

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



ORIGINAL

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

DOCKET NO. 9372

COMPLAINT COUNSEL'S CORRECTED PRE-TRIAL BRIEF AND EXHIBITS

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Dated: April 3, 2017

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I. INTRODUCTION

This case is about the dominant retailer in the online sale of contact lenses – 1-800 Contacts – that prefers to collude with its competitors rather than compete against them. At the heart of this case are at least 14 written agreements (“Bidding Agreements”) that 1-800 Contacts entered into with its most significant online rivals, who collectively account for some 80 percent of all contact lenses sold online.

The evidence will show that, through these Bidding Agreements, 1-800 Contacts effectively shut down its significant rivals’ search advertising against 1-800 Contacts’ trademarks, blocking relevant, valuable advertising that would have been displayed to consumers absent these agreements. Further, consumers suffer direct pecuniary harm, because the eliminated advertising would inform consumers that identical products are available at lower prices from 1-800 Contacts’ online competitors. Because the Bidding Agreements block this valuable advertising, consumers receive degraded search results, and at least some consumers have paid more for their contact lenses. 1-800 Contacts’ contemporaneous business documents demonstrate unequivocally that it lost sales, to the benefit of consumers, when its lower-priced rivals placed advertisements blocked by the Bidding Agreements.

The evidence will also show that 1-800 Contacts’ Bidding Agreements have artificially depressed prices in millions of auctions held by the major U.S. search engines for the display of advertising, thus depriving search engines of significant revenues they would otherwise have earned. The Bidding Agreements have also harmed the search engines by degrading the overall quality of the product they offer to consumers.

The evidence will show that reducing competition in search advertising auctions was a principal motive for, and the clear effect of, these Bidding Agreements. As 1-800 Contacts

concluded, from the point of view of the bidder in an auction: “low competition equals low cost.”¹

Once Complaint Counsel establishes a *prima facie* case of harm, the burden shifts to 1-800 Contacts to prove a cognizable and plausible procompetitive efficiency. 1-800 Contacts will not be able to do so. 1-800 Contacts’ central defense is that it entered into these Bidding Agreements to “protect” its trademark rights against online retailers such as Walgreens and Vision Direct. The evidence will show that that this defense both fundamentally misapplies trademark law, and was a mere cover for 1-800 Contacts’ plan to insulate itself from price competition. Indeed, the only court to opine on one of 1-800 Contacts’ agreements put it best:

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

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

* * * *

This pre-trial brief is divided into three parts. First, in our background section, we describe the evidence that the Court will hear regarding the online sale of contact lenses; how search advertising works; the evolution of 1-800 Contacts’ Bidding Agreements; and how those agreements have harmed consumers and search engines alike. Second, we set forth our legal analysis of the case, including Complaint Counsel’s *prima facie* demonstration of harm; and a

¹ CX0051 (Nov. 2010 “Search Overview” presentation) at -003.

rebuttal of 1-800 Contacts’ anticipated defenses. Third, we discuss the remedy that we ask the Court to enter.

II. FACTS

A. Industry Background

1. Overview of 1-800 Contacts

1-800 Contacts is the largest internet retailer of contact lenses in the United States. As its online sales grew in the early 2000s, 1-800 Contacts began to spend significantly for search engine advertisements, where it could reach customers who were actively shopping for contact lenses. Between 2004 and 2014, 1-800 Contacts spent over \$86 million on internet advertising, a significant portion of which was for paid search advertising.² By 2015, 1-800 Contacts had annual sales of { _____ }, and had a 53.6 percent share of online contacts sales.³

2. Overview of the Contact Lens Industry

Approximately 40 million Americans wear contact lenses.⁴ After obtaining a prescription, the consumer is shopping for a “commoditized” product: the prescription specifies not only the strength of the lens, but also the brand and product line (which affects the fit and suitability of the lens). As a result, there is no opportunity to sell alternative or “generic” lenses after a prescription is written, and convenience and price to the consumer are the major drivers of retail sales.⁵

² RX0739 (Murphy Report) Ex. 8.

³ CX8006 (Evans Report) ¶ 54 Table 1.

⁴ *Id.* ¶ 46.

⁵ CX8006 (Evans Report) ¶ 53, 248-49; CX1449 { _____ }.

Contacts are distributed through four major channels. First, consumers can buy from their Eye Care Professionals (“ECPs”).⁶ ECPs are generally the most expensive sellers, and the bulk of these sales are made during patient visits.⁷

Second, some general merchandise retailers, such as Walmart, or membership clubs, such as Costco, sell contact lenses. These retailers tend to price below ECPs, although – with the exception of membership clubs – they are usually more expensive than online options.⁸

Third, some brick-and-mortar retailers, such as Walmart, offer their customers the option of purchasing online, although they focus primarily on customers in their physical stores, and sell at the same price over the internet as in their brick-and-mortar locations.⁹

Fourth, “pure-play” online retailers sell only online. These stores appeal to customers who value convenience and low prices,¹⁰ although some online retailers – like Walgreens – may have significant brand recognition.¹¹ Together with online storefronts operated by brick-and-mortar retailers, online sales account for about 20 percent of all contact lens sales.¹² Online purchasing allows consumers to purchase refills without the need for an additional visit to an

⁶ An ECP is an ophthalmologist or optometrist who prescribes contact lenses. ECPs typically both prescribe the product and offer it for sale to their patients.

⁷ CX8006 (Evans Report) ¶ 251-52. ECPs may be divided into two sub-groups: (1) Independent ECPs (“IECPs”), which are independent retail locations associated with an ECP’s office, and which collectively account for thousands of locations across the country, and (2) national chains, which provide ECPs on location, but are run on a nationwide basis, such as Luxottica. *Id.* ¶ 51(a).

⁸ CX8006 (Evans Report) ¶ 248. Membership clubs, such as Costco, tend to price at a level comparable to online options, but they require an annual membership to shop, and engage in little or no price advertising. *See, e.g.*, CX8004 (Salas (Costco) Dec.) ¶¶ 2-3, 7-8.

⁹ CX9033 (Mohan (Walmart) Dep. Tr.) 18:19-19:20.

¹⁰ *See, e.g.*, CX9003 (Clarkson (AC Lens) IH Tr.) 17:15-18:4 (characterizing the category of online contacts retailers as having a combination of the best service, convenience, and relatively low pricing compared to ECPs and most other retail channels).

¹¹ Walgreens sells contact lenses only online, not in their physical stores. CX9038 (Hamilton (Walgreens) Dep. Tr.) 11:1-12.

¹² CX8006 (Evans Report) ¶ 53.

ECP or brick-and-mortar retailer, and pure-play online merchants usually offer the lowest prices for contact lenses. 1-800 Contacts, however, is the exception. While 1-800 Contacts prices below traditional ECPs, its price is on average higher than that of other online merchants, often by a substantial amount.¹³ Consumers are generally unaware of this, and believe that 1-800 Contacts' prices are comparable to that of other pure-play online retailers.¹⁴

1-800 Contacts has approximately 53 percent of the market for online contact lens sales, nearly four times the size of its next-largest rivals.¹⁵ The other major online retailers are listed and described in Exhibit A.

3. Overview of Search Advertising

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

Internet users need search engines to usefully access the vast amount of information on the internet. Search engines employ sophisticated algorithms to evaluate the content of the end user's request for information and to determine which parts of the web index may contain relevant responses. The search engine identifies potential responses and then ranks them based on the predicted likelihood of their relevance, displaying a search engine results page (“SERP”) to the end user in response to his or her query. Critically, all of this complex activity occurs rapidly and automatically, without any direct human intervention.

Google is the largest search engine in the United States by a significant amount, in terms of both query share (64 percent as of February 2016)¹⁶ and revenues (\$79 billion in FY 2016).¹⁷

¹³ CX8006 (Evans Report) ¶ 188; CX0439 { }.

¹⁴ CX0439 { }.

¹⁵ CX8006 (Evans Report) ¶ 54, Table 1.

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

Microsoft's **Bing** is the second largest search engine in the United States, with approximately 21 percent of the query share in February 2016 and \$3.7 billion in revenues in FY 2016.¹⁸ Bing also powers **Yahoo!**'s search engine,¹⁹ which is significantly smaller than either Google or Bing, with approximately 12 percent of the query share in February 2016 and \$2.7 billion in revenues for 2016.²⁰

Search engines serve information (search results) to users for free, obtaining revenue from advertisers that pay to get search engines to display their advertisements to users.²¹ Thus, there are two major components of any SERP: the "natural" or "organic" search results and the "sponsored listings" or "ads," which generally appear at the top and bottom of the SERP.²² (Attached as Exhibit B is a screen shot of a typical SERP, in response to a search for "contact lenses," taken from the Google search engine on March 24, 2017.)

In featuring advertisements on the SERP, search engines must balance the interests of at least two groups: **users** and **advertisers**. On the one hand, search engines need to attract advertisers, who bring in revenues. On the other hand, search engines need to attract users,

Rankings. There is reason to believe that ComScore underestimates Google's actual market share, given the disparity between search engine revenues of Google and its closest rival, Bing.

