00000305	GOOG-LENSE-00000311	JX2 5/12/17				
RX1367	E-mail from Natalia Bohm to Baiju Hindocha re Avg. CPC Increase	5/13/2014	GOOG-LENSE-00000315	GOOG-LENSE-00000315	JX2 5/12/17				
RX1368	E-mail from Kevin Hutchings to Natalia Bohm cc Brady Roundy; Adrian Barajas re Avg. CPC Increase	5/14/2014	GOOG-LENSE-00000316	GOOG-LENSE-00000317	JX2 5/12/17				
RX1369	E-mail from Baiju Hindocha to Natalia Bohm cc Mohit Bagga re Negative Keyword Matching	10/30/2014	GOOG-LENSE-00000318	GOOG-LENSE-00000319	JX2 5/12/17				GRANTED 4/4/2017
RX1370	E-mail from Baiju Hindocha to Natalia Bohm re Avg. CPC Increase	5/15/2014	GOOG-LENSE-00000320	GOOG-LENSE-00000322	JX2 5/12/17				GRANTED 4/4/2017
RX1371	Google search engine results page for 1800 contacts coupon code	5/15/2014	GOOG-LENSE-00000323	GOOG-LENSE-00000323	JX2 5/12/17				
RX1372	Google search engine results page for 1 800 contacts coupon codes	5/15/2014	GOOG-LENSE-00000324	GOOG-LENSE-00000324	JX2 5/12/17				
RX1373	E-mail from Adrian Barajas to Brady Roundy cc Natalia Bohm; Kevin Hutchings re Trademark Keywords Quality Score	11/10/2014	GOOG-LENSE-00000329	GOOG-LENSE-00000330	JX2 5/12/17				
RX1374	Settling the Quality Score Using Quality Score to Guide Optimizations	11/10/2014	GOOG-LENSE-00000331	GOOG-LENSE-00000350	JX2 5/12/17				
RX1375	E-mail from Brady Roundy to Natalia Bohm re Trademark Keywords Quality Score	11/21/2014	GOOG-LENSE-00000351	GOOG-LENSE-00000356	JX2 5/12/17		CX0098		
RX1380	E-mail from "paige" <paige.r@google.com> to ads-trademarks@google.com re [C#199657382] Trademark Protection	9/17/2007	GOOG-LENSE-00000648	GOOG-LENSE-00000649	JX2 5/12/17		CX0575		GRANTED 4/4/2017
RX1381	E-mail from sandra.s@google.com to ads-trademarks@google.com re [#43650922] Trademark question: 1800Contacts	1/20/2006	GOOG-LENSE-00000856	GOOG-LENSE-00000858	JX2 5/12/17				GRANTED 4/4/2017