¹⁷ Alphabet Inc. Annual Report (Form 10-K) for the Fiscal Year Ended December 31, 2016, at 24.

¹⁸ *comScore Releases February 2016 U.S. Desktop Search Engine Rankings* (Mar. 16, 2016), <https://www.comscore.com/Insights/Rankings/comScore-Releases-February-2016-US-Desktop-Search-Engine-Rankings>; Microsoft Corp. Annual Report (Form 10-K) for the Fiscal Year Ended June 30, 2016, at 35.

¹⁹ *Microsoft and Yahoo seal web deal*, BBC News (July 29, 2009), <http://news.bbc.co.uk/2/hi/business/8174763.stm>. Although Bing provides Yahoo! with results, Yahoo! controls its own SERP layout, which is different from the Bing layout.

²⁰ Yahoo! Inc. Annual Report (Form 10-K) for the Fiscal Year Ended Dec. 31, 2016, at 55.

²¹ For many search queries, ads do not appear on the page. However, for queries that are interpreted by the search engine as "commercial" in nature, *e.g.*, shopping queries, advertisements almost always appear.

²² Up until February 2016, Google also displayed advertisements on the right-hand side of the SERP. *See* CX9019 (Juda (Google) Dep. Tr.) 183:3-20.

otherwise they will not attract advertisers. Search engines generally operate on a “cost-per-click” model, which means that they only get paid by the advertiser if a user *clicks* on an advertisement. This means that they must pair advertisers with users that actually find them relevant: users will only click on an ad if they find it relevant or helpful to their search queries; and advertisers will only advertise on the search engine if they can get their products in front of potential customers who may be interested in the products they offer. Thus, search engines are constantly searching for the right balance to ensure that users are getting what they want (relevant content), and that advertisers are getting what they want (potential customers).

Thus, when a consumer searches for “contact lenses,” for example (*see Ex. B*), Google almost instantaneously constructs a SERP that its algorithms believe will be responsive to that inquiry. This SERP includes “organic” search results providing links to various retailers. The SERP also includes several advertisements from firms that have asked Google to display its advertisements to users who express interest in contact lenses.

Google evaluates every user’s response to each SERP that it constructs. Thus, for example, using the SERP in *Ex. B*, if users tend to click on the *third* organic link (for the retailer Lens Direct) each time one of them types in the term “contact lenses,” Google quickly learns that users who type in the term “contact lenses” tend to be interested in retailers of contact lenses (and in particular, Lens Direct). Eventually, that link will migrate toward the top of the SERP, as other links drop down, or off the SERP altogether. Google evaluates ads in the same fashion. When users are not clicking on a particular ad, Google learns that that ad is likely not relevant to users, and that ad will be demoted or eliminated from the SERP altogether.

Google interprets and applies continuous real-time learning from enormous volumes of this “click” data. Google analyzes what users click on in response to queries and how long the

user stays on the landing page, which is the website to which they are taken after clicking on the link.²³ In effect, users are continuously “voting” (with their clicks) on what is useful to them and what is not, and Google is continuously reacting to those votes, revising its SERP accordingly. Ultimately, Google is able to predict, typically with a high degree of confidence, what SERP will be relevant to any given user based on how *other users* have behaved in response to similar SERPs constructed in response to similar search queries.

b. Search Advertising Auction Model

Bidding on Keywords. Advertisers indicate their interest in displaying ads against various search queries by “bidding” on keywords in an auction. For example, a bid on the keyword “contact lenses” instructs Google that the advertiser wishes to display an advertisement to any user who types a query into Google relating to contact lenses, such as “where to buy contact lenses,” “are contacts right for me,” or “Acuvue Oasys” (a brand of contact lenses).

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

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

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negative keyword phrase to ensure that its ad does not surface in response to a search query for “contact lens eye infection.”²⁵

c. Unique Value of Search Advertising to Online Advertisers

Search advertising is uniquely valuable to advertisers because it puts an advertisement in front of a consumer at the precise moment the consumer is signaling her interest or intent by telling the search engine what she is seeking: it is literally the *right* ad, for the *right* user, at the *right* time. It is for this reason that search advertising is so valuable to advertisers, particularly those advertisers that sell products online.²⁶

B. Evolution of 1-800 Contacts’ Restraints Against Competitors

1. In the Face of Unprecedented Competition, 1-800 Contacts Pursues Online Rivals

As the internet exploded in the early 2000s, numerous online contact lens retailers emerged.²⁷ 1-800 Contacts’ online competitors adopted business models similar to 1-800

²⁵ Negative keywords can also be applied in exact, phrase, or broad match types. As with bidding, a negative **exact** match keyword will preclude an advertiser’s ad from being displayed only in response to a search query that *exactly* matches the advertiser’s negative keyword or keyword phrase. Thus, if a contact lens retailer enters “eye infection” as an “exact match” negative keyword, its ad will not appear in response to a user search query that exactly matches “eye infection,” but *might* appear in response to a search query for “contact lens eye infection,” because that search query includes additional terms. To prevent its ads from appearing in relation to *any* search query with the phrase “eye infection” in it, the advertiser would have to enter “eye infection” as a **phrase** match negative keyword, which ensures that no search query with the phrase “eye infection” – including the search query “contact lens eye infection” – will return one of its ads. Still, if a user enters the search query “contact lenses infection of the eye,” the advertiser’s ad *may* be displayed because the user did not enter the phrase in order selected by the advertiser. To prevent this, Google also offers a **broad** match negative keyword option, which prevent ads from being displayed if the words in the negative keyword phrase are used in any order.

²⁶ See, e.g., CX9039 (Clarkson (AC Lens) Dep. Tr.) 112:6-21 (AC Lens markets almost exclusively through direct channels like search and affiliates); CX8002

}; CX8003 {

²⁷ See generally CX8006 (Evans Report) at 33-38; CX9004 (Coon (former 1-800 Contacts) IH Tr.) 82:12-84:8 (identifying Coastal Contacts and Vision Direct as internet competitors from the early 2000s); CX9003 (Clarkson (AC Lens) IH Tr.) 6:15-8:23 (describing founding of AC Lens in 1996).

Contacts, but with lower prices.²⁸ Search engines – and search advertising more specifically – made the lower-priced online retailers more visible to potential customers, and facilitated price comparison.²⁹ This was a problem for 1-800 Contacts because 1-800 Contacts’ strategy revolved around investing heavily in television advertising in order to drive customers *into* the online channel.³⁰ Now, the premium-priced 1-800 Contacts faced a real threat: lower-priced competitors that could compete for its own customer base – those customers that 1-800 Contacts itself had lured from the brick-and-mortar world into online shopping.³¹ Thus, in July 2003, 1-800 Contacts’ search advertising manager warned the company’s chief marketing officer of a “major

²⁸ See, e.g., CX9001 (Bethers (1-800 Contacts) IH Tr.) 79:23-80:8 (“Q: So as a retailer selling the same products as your other retail competitors, you were also competing on price in addition to the service that you described? A: We always try to keep track of where your prices are, but we were never trying to compete with our online competitors on price. We basically came back and said *our online competitors are going to have lower prices than we do.*”) (emphasis added); CX9003 (Clarkson (AC Lens) IH Tr.) 47:24-48:4 (“[W]e feel like we have a very strong price differentiation factor relative to 1-800 Contacts because within the online space, there is different pricing stratification there too, and 1-800 Contacts has historically had the highest price among the online competitors.”); CX9000 {

} See, e.g., CX9000

; CX9003 (Clarkson (AC Lens) IH Tr.) 17:15-18:4 (characterizing the category of online contacts retailers as having a combination of the best service, convenience, and relatively low pricing compared to ECPs and most other retail channels).

²⁹ See, e.g., CX9001 (Bethers (1-800 Contacts) IH Tr.) 62:10-63:20; CX9004 (Coon (former 1-800) IH Tr.) 194:12-13.

³⁰ See, e.g., CX9004 (Coon (former 1-800 Contacts)) IH Tr. 40:11-19 (“if we spend money on TV it drives internet revenue”). This strategy has largely worked for 1-800 Contacts. Its business documents tout “direct” traffic sources, including paid trademark search, as highly efficient at converting interest generated by broadscale advertising into sales. Direct traffic accounts for more than { } percent of 1-800 Contacts’ sales. See, e.g., CX1743 { }.

Approximately { } percent comes from trademark paid search alone. *Id.*

³¹ CX0055 at -015 (Summary of Apr. 26, 2004, 1-800 strategy offsite meeting) (1-800 faced a “[s]ignificant pricing disadvantage on the Internet, [because it was the] highest of all entities on the Web”); CX9001 (Bethers (1-800) IH Tr.) 98:11-12 (“[A]mong the ones that I was aware of, yes, we were the highest in 2004”); CX9004 (Coon (former 1-800) IH Tr.) 212:17-24 (“Q: Highest of all entities on the web. Was this already true in 2004? A: I mean, probably. Most of the on-line competitors, they didn’t invest much in advertising . . . So really all they had was price.”).

identifying competitors.) 1-800 Contacts thus cultivated a “rep of going after people,” a “worthwhile investment” in the words of 1-800 Contacts’ CEO, because he disliked “having competitors hijack and steal our customers before they get to checkout.”³⁹

Most of 1-800 Contacts’ competitors were relatively small online retailers that lacked the resources to battle against 1-800 Contacts. Thus, with one notable exception discussed below,⁴⁰ 1-800 Contacts’ competitors quickly yielded to 1-800 Contacts’ demands.⁴¹ Between 2007 and 2013, this process yielded 11 additional Bidding Agreements with online competitors, all reciprocally barring advertising against the settling parties’ brand names.

complaining about AC Lens ads appearing on searches for variations on 1-800 Contacts. AC Lens responded that it had implemented negative keywords to prevent such ads from appearing. *See* CX1759 (Jul. 6, 2005, email from Peter Clarkson, AC Lens, attaching letter to Roy Montclair, 1-800 Contacts). In 2010, after receiving additional demand letters from 1-800 Contacts, AC Lens entered into a second agreement that explicitly addressed keyword bidding. *See* CX0317 (2010 AC Lens agreement).

³⁶

} *See* CX8003 {

.} *Id.*

³⁷ 1-800 Contacts actually sued Lens.com for “breach of contract,” claiming that it had an agreement with Lens.com wherein the parties agreed not to bid on one another’s trademarks and to implement negative keywords. In his deposition during the Lens.com litigation, Lens.com’s CEO testified that there was such an agreement. CX1673 (Samourkachian (Lens.com) Dep. Tr.) 178:17-181:3, *1-800 Contacts v. Lens.com*).

³⁸ Lenscrafters initially sent a cease-and-desist letter to 1-800 Contacts in 2005, claiming that 1-800 Contacts had “purchased sponsored advertisements at Google . . . for the Lenscrafters trademark, to trigger a link to [1-800 Contacts’] directly competitive . . . website.” CX0087 (Letter from Karen Gaunt, Lenscrafters, to 1-800 Contacts, Apr. 25, 2005). Subsequently, the firms engaged in back-and-forth correspondence, through which it appears that they agreed to stop bidding on one another’s trademarks and to implement certain negative keywords. *See, e.g.*, CX0715 (Email from Brandon Dansie, 1-800 Contacts, to Kevin McCallum, 1-800 Contacts, dated Aug. 25, 2005); CX0117 (Email from Connie Ross, Lenscrafters, to Brandon Dansie, 1-800 Contacts, Aug. 29, 2005).

³⁹ *See* CX0068 (Apr. 12, 2007, email from Jonathan Coon, 1-800 Contacts, to Mario Cibelli, Marathon Partners).

⁴⁰ *See infra* Section II.B.2.

⁴¹ Negotiations were limited to modifying the lists of trademarked terms identified in the agreements and superficial revisions to phrasing, while the core restrictions sought by 1-800 Contacts remained intact.

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

In 2007, 1-800 Contacts sued Lens.com in the U.S. District Court for the District of Utah, for breach of an agreement not to bid on one another's trademark keywords and for trademark infringement.⁴² 1-800 Contacts alleged that Lens.com was infringing its trademarks by bidding on 1-800 Contacts-related keywords, and thus causing Lens.com ads to appear on a SERP in response to search queries for "1-800 Contacts."

In December 2010, the court granted summary judgment in favor of Lens.com.⁴³ The court specifically found that 1-800 Contacts had not shown likelihood of confusion caused by Lens.com's use of 1-800 Contacts' trademarks as keywords.⁴⁴ The district court reasoned that the content of the ad is key to the analysis of likelihood of confusion.⁴⁵

The court also found insufficient evidence of an agreement between 1-800 Contacts and Lens.com on trademarked keywords. The court noted, however, that such an agreement might not "survive antitrust challenge." *Id.* at 1188. Specifically, the District of Utah observed:

Were this actually an agreement entered into by the parties, the court questions whether it would survive an antitrust challenge. [1-800 Contacts] does not seek merely to preclude usage of its trademark. Instead, *it wants to obliterate any other competitor advertisement from appearing on a search-results page* when a consumer types in '1800Contacts' as a search term or some variation of it. This is disturbing given that broad matching of the generic term 'contacts' could trigger an advertisement if a consumer enters the search term '1800Contacts.' *A trademark right does not grant its owner the right to stamp out every competitor advertisement.*⁴⁶

⁴² See Complaint, *1-800 Contacts v. Lens.com, Inc.*, 755 F. Supp. 2d 1151 (D. Utah 2010).

⁴³ *Lens.com, Inc.*, 755 F. Supp. 2d 1151 (D. Utah 2010).

⁴⁴ *Id.* at 1182.

⁴⁵ *Id.* at 1174 (explaining that "the mere purchase of a trademark as a keyword cannot *alone* result in consumer confusion" and that "the relevant inquiry here regarding consumer confusion is . . . the language of the advertisement generated by the keyword").

⁴⁶ *Lens.com*, 755 F. Supp. 2d 1151, 1188 (D. Utah 2010) (emphasis added).

The Court of Appeals for the Tenth Circuit upheld the central finding of the district court's opinion.⁴⁷ While not rejecting the possibility that bidding on a trademark could be a component of an infringement claim, the court emphasized that “the labeling and appearance” of an ad and the surrounding context were critical factors in determining likelihood of confusion arising from use of trademarks as keywords.⁴⁸ The Tenth Circuit expressly rejected 1-800 Contacts' contention that the mere appearance of Lens.com's ads on a SERP in response to a query for “1-800 Contacts” was confusing.⁴⁹ The court observed:

Perhaps in the abstract, one who searches for a particular business with a strong mark and sees an entry on the results page will naturally infer that the entry is for that business. *But that inference is an unnatural one* when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for.⁵⁰

Thus, in the one case 1-800 Contacts has fully litigated on its view of trademark infringement, it lost decisively, twice. *Lens.com* is a widely-cited precedent on the limits of trademark infringement liability with regard to keyword bidding.⁵¹

⁴⁷ *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229 (10th Cir. 2013). 1-800 Contacts had alleged both direct infringement by Lens.com and secondary liability for infringing ads placed by Lens.com's affiliates. Some of the affiliate-placed ads at issue featured variations on 1-800 Contacts' trademarks in their text. The district court dismissed all of 1-800 Contacts' infringement theories on summary judgment. The Tenth Circuit reversed and remanded “[w]ith respect to the secondary-liability claims related to ads that did display the mark in their text” on the theory of contributory infringement. *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1256-57 (10th Cir. 2013).

⁴⁸ *Id.* at 1245.

⁴⁹ The Tenth Circuit also rejected a study proffered by 1-800 Contacts purporting to show evidence of confusion, concluding that the study was unreliable, and that even if it were admissible, the survey's confusion levels were too low to support 1-800 Contacts' claims. *Id.* at 1246-47.

⁵⁰ *Id.* at 1245.

⁵¹ See *infra* Section III.D.1 (providing overview of trademark law).

C. Bidding Agreements Harm Competition

Between 2004 and 2013, 1-800 Contacts entered into at least 14 written Bidding Agreements with competing sellers of contact lenses.⁵²

1. Overview of the Bidding Agreements

Thirteen of the Bidding Agreements settled threatened or actual trademark litigation brought by 1-800 Contacts against a competing retailer of contact lenses. Exhibit C lists the agreements, by date, which resulted from lawsuits, or threats, of lawsuits, by 1-800 Contacts against its rivals. The fourteenth agreement challenged in the Complaint resides in a Sourcing and Services Agreement between Luxottica and 1-800 Contacts, entered in 2013, that contains a reciprocal search advertising restriction that is substantially similar to the other 13 Bidding Agreements.⁵³ There is, however, no indication that this horizontal agreement was connected in any way with an allegation of trademark infringement.

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

First, each of the Bidding Agreements forbids a competitor of 1-800 Contacts from using 1-800 Contacts' trademarks, URLs, and variations thereof as search advertising keywords. In other words, competitors cannot bid on 1-800 Contacts' trademarked terms in a search advertising auction under any circumstances.

⁵² Answer ¶ 20. 1-800 Contacts had additional unwritten agreements, *see supra* pp. 12-13, but these additional agreements do not change the analysis. Therefore, Complaint Counsel does not separately seek to "prove" their existence.

⁵³ CX0331 (Dec. 13, 2013, Contact Lens Sourcing and Services Agreement between Luxottica and 1-800 Contacts), Section 17.10-11.

Second, each of the Bidding Agreements requires a competitor of 1-800 Contacts to affirmatively prevent its ads from appearing *any time* a search query includes 1-800 Contacts' terms. This is true even when the competitor is *not* bidding on 1-800 Contacts' trademarks. For example, as described earlier, a search engine might deem a competitor's ad relevant to a search for "1-800 Contacts" when the competitor bid only on the generic term "contact lenses." The Bidding Agreements require a competitor to add "negative" keywords to its search advertising accounts to ensure that its ads are not displayed whenever a user conducts a search that "includes" any of 1-800 Contacts' trademarked terms.⁵⁴

All 14 of the written Bidding Agreements impose identical (reciprocal) restrictions on 1-800 Contacts.