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Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX1385	E-mail from Prashant Fuloria to various Google employees re Trademark policy transition - update #2 (2/25)	2/25/2004	GOOG-LENSE-00000870	GOOG-LENSE-00000871	JX2 5/12/17		CX1134		
RX1388	E-mail from Michael Mayzel to Cindy McCaffrey; Sheryl Sandberg; kraneteam@google.com (David Krane) re Updated Trademark PR FAQ/key msgs	4/9/2004	GOOG-LENSE-00000901	GOOG-LENSE-00000905	JX2 5/12/17				GRANTED 4/4/2017
RX1391	Trademark Policy Discussion Impact on Advertiser ROI and Google Revenue	3/17/2004	GOOG-LENSE-00000915	GOOG-LENSE-00000921	JX2 5/12/17				GRANTED 4/4/2017
RX1392	New Trademark Policy & Process Document March 29, 2004	3/29/2004	GOOG-LENSE-00000922	GOOG-LENSE-00000924	JX2 5/12/17				GRANTED 4/4/2017
RX1393	Trademark Policy Discussion Impact on Advertiser ROI and Google Revenue	3/13/2004	GOOG-LENSE-00000925	GOOG-LENSE-00000931	JX2 5/12/17				GRANTED 4/4/2017
RX1506	E-mail from Adrian Barajas to Kevin Hutchings re Request Trademark Question	7/7/2014	GOOG-LENSE-00001184	GOOG-LENSE-00001184	JX2 5/12/17				
RX1507	E-mail from Natalia Bohm to Mohit Bagga re Clinic Interaction in category: Adelphi Tracking Category - Brand & Performance - Troubleshooting (Fix/Explain) - Search - Ad Serving & Quality - Ad Serving - Performance/Traffic Fluctuation - CPC Fluctuation	10/8/2015	GOOG-LENSE-00001185	GOOG-LENSE-00001186	JX2 5/12/17				GRANTED 4/4/2017
RX1508	E-mail from Natalia Bohm to Mohit Bagga re Clinic interaction in category: Adelphi Tracking Category - Brand& Performance - Troubleshooting (Fix/Explain) - Search - Ad Serving & Quality - Ad Serving - Performance/Traffic Fluctuation - CPC Fluctuation	10/8/2015	GOOG-LENSE-00001187	GOOG-LENSE-00001188	JX2 5/12/17		CX1124		GRANTED 4/4/2017
RX1522	Negative Keywords Definition		GOOG-LENSE-00001215	GOOG-LENSE-00001215	JX2 5/12/17		CX1166		
RX1623	E-mail from Jeff Dean to google'smisc@google.com; council@google.com re AdWords without color	11/6/2002	GOOG-LENSE-00002040	GOOG-LENSE-00002040	JX2 5/12/17				
RX1630	Exhibit 11 What is Quality Score and How is it Calculated?		GOOG-LENSE-00003532	GOOG-LENSE-00003582	JX2 5/12/17				
RX1632	Trademark Experiment (redacted); Trademark Experiments 2 and 4	03/00/2004	GOOG-LENSE-00003745	GOOG-LENSE-00003752	JX2 5/12/17				GRANTED 4/4/2017
RX1633	Trademark Experiment (Redacted) (Exhibit 3)		GOOG-LENSE-00003745	GOOG-LENSE-00003752	JX2 5/12/17				
RX1635	Trademark Experiments 2 and 4 (redacted)	03/00/2004	GOOG-LENSE-00003810	GOOG-LENSE-00003814	JX2 5/12/17				GRANTED 4/4/2017
RX1637	Adwords Trademark Policy - Update Reseller and Information Site Policies		GOOG-LENSE-00003927	GOOG-LENSE-00003928	JX2 5/12/17				
RX1639	Trademark Study - Level of confusion comparison Experiment 2 and 3		GOOG-LENSE-00004047	GOOG-LENSE-00004048	JX2 5/12/17				GRANTED 4/4/2017
RX1641	Ads Quality Communication Document Search (Draft)	11/20/2006	GOOG-LENSE-00004081	GOOG-LENSE-00004089	JX2 5/12/17		CX1170, RX0125		GRANTED 4/4/2017
RX1643	Trademark Experiment (redacted); Trademark Experiments 2 and 4	03/00/2004	GOOG-LENSE-00004231	GOOG-LENSE-00004237	JX2 5/12/17				GRANTED 4/4/2017
RX1695	Focus group script re searching on web		GOOG-LENSE-00004964	GOOG-LENSE-00004964	JX2 5/12/17				GRANTED 4/4/2017