Notably, the Bidding Agreements' restrictions are not limited to situations in which the resulting ads were likely to cause confusion. Indeed, the agreements prevent a competitor from bidding on restricted terms regardless of how clearly the ad discloses the identity of the advertiser.⁵⁵

⁵⁴ Except in 1-800 Contacts' agreement with Coastal, the obligation to use negative keywords is explicit. Evidence will show that the Coastal agreement, as interpreted by 1-800 Contacts and Coastal, also requires the use of negative keywords, based on the agreement's general requirement that Coastal prevent its ads from appearing any time a search query includes 1-800 Contacts' restricted terms. CX0092 (Letter from Mark Miller, counsel, 1-800 Contacts, to Steven Bochen, Coastal Contacts, dated May 30, 2014). Several of the agreements explicitly use the phrase "include" to signify when advertising may not appear. *See, e.g.*, CX0317 (AC Lens agreement); CX0324 (Web Eye Care agreement); CX0320 (Lenses For Less agreement).

⁵⁵ While there is a "carveout" for "comparative advertising" in most of the written agreements, the evidence will show that the parties assigned no meaning to the "carveout," and that it never resulted in the display of a single "comparative" advertisement. 1-800 Contacts' executives were unable to identify any competitor that displayed an advertisement pursuant to the "carveout." Nor was a single competitor able to explain how the supposed "carveout" actually affected the operation of the Bidding Agreement, since each competitor clearly understood that it was not permitted to appear in response to any search query that contained a 1-800 Contacts-related term, *even where* that competitor was *only* bidding on generic terms. *See, e.g.*, CX9039 (Clarkson Dep. Tr.) 145:2-146:20 (AC Lens understood agreement to require "phrase match," which eliminated possibility of comparative advertising); CX9014 (

{ ; CX8002 { }; CX8001 . Indeed, when Vision Direct interpreted its 2004 agreement with 1-800 Contacts to *permit* bidding on generic keywords, 1-800 Contacts sued Vision Direct for a second time, demanding that it implement negative keywords to *specifically*

2. 1-800 Contacts Continues to Enforce the Bidding Agreements Today

1-800 Contacts continues to enforce its Bidding Agreements today, unmodified. Absent the agreements, Walgreens and other restrained sellers would bid on 1-800 Contacts trademarked keywords, or would consider doing so.⁵⁹

3. Bidding Agreements Result in Harm to Consumers and Search Engines

a. Harm to Consumers

The Bidding Agreements directly harm consumers by (1) reducing the quality and quantity of informative advertising and (2) causing at least some consumers to pay more for contact lenses. Reducing the availability of informative advertising harms consumers by degrading the quality of the SERP that consumers receive, adding to their search costs, and leaving them a lower-quality SERP that contains less information than Google would provide, in the absence of the restraints.⁶⁰

The Bidding Agreements also reduce competition between 1-800 Contacts and the settling parties, likely leading to higher average prices than what would otherwise prevail. The Bidding Agreements remove information about 1-800 Contacts' online rivals that consistently charge lower prices than 1-800 Contacts.

query, whether the search is for the phrase “1-800 Contacts *rebate*” or for the phrase “1-800 Contacts cheaper competitors.” *See supra* n.54-55.

⁵⁹ *See, e.g.*, CX9008 (Hamilton (Walgreens) IH Tr.) at 63:5-64:7; CX8002 { }; CX8001 { }; CX9003 (Clarkson (AC Lens) IH Tr.) 35:16-36:3, 37:16-38:7; CX9000 { }.

⁶⁰ CX8006 (Evans Report) ¶¶ 191-93; *id.* at ¶ 208; *id.* at ¶¶ 223-29. *See also, e.g.*, CX0471 (Google) (Apr. 13, 2004, email from Rose Hagan to Howard Metzenberg describing Google's revised policy regarding bidding on trademarks as keywords) (“By preventing advertisers from using trademarked terms as keywords, Google has been reducing the relevant information about products and services users see and thus limiting user choice. We believe the right approach is to give users more choices and access to as much information as is relevant to their search or interest.”); CX0888 { }.

Dr. Susan Athey constructed a model to determine the impact of the Bidding Agreements on consumers. Dr. Athey concludes that, in the absence of the Bidding Agreements, consumers would be exposed to information about a greater number of competitors, that more consumers would click on competitor ads, and that this would increase consumer welfare in a number of ways.⁶¹ Dr. Athey will testify about these findings at trial.

Similarly, Dr. David Evans concludes that at least some consumers who searched for “1-800 Contacts” and saw an ad for a lower-priced rival would have purchased from that rival rather than from 1-800 Contacts.⁶² The conclusions of Drs. Evans and Athey are bolstered by 1-800 Contacts’ own contemporaneous estimate in 2008 that competitive bidding by rivals on 1-800 Contacts’ BKWs was causing it to lose some \$68,604 in sales per month.⁶³ Similarly, search advertising reports prepared by 1-800 Contacts employees specifically identify the “removal” of lower-priced competitors from the SERP as a material factor in generating sales.⁶⁴

The disparity between consumers’ perception of the price differential between 1-800 Contacts and its lower-price rivals and the *actual* price differential compounds this injury.

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⁶¹ CX8007 (Athey Report) ¶¶ 102-09.

⁶² CX8006 (Evans Report) ¶¶ 225-27.

⁶³ CX0213 (1-800 Spreadsheet, Competitor on TM Cost Estimates, Oct. 17, 2008).

⁶⁴ *See, e.g.*, CX0564 (Email from Bryce Craven to Brandon Dansie, et. al., Jun. 21, 2010) (“Contributing to the TM success was the removal of a few competitors who had been showing up on our best TM terms. Walgreens was the most notable of these and dropped off on the 15th of June.”).

⁶⁵ *See* CX1449 {
(Evans Report) ¶ 189 & n.197-200.

} *See also* CX8006

advertising of the disparity, 1-800 Contacts would be forced to price-match in a much larger number of instances or even, perhaps, lower its prices across the board.⁶⁶

b. Harm to Search Engines

The Bidding Agreements also directly result in financial harm to the search engines. Dr. Evans constructed a model showing that the Bidding Agreements reduced 1-800 Contacts' cost-per-click by 49-59 percent.⁶⁷ 1-800 Contacts itself estimated in 2008 that competitive auction bidding cost it an additional \$20,434 per month in advertising costs.⁶⁸ 1-800 Contacts' contemporaneous documents directly link a reduction in competition to lower advertising costs: "low competition equals low cost."⁶⁹ And a 2009 email between 1-800 Contacts marketing employees explains that the *purpose* of the trademark enforcement policy was to "remove competitors[,] which in turn drives down how much we pay per click."⁷⁰

1-800 Contacts' Bidding Agreements also reduce the quality of the SERP displayed by the search engines. Because they have fewer potentially relevant ads to choose from, the search engines are unable to display information that they believe may be relevant and useful to consumers.⁷¹ Dr. Evans constructed a model demonstrating that, in the absence of the Bidding

⁶⁶ CX8006 (Evans Report) ¶¶ 193, 228-29.

⁶⁷ CX8006 (Evans Report) ¶ 168.

⁶⁸ CX0213 (1-800 Spreadsheet, Competitor on TM Cost Estimates, Oct. 17, 2008).

⁶⁹ See CX0051 (Nov. 2010 "Search Overview" presentation) at -003.

⁷⁰ See CX0935 (Jun. 22, 2009, email from Bryce Craven, 1-800 Contacts, to Jessica Faulkner, 1-800 Contacts).

⁷¹ Indeed, Google changed its trademark policy in 2004 to offer consumers "more choices and access to as much information as is relevant to their search or interest." CX0471 (Google) (Apr. 13, 2004, email from Rose Hagan to Howard Metzenberg describing Google's revised policy regarding bidding on trademarks as keywords); CX0888 { }.

Agreements, Google would have served more than a hundred million additional ads between January 2010 and June 2015.⁷²

In addition to not being able to serve up a large volume of potentially relevant advertising, these artificially-imposed restraints hamper the search engines' ability to learn by analyzing what users are choosing to click on (or not to click on).⁷³ {

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III. LEGAL ANALYSIS

1-800 Contacts restrained competition in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, by entering into a series of at least 14 bilateral agreements (collectively referred to as the "Bidding Agreements") with rival online sellers of contact lenses, preventing the parties from competing against one another in certain online advertising auctions.⁷⁶

The Bidding Agreements had the purpose, capacity, tendency, and likely effect of restraining competition unreasonably and injuring consumers and others by, among other things:

⁷² CX8006 (Evans Report) ¶ 21.

⁷³ See *supra* pp. 7-8 (describing search engine use of "click" data to improve relevancy algorithms).

⁷⁴ CX8005 { }.

⁷⁵ *Id.* { }.

⁷⁶ Compl. ¶¶ 1, 20, 33.

- Depriving consumers of truthful and non-misleading information about the prices, products, and services offered by online sellers of contact lenses;
- Depriving consumers of the benefits of vigorous price and service competition among online sellers of contact lenses;
- Preventing online sellers of contact lenses from disseminating truthful and non-confusing information about the availability of, and prices for, their products and services;
- Increasing consumers' search costs relating to the online purchase of contact lenses;
- Causing at least some consumers to pay higher prices for contact lenses than they would pay absent the agreements, acts, and practices of 1-800 Contacts;
- Unreasonably restraining price competition in certain search advertising auctions;
- Distorting prices in, and undermining the efficiency of, certain search advertising auctions;
- Preventing search engine companies from displaying to users on the search results page the array of advertisements most responsive to a user's search; and
- Impairing the quality of the service provided to consumers by search engine companies, including the search results page.

Part A addresses the relevant standards of review and burdens of proof. Part B addresses concerted action. Part C addresses establishing a *prima facie* case of harm through the three methods endorsed by the Commission in *Realcomp*.⁷⁷ Part D addresses 1-800 Contacts' defenses and justifications.

⁷⁷ *In re RealComp II., Ltd.*, 148 F.T.C. ___, No. 9320, 2007 WL 6936319, at *17 (F.T.C. Oct. 30, 2009).

A. Standard of Review and Burden of Proof

In order to establish a violation of Section 1, Complaint Counsel must prove (1) the existence of a contract, combination, or conspiracy among two or more separate entities (*i.e.*, concerted action), that (2) unreasonably restrains trade, and (3) affects interstate or foreign commerce.⁷⁸ Conduct unreasonably restrains trade when it has, or is likely to have, a substantial anticompetitive effect in the market, such as by stabilizing or increasing prices, reducing output, reducing quality or reducing consumer choice.⁷⁹ The evaluation of whether a particular horizontal restraint unreasonably restrains trade “takes place along an analytical continuum in which a challenged practice is examined in the detail necessary to understand its competitive effect.”⁸⁰

At one end of the continuum, certain restraints, including naked price-fixing, market allocation agreements, and bid-rigging, are conclusively deemed harmful to competition and are *per se* illegal.⁸¹ Restraints that may not be *per se* illegal, but bear a “close family resemblance” to such restraints are deemed “inherently suspect” and presumed to harm competition.⁸² Such restraints are subjected to abbreviated rule of reason analysis because, “based upon economic

⁷⁸ *Realcomp II, Ltd. v. Fed. Trade Comm’n*, 635 F.3d 815, 824 (6th Cir. 2011); *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 768 (1999). Conduct that violates Section 1 or 2 of the Sherman Act is deemed to constitute an unfair method of competition and hence a violation of Section 5 of the FTC Act as well. *Fed. Trade Comm’n v. Cement Inst.*, 333 U.S. 683, 694 (1948); *Fashion Originators’ Guild v. Fed. Trade Comm’n*, 312 U.S. 457, 463-64 (1941). Complaint Counsel will not address the Commission’s jurisdiction over this matter, or the interstate commerce element of Section 1, neither of which appear to be in dispute.

⁷⁹ See, e.g., *Standard Oil Co. v. United States*, 283 U.S. 163, 179 (1931); *Hahn v. Oregon Physicians’ Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988).

⁸⁰ *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 336 (2003) (hereinafter *Polygram I*), *aff’d*, *Polygram Holding, Inc. v. Fed. Trade Comm’n*, 416 F.3d 29 (D.C. Cir. 2005) (hereinafter *Polygram II*).

⁸¹ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-224 (1940) (price fixing); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (market allocation); *Nat’l Soc. Of Prof’l Engineers v. United States*, 435 U.S. 679, 692-93 (1978) (bid rigging).

⁸² *Polygram II*, 416 F.3d at 37.

learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition.”⁸³ Such inherently suspect conduct may be condemned without proof of market power or direct evidence of harmful effects.⁸⁴ A fuller market analysis will only be necessary if the respondent can show that the challenged conduct had cognizable and plausible procompetitive justifications, such as increasing output, or improving product quality, service, or innovation.⁸⁵ A justification is cognizable if it is compatible with the goal of the antitrust laws to further competition, and it is plausible if it will “plausibly create or improve competition” and “cannot be rejected without extensive factual inquiry.”⁸⁶ If the respondent can make such a showing, a more plenary analysis will be undertaken.

At the opposite end of the spectrum, a full rule of reason analysis is appropriate when the likely competitive effects of a challenged practice are unknown.⁸⁷ Likely competitive effects can be proven through two alternative means: evidence of the actual effects of the restraint; or evidence of market power and the nature of the restraint.⁸⁸ Competitive harm, once proven, is then weighed against any proven plausible and cognizable procompetitive efficiencies.⁸⁹ The challenged policies must also be reasonably necessary – and no broader than necessary – to

⁸³ *Id.* at 36 (condemning a joint venture’s moratorium on discounting and advertising for products outside of the venture under an abbreviated rule of reason analysis); *see also Mass Bd. Of Registration in Optometry*, 110 F.T.C. 549, 607 (F.T.C. 1988) (condemning a licensing board’s ban on advertising discounts by optometrists).

⁸⁴ *Polygram I*, 136 F.T.C. 310, 350-52, 359 (rejecting efficiencies “as a matter of law because they go far beyond the range of justifications that are cognizable under the antitrust laws”).

⁸⁵ *Id.* at 352.

⁸⁶ *Id.* at 347.

⁸⁷ *E.g., Realcomp II, Ltd.*, Dkt. No. 9320, slip. Op. at 19-20 (F.T.C. 2009).

⁸⁸ *Id.*

⁸⁹ *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001).

achieving the alleged efficiencies.⁹⁰ Even with a showing of plausible and cognizable efficiencies, the court may still condemn restraints without “the fullest market analysis,” so long as the evidence results in a “confident conclusion about the principal tendency” of the concerted action.⁹¹

Complaint Counsel bears the initial burden of establishing a *prima facie* case of competitive harm. Once it has done so, the burden shifts to Respondent, who bears the burden of proving that this harm is outweighed by cognizable and plausible procompetitive efficiencies, if any.⁹²

B. Concerted Action

There is no dispute that there is concerted action in this case. The Complaint challenges 14 Bidding Agreements between 1-800 Contacts and numerous rival online sellers of contact lenses. There is no dispute that the agreements exist, as each written agreement is plain on its face, and executed by a representative of 1-800 Contacts and a representative of a competing online seller of contact lenses.⁹³ 1-800 Contacts does not contend otherwise.

⁹⁰ See, e.g., *Nat’l Collegiate Athletic Ass’n v. Bd. Of Regents*, 468 U.S. 85, 119 (1984); *Polygram I*, 136 F.T.C. at 335, 359; *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1019 (10th Cir. 1998); *In re Brunswick Corp.*, 94 F.T.C. 1174, 1275 (F.T.C. 1979).

⁹¹ *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 779-81 (1999) (discussing how level of antitrust scrutiny is based on a continuum).

⁹² *Microsoft*, 253 F.3d. at 59. Note that this burden-shifting does not apply to *per se* illegal claims, in which cases the respondent is not offered the opportunity to present any efficiencies for *per se* illegal conduct.

⁹³ See CX0310 (Coastal Contacts); CX0311 (first Vision Direct); CX0314 (second Vision Direct); CX0313 (EZ Contacts); CX0315 (Lensfast); CX0317 (AC Lens); CX0319 (Empire Vision); CX0320 (Lenses For Less); CX0321 (Tram Data); CX0322 (Walgreens); CX0323 (Contact Lens King); CX0324 (Web Eye Care); CX0325 (Standard Optical); CX0326 (Memorial Eye); CX0331 (Luxottica). In addition, as described earlier, there are unwritten agreements between 1-800 Contact and certain other retailers. See *supra* pp. 12-13. However, the existence of those additional agreements does not materially change the analysis of competitive harm. Therefore, Complaint Counsel need not specifically prove their existence.

C. Three Methods of Establishing *Prima Facie* Harm

The Complaint alleges that 1-800 Contacts violated Section 5 of the FTC Act by entering into numerous Bidding Agreements with rival online sellers of contact lenses that prevented the parties from competing in certain search advertising auctions. Using any of the three methods identified by the Commission in *Realcomp*,⁹⁴ 1-800 Contacts' Bidding Agreements resulted in substantial anticompetitive harm. *First*, the Bidding Agreements should be deemed “inherently suspect” and presumed anticompetitive because the agreements bear a “close family resemblance” to other practices that have been found to be harm competition – in particular, bid rigging and/or advertising restraints.⁹⁵

Second, the evidence will show that the Bidding Agreements resulted in direct harm to search engines (whose auctions have been distorted; revenues reduced; and search product diminished) and to consumers (who have received an inferior search product; have been prevented from seeing relevant and useful advertising; and some of whom have paid more for contact lenses as a result).

Third, the evidence will show that the parties' collective market power in a relevant market for online sales of contact lenses further supports a finding that the Bidding Agreements have resulted in substantial anticompetitive harm.

1. “Inherently Suspect” Analysis

The Complaint alleges that 1-800 Contacts entered into at least 14 written agreements with rival online sellers of contact lenses that prevented the parties from competing in certain search advertising auctions. 1-800 Contacts' Bidding Agreements are “inherently suspect” in at

⁹⁴ *In re Realcomp II, Inc.* 148 F.T.C. ___, No. 9320, 2007 WL 6936319, at *17 (F.T.C. Oct. 30, 2009).