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Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX1697	Field Studies Preview (SQ Leads Nov,14, 2006)	11/14/2006	GOOG-LENSE-00005653	GOOG-LENSE-00005687	JX2 5/12/17				GRANTED 4/4/2017
RX1698	EPCOT Study Report: What do users see about Google ads?	3/15/2007	GOOG-LENSE-00005688	GOOG-LENSE-00005735	JX2 5/12/17				GRANTED 4/4/2017
RX1729	DG, CCI Investigation Report Case No. 7/2012 A. Submission of CONSIM - Section 2 Bidding on Trademarks as Keywords	07/00/2012	GOOG-LENSE-00005766	GOOG-LENSE-00005873	JX2 5/12/17		RX1255		GRANTED 4/4/2017
RX1768	Referral Services Performance March 2005	03/00/2005	ME000873	ME000960	JX2 5/12/17	2044:8	CX1301		GRANTED 4/12/2017
RX1769	Redacted notes of calls to customer service, 1/22/2009 to 7/25/2009	7/25/2009	ME000961	ME000961	JX2 5/12/17	1955:10			GRANTED 4/12/2017
RX1772	E-mail to ShipMyContacts re Order	11/5/2009	ME000964	ME000965	JX2 5/12/17	212:15			GRANTED 4/12/2017
RX1773	E-mail from ShipMyContacts re Prescription from my doctor	4/14/2007	ME000966	ME000966	JX2 5/12/17				GRANTED 4/12/2017
RX1774	ShipMyContacts.com web page with customer order	5/14/2010	ME000969	ME000971	JX2 5/12/17	2006:16			GRANTED 4/12/2017
RX1775	ShipMyContacts.com web page with cancelled customer order	5/14/2010	ME000972	ME000973	JX2 5/12/17	2010:11			GRANTED 4/12/2017
RX1776	ShipMyContacts.com web page with cancelled customer order	5/14/2010	ME000974	ME000975	JX2 5/12/17	2008:14			GRANTED 4/12/2017
RX1777	ShipMyContacts.com web page with cancelled customer order	5/14/2010	ME000976	ME000977	JX2 5/12/17	2003:8			GRANTED 4/12/2017
RX1785	Customer service notes ranging from 5/7/2007 to 11/14/2007	11/14/2007	ME001931	ME001931	JX2 5/12/17				GRANTED 4/12/2017
RX1789	ShipMyContacts cancelled customer order	5/14/2010	ME007082	ME007086	JX2 5/12/17				GRANTED 4/12/2017
RX1793	Order Granting Stipulated Motion to Stay Pending Tenth Circuit Appeal (1-800 Contacts v. Memorial Eye)	12/20/2010	ME10001047	ME10001047	JX2 5/12/17	2021:10		NH	
RX1794	Stipulation of Dismissal with Prejudice (1-800 Contacts v. Memorial Eye)	12/3/2013	ME10001100	ME10001100	JX2 5/12/17			NH	
RX1798	ShipMyContacts letter to customers regarding suspension of services	10/27/2014	ME10001320	ME10001320	JX2 5/12/17		CX1317		
RX1800	E-mail re Your Content Optimization is Ready	8/8/2008	ME-EM000009	ME-EM000010	JX2 5/12/17				GRANTED 4/12/2017
RX1801	E-mail to ShipMyContacts.com re Competitor Match		ME-EM001797	ME-EM001797	JX2 5/12/17				GRANTED 4/12/2017
RX1802	E-mail from AdWords Support to ShipMyContacts re: keyword help	9/20/2005	ME-EM003100	ME-EM003101	JX2 5/12/17				GRANTED 4/12/2017
RX1803	E-mail from to shipmycontacts.com	1/9/2009	ME-EM003106	ME-EM003108	JX2 5/12/17				GRANTED 4/12/2017
RX1804	E-mail from ShipMyContacts to re Your "Campaign #1" optimization is ready	1/8/2009	ME-EM003749	ME-EM003750	JX2 5/12/17				GRANTED 4/12/2017
RX1818	E-Mail from Chan, Roy to Faulkner, Jessica re: 1-800 Contacts Top 25 Affiliate Please Respond ASAP	7/6/2009	PL010712	PL010714	JX2 5/12/17	637:20			