⁹⁵ *See Polygram II*, 416 F.3d at 37.

least two respects: *first*, from the search engine perspective, the agreements restrain price competition, in that they allocate to competing sellers the right to bid in search advertising auctions. *Second*, from the consumer perspective, the agreements restrain truthful and relevant advertising, a practice that the Commission has long found to be presumptively anticompetitive.

a. Bidding Agreements Constitute Price Restraints

Any “agreement that [interferes] with the setting of price by free market forces is illegal on its face.”⁹⁶ An agreement allocating to competitors the right to participate in an auction, referred to as “bid-rigging,” is a classic example of this type of market interference. In *National Society of Professional Engineers v. United States*, the Supreme Court summarily condemned an agreement among engineers that restrained such competitive bidding. As the Court observed: “[A]greements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . . are ‘illegal *per se*.’”⁹⁷ More broadly, horizontal restraints on price competition were judged to be presumptively anticompetitive in *NCAA*⁹⁸ and *PolyGram*.⁹⁹

Here, 1-800 Contacts and its rivals agreed to restrain price competition in search advertising auctions. 1-800 Contacts’ Bidding Agreements consist of two elements: *first*, 1-800

⁹⁶ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (internal quotations omitted) (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59 (1940), and *United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969), and noting that agreement not to quote prices until after contract is awarded “is not price fixing as such, [but] no elaborate industry analysis is required to demonstrate the anti-competitive character of such an agreement”). See *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 325 (4th Cir. 1982) (“Any agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party constitutes bid rigging per se violative of 15 U.S.C. Section 1.”); *United States v. Beaver*, 515 F.3d 730, 737 n.3 (7th Cir. 2008) (holding net-price-discount *per se* illegal). See also *In re Northwest Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174, 199 (E.D. Mich. 2002) (explaining that “an agreement need not dictate every conceivable aspect of each conspirator’s behavior in order to violate § 1”).

⁹⁷ *Prof’l Eng’rs*, 435 U.S. at 692.

⁹⁸ *NCAA v. Bd. Of Regents*, 468 U.S. 85 (1984).

⁹⁹ *Polygram II*, 416 F.3d 29.

Contacts’ rivals agree that they will not affirmatively *bid* in search advertising auctions for numerous specified “keywords” consisting of 1-800 Contacts’ trademarks and variations thereof. The rivals also agree to *remove* themselves from any auctions for *generic* keywords where bidding on such keywords would result in the display of a rival’s ad against 1-800 Contacts-related terms. *Second*, 1-800 Contacts similarly agrees not to participate in specified auctions relating to its rivals’ trademarks. In effect, as 1-800 Contacts is the “hub” of all of these Bidding Agreements, 1-800 Contacts largely reserved an entire class of auctions to itself.¹⁰⁰

The victim of the bid-rigging scheme – here, the search engine – suffers from reduced competition for a particular bid, receiving less money as a result.¹⁰¹

The proposition that allocating the right to participate in auctions tends to suppress competition is uncontroversial. One form of competitive injury associated with bid rigging is price distortion: the seller receives (and the buyer pays) a non-competitive price.¹⁰² Not surprisingly, 1-800 Contacts’ contemporaneous documents show a clear price distortion in this case. For example, as part of 1-800 Contacts’ “Paid Search Bid Management” strategy, 1-800 Contacts sought to “[k]eep competitors and affiliates off” its trademarked keywords, because

¹⁰⁰ There were a few exceptions. Namely, 1-800 Contacts was not able to stop Walmart from bidding on its trademarks, despite its attempt to do so (CX0007 (Apr. 5, 2013, Letter from Mark Miller to Peter Clarkson, AC Lens)), and it does not have an agreement with online retailer Lens Direct. CX0404 (Mar. 20, 2006, Letter from Bryan Pratt, counsel to 1-800 Contacts, to Scott Slade, Lens Direct); CX1242 (June 13, 2011, Letter from Harry Schochat, counsel for Lens Direct, to Mark Miller). {
See, e.g., CX9033 (Mohan (Walmart) Dep. Tr.) 53:21-54:14; CX9023 ({
 CX1779 ({
 }). Nor did 1-800 Contacts secure *written* agreements with certain other firms, although it appears that unwritten agreements existed between these parties. *See supra* pp. 12-13.

¹⁰¹ In this case, 1-800 Contacts’ Bidding Agreements are even more egregious because the parties agree not just to *refrain* from bidding, but also – through the use of negative keywords – to *remove* themselves from auctions involving *generic* keywords. *See supra* pp. 17-18 (describing how negative keyword provisions are enforced).

¹⁰² Robert S. Pindyck & Daniel L. Rubinfeld, MICROECONOMICS 495 (5th ed. 2001) (“In a private value auction [where bidders have different reservation prices for the offered item], [the seller] should encourage as many bidders as possible: Additional bidders increase the expected bid of the winner and the expected valuation of the second-highest bidder as well.”).

“[l]ow competition = low cost.”¹⁰³ 1-800 Contacts’ CEO Brian Bethers acknowledged: “That’s the goal and objective that we have So on our trademark search I would like to spend an appropriate amount, as little as we can.”¹⁰⁴

The evidence will show that 1-800 Contacts’ marketing team carefully implemented, and monitored, this strategy over the course of more than a decade. For example, former 1-800 Contacts search advertising manager Bryce Craven reported weekly whether 1-800 Contacts was paying more or less for search advertising, depending on whether competitors were bidding on 1-800 Contacts’ keywords (costs went up), or whether 1-800 Contacts’ rivals had been successfully “removed” from the auction (costs went down).¹⁰⁵ Indeed, 1-800 Contacts’ own analysis shows that it would pay search engines \$20,434 per month more in advertising costs if it had competition in auctions for its trademarked keywords.¹⁰⁶

1-800 Contacts’ estimate is consistent with Dr. Evans’ conclusion that the Bidding Agreements “substantially lowered the price [1-800 Contacts] pays for clicks on its keywords.”¹⁰⁷ 1-800 Contacts’ “savings,” of course, represents a financial loss to the search engines – and a direct form of competitive injury.

But that is not the only competitive harm caused by the Bidding Agreements. As Google’s director for ad quality Adam Juda will testify, Google is even more concerned with the

¹⁰³ CX0051 (Nov. 2010 “Search Overview” presentation) at -003.

¹⁰⁴ CX9001 (Bethers (1-800) IH Tr.) 196:17-19, 197:2-4 (discussing CX0051 at -003); CX9012 (Schmidt IH Tr.) 182:7-15 (“Q: And the second bullet says, Low competition equals low costs. What’s your understanding of that bullet? A: The harm that we – one of the harms from people bidding on our brand is that it increased our costs. Q: It increased your costs when they bid? A: Yes.”); *id.* at 211:10-16 (same).

¹⁰⁵ *See supra* p. 20 & n.64.

¹⁰⁶ *See* CX0213 (Oct. 17, 2008, internal spreadsheet calculating cost of competitive bids).

¹⁰⁷ CX8006 (Evans Report) ¶ 168 (showing that the Bidding Agreements reduced the CPC for 1-800 Contacts’ brand name keywords by 49 to 59 percent).

effect of 1-800 Contacts’ Bidding Agreements on the quality of its product – *i.e.*, the quality of the SERP. The Bidding Agreements eliminate highly relevant ads from the bidding pool, and thus undermine Google’s objective of assembling the best possible results.¹⁰⁸ As the evidence will show, this degrading of the SERP harms the search engine and its users.

b. Bidding Agreements Constitute Advertising Restraints

It is an axiom of antitrust law and modern economics that truthful and non-misleading advertising plays an important role in facilitating efficient markets, and conversely that a restraint on truthful and non-misleading advertising is likely to cause competitive harm.¹⁰⁹ Numerous empirical studies have found that restrictions on advertising result in consumers paying higher prices.¹¹⁰ And courts have judged advertising restraints as *per se* unlawful.¹¹¹

The Commission concluded in *PolyGram* that an agreement between music companies not to advertise two recordings for a period of six weeks was inherently suspect. And, in *Realcomp*, the Commission concluded that an agreement among real estate brokers to impede the dissemination of certain house listings “operated as a restraint on advertising” and hence was inherently suspect.¹¹² In *Realcomp*, as in this case, the challenged restraint eliminated a competitively significant category of advertising, but it did not bar all advertising. Similarly, in

¹⁰⁸ *See supra* pp. 7-9, 21-22 & n.71.

¹⁰⁹ *See Cal. Dental*, 526 U.S. at 773 (“[R]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for [rivals] to compete on the basis of price.”) (*quoting Cal. Dental Ass’n v. F.T.C.*, 128 F.3d 720, 727 (9th Cir. 1997)); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992) (“it is clear as an economic matter that restrictions on fare advertising have the forbidden effect upon fares”); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (advertising “performs an indispensable role in the allocation of resources in a free enterprise system”).

¹¹⁰ *PolyGram*, 136 F.T.C. at 356 n.52 (collecting the empirical studies).