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Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX1835	Negative Keyword List for 1-800 Contacts		WAG-0000016	WAG-0000016	JX2 5/12/17				GRANTED 4/4/2017
RX1836	Negative Keyword Report	04/00/2016	WAG-0000017	WAG-0000017	JX2 5/12/17				GRANTED 4/4/2017
RX1837	Negative Keyword Report		WAG-0000018	WAG-0000018	JX2 5/12/17				GRANTED 4/4/2017
RX1838	Negative Keyword List		WAG-0000019	WAG-0000019	JX2 5/12/17				GRANTED 4/4/2017
RX1839	Walgreens Negative Keyword List		WAG-0000020	WAG-0000020	JX2 5/12/17				GRANTED 4/4/2017
RX1840	Walgreens Optical Business Update 20 March 2014	3/20/2014	WAG-0000028	WAG-0000028	JX2 5/12/17		RX1841, RX0153		GRANTED 4/12/2017
RX1842	FY15 Revenue Analysis (August 24, 2014 - August 23, 2015)	8/23/2015	WAG-0000074	WAG-0000074	JX2 5/12/17		CX1489		GRANTED 4/4/2017
RX1843	FY16 Revenue Analysis (August 23, 2015 - August 21, 2016)	8/21/2016	WAG-0000075	WAG-0000075	JX2 5/12/17		CX1490		GRANTED 4/4/2017
RX1844	Walgreens Contacts Sales Breakout	00/00/2016	WAG-0000076	WAG-0000076	JX2 5/12/17		CX1510		GRANTED 4/4/2017
RX1846	Walgreens Optical Weekly Recap FY15 FW26	11/30/2016	WAG-0000202	WAG-0000202	JX2 5/12/17				GRANTED 4/4/2017
RX1849	WebEyeCare Financials (2011-2015)	00/00/2015	WEBEYECARE0000078	WEBEYECARE0000078	JX2 5/12/17				GRANTED 4/4/2017
RX1877	Yahoo Money Makers an Analysis of Profitable Users on Y	11/00/2006	YAH-0003812	YAH-0003869	JX2 5/12/17				
RX1887	North Ad Click Survey Refresh Raj R. June 2009	06/00/2009	YAH-0006144	YAH-0006158	JX2 5/12/17	2408:7			
RX1893	E-mail from Carmen Arenal to Don Aydon; Chip Jessopp; Michael Egan; Cheryl Dartt and cc to Laura Covington; Lisa McFall re AA - Standstill Agreement	6/7/2007	YAH-0006595	YAH-0006595	JX2 5/12/17				
RX1908	E-mail from Bruce Wark to Carmen Arenal; Curry, Alice; Friedman, Rob; Broadfeld, Donald; Laura Covington; Lisa McFall; Michael Egan; Cheryl Dartt; Don Aydon; Chip Jessopp re Meeting with AA regarding TM Policy	5/29/2007	YAH-0007103	YAH-0007103	JX2 5/12/17				
RX1921	Presentation: Category Overview by Don Aydon & Gabriel Graham - Agency Training June 15 - 16th 2005	6/16/2005	YAH-0007505	YAH-0007542	JX2 5/12/17		CX1806		
RX1923	E-mail from David Pann to Darshan Kantak, Marc Canabou, and Tina Krueger re Relevancy Testing from the Burbank Group	5/8/2006	YAH-0007548	YAH-0007552	JX2 5/12/17				
RX1940	Declaration of Richard Pace	12/22/2016	Yahoo-00000001	Yahoo-00000002	JX2 5/12/17				
RX1942	Email from Nick Stanley to Scott Kane re Missing Match Type Analysis	2/18/2015	ACLENS-00043429	ACLENS-00043430	JX2 5/12/17				
RX1943	Google AdWords Help article re: Organic search result	3/14/2017	N/A	N/A	JX2 5/12/17				
RX1946	Google AdWords Help Center welcome page	3/14/2017	N/A	N/A	JX2 5/12/17				