¹¹¹ *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995); *United States v. Gasoline Retailers Ass’n*, 285 F.2d 688 (7th Cir. 1961); *United States v. The House of Seagram, Inc.*, 1965 Trade Cas. (CCH) 71,517 (S.D. Fla. 1965).

¹¹² *Realcomp II*, No. 9320, 2007 WL 6936319, at *26 (“Courts have long treated agreements among competitors to restrict advertising as posing serious dangers to competition and as having a great capacity to affect prices.”).

April 2016, the Antitrust Division of the Department of Justice entered into a consent decree with two West Virginia hospitals that had agreed not to place print or billboard advertisements in the county where the other hospital was located.¹¹³ As in *Realcomp*, the hospitals' agreement did not preclude the defendants from using many other marketing channels, such as television, radio, or internet advertising.¹¹⁴ The Antitrust Division's complaint nonetheless characterized this restriction on billboard placement as *per se* illegal.¹¹⁵

The Bidding Agreements here restrained a significant volume of truthful and non-misleading competitive advertising.¹¹⁶ Restrictions on truthful and non-misleading advertising raise consumers' search costs; that is, the restraint makes it more costly for consumers to discover the prices offered by competing sellers, thus resulting in less competition and higher transaction prices.¹¹⁷

¹¹³ Proposed Final Judgment, *United States v. Charleston Area Med. Ctr.*, No. 2:16-cv-03664-JTC (S.D.W. Va. Apr. 14, 2016), available at <https://www.justice.gov/atr/case-document/323547>; Compl. ¶¶ 14-19, *United States v. Charleston Area Med. Ctr.*, No. 2:16-cv-03664-JTC (S.D.W. Va. Apr. 14, 2016), available at <https://www.justice.gov/atr/case-document/323543>.

¹¹⁴ *See id.*

¹¹⁵ *Id.* ¶ 23. *See also* *Mass Bd. Of Registration in Optometry*, 110 F.T.C. 549 (F.T.C. 1988) (condemning a licensing board's ban on one type of advertising); *Polygram II*, 416 F.3d 29 (condemning restraint that lasted only six weeks).

¹¹⁶ 1-800 Contacts correctly points out that there are many advertising opportunities that are not foreclosed by the Bidding Agreements (*e.g.*, television, radio, newspapers). However, as explained earlier, search advertising is quite different from other types of advertising, and of unique value to both consumers of contact lenses and to competitors of 1-800 Contacts. *See supra* p. 10. Moreover, this particular type of search advertising – trademarked search advertising – was especially important for 1-800 Contacts. *See supra* p. 10-12 & n.30.

¹¹⁷ James L. Langenfeld and Louis Silvia, *Federal Trade Commission Horizontal Restraint Cases: An Economic Perspective*, 61 ANTITRUST L. J. 653, 672–73 (1993) (“Many consumers search the prices of different firms for the lowest quality-adjusted price of a desired product or service. With each additional place searched to determine the price of a product or service, consumers get more information on the likely lowest price. . . . Restrictions on advertising clearly increase the cost of consumers' obtaining information on the lowest price. Consumers are then faced with a trade-off. They must either spend more time and money searching for a lower price (higher quality) supplier or cut their search short when the restriction-induced increase in search costs more than offsets the increased likelihood of finding a lower price. This leads some consumers to pay higher prices for the desired product or service, while others stop their search before they find a price low enough to induce them to buy, thus reducing output.”).

The effect on consumer search costs is particularly acute with respect to restrictions on internet search advertising. For queries that are interpreted by the search engine as “commercial” in nature, *e.g.*, shopping queries, search advertising is presented to consumers at the precise moment when those consumers are likely to be ready to purchase.¹¹⁸ The consumer can quickly and easily peruse the advertisements and/or navigate from one advertiser’s website to the next in search of the best available price.¹¹⁹ Agreements among advertisers that (unbeknownst to consumers) distort those results rob consumers of the unique value of search advertising.

As Dr. Evans will testify, when a consumer of contact lenses is presented with *only* the 1-800 Contacts advertisement, that consumer is more apt to curtail her search and to settle for whatever price is offered by 1-800 Contacts.¹²⁰ This is the very analysis that impelled 1-800 Contacts to demand that its competitors cease advertising against the 1-800 Contacts trademarked keywords.¹²¹ Indeed, in 2008, 1-800 Contacts estimated that *each month* it lost \$68,604 in sales due to rivals’ search advertising against 1-800 trademarks.¹²²

¹¹⁸ See *supra* p. 10 & n.21.

¹¹⁹ See Eric Goldman, *Deregulating Relevancy*, 54 EMORY L.J. 507, 517-20 (2005).

¹²⁰ See CX8006 (Evans Report) ¶¶ 189, 191-94.

¹²¹ See, *e.g.*, CX9004 (Coon (former 1-800 Contacts) IH Tr.) 152:17-154:13 (“When people type 1-800 Contacts into their browser they are trying to go there just like they are when they dial 1-800 Contacts. The phone system doesn’t like pick up and go oh, you called Domino’s Pizza and they pick up and go oh, hey, before we connect your call, you know, Pizza Hut has pizza half off. Would you like to be connected to Pizza Hut instead? That’s just not how the phone system works. It could have, I suppose.” “Google’s a switchboard. Right? And I think it’s wrong for them to try to interrupt somebody who is just asking to be connected and try to profit off of ads and confusion and interfering with that effort to just connect with the party they’ve asked for.”); CX9001 (Bethers (1-800 Contacts) IH Tr.) 124:13-17 (“If an advertisement comes to me and I’m ready to go into a store, I’m not looking to have five other people run up to me at the entrance of the door and say, ‘By the way, I’m so and so, and I’m so and so, and I’m so and so.’”); CX0279 (Dec. 15, 2009, email to J. Faulkner and B. Craven from J. Judd: marketing staff responsible for monitoring rival ads observed “it concerns me that customers may take the opportunity to order with our competitors, especially when their ad copy is so ‘savings’ driven”; attaching screen shots of advertisements from competitors offering aggressive discounts).

¹²² See CX0213 (Oct. 17, 2008, internal spreadsheet calculating cost of competitive bids).

Finally, restraints on advertising may impede market entry by removing a low-cost means for a new rival to gain market awareness and acceptance.¹²³ For example, {

.}¹²⁴ Other retailers will testify that they found it particularly useful to advertise against 1-800 Contacts' trademark because it put their ads in front of a large number of consumers who might not otherwise be familiar with their brands.¹²⁵

c. Actavis and Clorox Do Not Preclude Inherently Suspect Analysis

1-800 Contacts contends that the competitive effects of the Bidding Agreements cannot be considered inherently suspect because the Bidding Agreements settled alleged trademark

¹²³ See CX8006 (Evans Report) ¶¶ 93, 181 n.188, 191.

¹²⁴ See CX8001 { }.

¹²⁵ See, e.g., CX9039 (Clarkson (AC Lens) Dep. Tr.) 104:13-18 (“[W]e know from public data that there are an awful lot of people who search for 1-800-CONTACTS. We think that some portion of them would be interested in an offer that said, ‘We’re 20 percent cheaper.’ So it – we think it would be a compelling proposition to consumers.”). See also, e.g., CX8003 ({

}).

1-800 Contacts' employees agree that getting a retailer's name in front of the consumer matters, even in cases where the consumer chooses another option. For example, 1-800 Contacts' chief marketing officer testified that “[s]earch advertising is advertising as well as a channel to drive people directly to your site. And we believe that some people who see that advertising might – it might leave an impression, and then later on they could decide that they want to still go to the site because they remember that search advertisement.” CX9034 (Roush (1-800 Contacts) Dep. Tr.) 47:16-22; see *id.* at 44:24-45:14. See also, e.g., CX0296 {

(emphasis added).

disputes between 1-800 Contacts and its rivals. In support of this argument, 1-800 Contacts cites *FTC v. Actavis*¹²⁶ and *Clorox Co. v. Sterling Winthrop*.¹²⁷

1-800 Contacts' reliance on *Actavis* is misplaced.¹²⁸ The Supreme Court *did not* direct that settlements of intellectual property disputes may *never* be judged inherently suspect. Stated differently, competitors cannot avoid truncated analysis simply by structuring their inherently suspect restraints as the settlement of litigation.

In *Actavis*, a brand-name drug owner sued two generic drug manufacturers for patent infringement. In settlement of these claims, (i) the brand company agreed to pay the generic companies tens of millions of dollars, and (ii) the generic companies agreed to refrain from launching competing product for nine years (while allowing generic entry five years *before* the expiration of the patent).¹²⁹ The Commission contended that the large cash payment from the patent holder to the alleged infringer undercut the claim that the agreed-upon entry date reflected the parties' assessment of the strength of the patent, and that, in substance, this was a payment not to compete.¹³⁰ On this basis, the Commission argued that the agreement was presumptively unlawful.

Although the Court did not adopt the Commission's view that reverse payment agreements should be deemed presumptively unlawful, *Actavis* does not disturb the basic

¹²⁶ 133 S. Ct. 2223 (2013).

¹²⁷ 117 F.3d 50 (2d Cir. 1997).