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Exhibit No.	Description	Date	BegBates	EndBates	Admitted by	Discussed	Also Referenced As	Non-Hearsay	In Camera
RX1947	Search Engine Marketing – Bing Ads web page	3/14/2017			JX2 5/12/17				
RX1950	Google Advertising Policies Help article re: Trademarks	00/00/2017	N/A	N/A	JX2 5/12/17				
RX1951	Google AdWords Policy Answer: Help for Trademark Owners	00/00/2017	N/A	N/A	JX2 5/12/17				
RX1952	Google Inside AdWords Blog: AdWords Trademark Policy (Part 1 of 2)	11/13/2006	N/A	N/A	JX2 5/12/17				
RX1953	E-mail from Bismarck Lepe on behalf of sps-prod@google.com to ad-sales@google.com re Update - Trademarks (US/NA) - Trademark Policy Launching 6/15/2004	6/9/2004	GOOG-LENSE-00002277	GOOG-LENSE-00002277	JX2 5/12/17				
RX1960	Bing Blogs, "The Choice is Clear, Don't Get Scroogled This Year"	12/6/2012	N/A	N/A	JX2 5/12/17				
RX1962	Search Quality Insights - Whole Page Relevance	3/5/2012	N/A	N/A	JX2 5/12/17				
RX1963	Bing Blog, "Bing Your Brain: Choice Overload"	1/25/2013	N/A	N/A	JX2 5/12/17				
RX1993	Google search result for "contact lenses"	10/19/2016	N/A	N/A	JX2 5/12/17	2270:16		*	
CX0003	Proposed Letter of Agreement between AC Lens, Inc. and 1-800 Contacts, Inc.	11/26/2002	FTC-0000004	FTC-0000007	JX2 5/12/17	322:3		NH	
CX0201	E-mail from Brian Bethers to Joe Zeidner; Dave Walker; Max Neves; John Murray; Junhyon Park; John Graham; Mark Travis; Joan Blackwood cc Rob Hunter FW: Final Information Memorandum	2/14/2012	1-800F_00032425	1-800F_00032425-079	JX2 5/12/17	2698:11	CX0526		
CX1123	E-mail from Natalia Bohm to Kevin Hutchings cc Brady Roundy; Adrian Barajas bcc po5@google.com re Negative Keyword Matching	10/30/2014	GOOG-LENSE-00000129	GOOG-LENSE-00000130	JX2 5/12/17		RX1342		
CX1124	E-mail from Natalia Bohm to Mohit Bagga re Clinic interaction in category: Adelphi Tracking Category > Brand & Performance > Troubleshooting (Fix/Explain) > Search > Ad Serving & Quality > Ad Serving > Performance/Traffic Fluctuation > CPC Fluctuation	10/8/2015	GOOG-LENSE-00001187	GOOG-LENSE-00001188	JX2 5/12/17		RX1508		
CX1309	ShipMyContacts.com Profit & Loss January through December 2011	12/00/2011	ME10000718	ME10000721	JX2 5/12/17	2035:15			GRANTED 4/12/2017
CX1769	Email from Shelley Carmichael to Bryce Craven re: Account Negatives?	3/12/2010	1-800F_00078484	1-800F_00078486	JX2 5/12/17		CX1769		

# **APPENDIX 3**

**APPENDIX 3**

**RESPONDENT'S WITNESS INDEX PURSUANT TO RULE 3.46(c)**

<b>Name</b>	<b>Title</b>	<b>Firm/University</b>	<b>Transcript Cite</b>	<b>Date</b>
Goodstein, Ronald	Associate Professor of Marketing	McDonough School of Business, Georgetown University	Tr. 2365:5-2386:21 Tr. 2396:1-2474:4 Tr. 2484:1-2488:24	4/28/2017
	Respondent's Expert		<u>in camera</u> Tr. 2387:1-2395:22 Tr. 2475:1-2483:5	4/28/2017 in camera
Pratt, Bryan	Partner	Holland & Hart LLP	Tr. 2490:17-2643:5	4/28/2017
Coon, Jonathan	Founder and Former CEO	1-800 Contacts, Inc.	Tr. 2649:4-2887:18	5/1/2017
Schmidt, Clint	Former Director of E-Commerce	1-800 Contacts, Inc.	Tr. 2888:18-2911:24	5/1/2017
			Tr. 2917:15-2957:13	5/2/2017
Van Liere, Kent	Managing Director	NERA Economic Consulting	Tr. 2958:1-3163:17	5/2/2017
	Respondent's Expert		Tr. 3170:12-3238:20	5/3/2017
Hogan, Howard	Partner and Co-Chair of the Fashion, Retail and Consumer Products Group	Gibson, Dunn & Crutcher LLP	Tr. 3239:6-3279:18 Tr. 3297:1-3341;16 Tr. 3345:1-3421:7	5/3/2017
			<u>in camera</u> Tr. 3280:1-3296:19 Tr. 3342:1-3344:11	5/3/2017 in camera
	Respondent's Expert		Tr. 3430:1-3506:3	5/4/2017

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Bethers, Brian	CEO	1-800 Contacts, Inc.	Tr. 3506:18-3559:12 Tr. 3581:1-3658:7  <u>in camera</u> Tr. 3560:1-3580:8  Tr. 3663:12-3784:3 Tr. 3827:1-3832:12 Tr. 3853:1-3855:6  <u>in camera</u> Tr. 3785:1-3826:21 Tr. 3833:1-3852:19	5/4/2017  5/4/2017 in camera  5/9/2017  5/9/2017 in camera
Ghose, Anindya	Professor of Information, Operation, and management Sciences; Professor of Marketing; Stern Faculty Scholar; NEC Faculty Fellow  Respondent's Expert	New York University	Tr. 3861:17-3876:24 Tr. 3903:1-3922:10 Tr. 3927:1-4055:6 Tr. 4069:1-4082:9  <u>in camera</u> Tr. 3877:1-3902:6 Tr. 3923:1-3926:17 Tr. 4056:1-4068:9	5/10/2017  5/10/2017 in camera

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**RESPONDENT'S WITNESS INDEX PURSUANT TO RULE 3.46(c)**

Murphy, Kevin M.	Faculty Member of the Booth School of Business and the Department of Economics	University of Chicago	Tr. 4082:23-4102:21 Tr. 4114:1-4128:23 Tr. 4141:1-6	5/10/2017
	Senior Consultant	Charles River Associates	<u>in camera</u> Tr. 4103:1-4113:25 Tr. 4129:1-4140:3	5/10/2017 in camera
	Respondent's Expert		Tr. 4148:12-4186:7 Tr. 4203:1-4209:14 Tr. 4246:1-15 Tr. 4279:1-4367:2	5/11/2017
			<u>In camera</u> Tr. 4187:1-4202:11 Tr. 4210:1-4245:25 Tr. 4247:1-4278:13	

**CERTIFICATE OF SERVICE**

I hereby certify that on June 15, 2017, I filed the foregoing document 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

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 served via electronic mail a copy of the foregoing document on:

Daniel Matheson, *dmatheson@ftc.gov*  
*BC-1040-1800-SearchAdTeam-DL@ftc.gov*

DATED: June 15, 2017

By: /s/ Eunice Ikemoto  
Eunice Ikemoto

**CERTIFICATE FOR ELECTRONIC FILING**

I hereby certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

DATED: June 15, 2017

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



Notice of Electronic Service

**I hereby certify that on June 22, 2017, I filed an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s [Proposed] Findings of Fact and Conclusions of Law, with:**

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
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Washington, DC, 20580

Donald Clark  
600 Pennsylvania Ave., NW  
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**I hereby certify that on June 22, 2017, I served via E-Service an electronic copy of the foregoing Respondent 1-800 Contacts, Inc.'s [Proposed] Findings of Fact and Conclusions of Law, upon:**

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