¹²⁸ Curiously, 1-800 Contacts has also contended that its Bidding Agreements should be immune from antitrust scrutiny altogether under *Actavis*, a contention that was rejected by the Commission in February 2017. *See* Opinion and Order of the Commission Granting Complaint Counsel's Motion For Partial Summary Decision, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017), at 4 ("The Supreme Court made clear in *Actavis* that neither the fact that the agreements in question were settlement agreements nor the fact that they concerned patent rights rendered them immune from antitrust scrutiny.").

¹²⁹ *Actavis*, 133 S. Ct. at 2227.

¹³⁰ *Id.* at 2234.

principle that antitrust analysis focuses on the nature of the restraint at issue, even in the settlement of patent litigation.¹³¹ Indeed, *Actavis* cites with approval several earlier Supreme Court decisions applying *per se* (truncated) analysis to overly restrictive patent settlements.¹³² Instead, *Actavis* determines that the existence of a reverse payment *by itself* is not sufficient to confidently conclude that the “arrangement[] in question would have an anticompetitive effect on customers and market.” As the Court explained: “[T]he likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor’s anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification.”¹³³

Unlike in *Actavis*, here, Complaint Counsel does not contend that Respondent’s intellectual property right is uncertain. Indeed, Complaint Counsel will stipulate that the “1-800 Contacts” trademark is valid and enforceable. But a trademark is unlike a patent. A valid patent invests the patent holder with the exclusive right to use the subject invention. A valid trademark invests the trademark owner with a far more limited right to bar only *confusing* uses of the trademark. On their face, the Bidding Agreements reach significantly beyond 1-800 Contacts’ property right by (i) barring non-confusing uses of the trademark; (ii) requiring negative keywords; and (iii) providing for reciprocal restraints on competition by 1-800 Contacts.

In sum, *Actavis* did not adopt the sweeping rule that Respondent asserts. Where the terms of a settlement of intellectual property dispute reach non-infringing competing products,

¹³¹ *Id.* at 2231.

¹³² See *Actavis*, 133 S.Ct. at 2231-32 (citing *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963); *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952); *United States v. Line Material Co.*, 333 U.S. 287, 310-12 (1948)). See also Opinion and Order of the Commission Granting Complaint Counsel’s Motion For Partial Summary Decision, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017), at 4 (citing same decisions).

¹³³ *Actavis*, 133 S. Ct. at 2237.

courts have applied the *per se* rule. For instance, in *In re Cardizem Antitrust Litigation*,¹³⁴ the Sixth Circuit held a reverse payment settlement agreement *per se* illegal because its restrictions “extended to noninfringing and/or potentially noninfringing versions of generic Cardizem” and, thus, the agreement could “not be fairly characterized as merely an attempt to enforce patent rights.”¹³⁵

1-800 Contacts also asserts that its Bidding Agreements cannot be “inherently suspect” because they constitute a “traditional” method of resolving a trademark dispute, akin to a settlement approved under the rule of reason in *Clorox*.¹³⁶ In *Clorox*, the owner of the LYSOL mark initially claimed that Cyanamid’s PINE-SOL mark was itself confusingly similar to LYSOL.¹³⁷ The parties settled the dispute by agreeing that, in order to avoid consumer confusion, Cyanamid would not use the PINE-SOL mark to market its own disinfectant products (where the LYSOL brand was prominent).¹³⁸ In a later challenge to the (superseding) settlement by Cyanamid’s successor, Clorox, the Second Circuit, applying the rule of reason, concluded that the settlement was not anticompetitive.¹³⁹

Clorox does not help 1-800 Contacts. In *Clorox*, the trademark owner barred its competitor from using a mark that was confusingly similar to the LYSOL mark to market a competing disinfectant product. But nothing prevented Cyanamid from *displaying* or *offering* the

¹³⁴ 332 F.3d 896, 907-09 & n.13 (6th Cir. 2003).

¹³⁵ *Id.* at 907-09 & n.13. *See also, e.g., F.T.C. v. Watson Pharm., Inc.*, 677 F.3d 1298, 1310 (11th Cir. 2012); *In re Terazosin Hydrochloride Antitrust Litig.*, 352 F. Supp. 2d 1279 (S.D. Fla. 2005).

¹³⁶ 117 F.3d 50 (2d Cir. 1997).

¹³⁷ *Id.* at 53.

¹³⁸ *Id.*

¹³⁹ *Id.* at 61.

competing merchandise, so long as it was not confusingly labeled.¹⁴⁰ By contrast, 1-800 Contacts is banning competitors from *displaying* and *offering* their products in competition with 1-800 Contacts in any auction resulting from 1-800 Contacts-related keywords.¹⁴¹ As there was no agreement between Sterling and Cyanamid simply to cease competing, *Clorox* offers no view on the legality of such a restraint or the propriety of truncated analysis.¹⁴²

1-800 Contacts' Bidding Agreements broadly, and on their face, preclude non-infringing activity. Moreover, the negative keyword provisions bar competitor advertising even where the competitor in not "using" the 1-800 Contacts trademark. As such, 1-800 Contacts' agreements, like the agreement at issue in *In re Cardizem*,¹⁴³ cannot be fairly characterized as merely an attempt to enforce trademark rights. Accordingly, truncated analysis is appropriate, and the burden should shift to 1-800 Contacts to prove a legitimate efficiency defense.¹⁴⁴

¹⁴⁰ *Id.* at 57 ("The trademark agreement at issue here does no more than regulate how the name PINE-SOL may be used; it does not in any way restrict *Clorox* from producing and selling products that compete directly with the *LYSOL* brand, so long as they are marketed under a brand name other than *PINE-SOL*. Accordingly, at first blush it would not appear to restrict *Clorox*'s, much less any other competitor's, ability to compete in the markets *LYSOL* products allegedly dominate.") (emphasis added).

¹⁴¹ *See supra* pp. 16-18 (explaining that Bidding Agreements broadly prohibit rival advertising from appearing on a SERP in response to a search query including the term "1-800 Contacts" or a close variation thereof).

¹⁴² The *Clorox* court explicitly distinguished between the agreement at issue in the case and "trademark agreements that in reality serve to divide markets, and thus have been condemned as illegal *per se* under the antitrust laws." *Clorox*, 117 F.3d at 55 (internal citation omitted). *See id.* at 54-55 (because the agreements at issue do not "effect any of the types of restraints that have historically been condemned as illegal *per se*, such as price fixing, market divisions, tying arrangements, or boycotts," the court will review the agreement under the rule of reason); *id.* at 60 ("in the absence of any evidence that the provisions relating to trademark protection are auxiliary to an underlying illegal agreement between competitors – such as . . . territorial market division . . . we believe the parties' determination of the scope of needed trademark protections is entitled to substantial weight").

¹⁴³ 332 F.3d 896 (6th Cir. 2003).

¹⁴⁴ *See Polygram I*, 136 F.T.C. at 345.

2. Direct Evidence of Harm

The evidence will also show that 1-800 Contacts' Bidding Agreements have resulted in actual harm to both search engines and consumers.

a. Direct Evidence of Harm to Search Engines

1-800 Contacts' Bidding Agreements have resulted in actual harm to search engines by distorting the search engines' advertising auctions, diminishing their revenues, and, perhaps most importantly, diminishing the quality of the search engines' product. Specifically, 1-800 Contacts' Bidding Agreements distorted the search engine auctions by removing many relevant (and willing) advertisers from the pool, even in instances where the search engine itself determined that an advertiser's offering was directly relevant to the user's query.¹⁴⁵

As Dr. Evans' model shows, the Bidding Agreements also directly reduced search engine revenues for 1-800 Contacts-related auctions, by largely reserving those auctions to 1-800 Contacts and allowing 1-800 Contacts to pay significantly less than it would pay in a more competitive auction.¹⁴⁶ Notably, 1-800 Contacts expressly acknowledges this point in its own documents.¹⁴⁷

Finally, the Bidding Agreements entered into by 1-800 Contacts and its most significant online rivals resulted in a lower-quality product, as the search engine results were artificially manipulated by the removal of relevant, valuable advertisements that would otherwise have been visible to users.¹⁴⁸

¹⁴⁵ See *supra* pp. 17-18, 21-22.

¹⁴⁶ See *supra* pp. 21, 30.

¹⁴⁷ See *supra id.*

¹⁴⁸ See *supra* pp. 21-22, 30-31. This initial harm to product quality is not limited to merely one specific auction; rather, it compounds over time, as the search engine's algorithms will have more difficulty determining which advertisements are relevant, and which are not. See *supra* p. 22; see also, e.g., CX8005 {

b. Direct Evidence of Harm to Consumers

1-800 Contacts' Bidding Agreements also resulted in actual harm to consumers by diminishing quality of search results, suppressing relevant competitive information, and causing at least some consumers to pay more than they otherwise would have paid for contact lenses. The quality of search results displayed to consumers has been diminished as a result of 1-800 Contacts' Bidding Agreements. Such search advertising is particularly valuable to consumers because 1-800 Contacts is consistently the highest-priced seller on the internet, and *consumers do not know it*. As 1-800 Contacts' own documents observe, {

} ¹⁴⁹

In addition, because the Bidding Agreements suppressed advertisements for lower-priced rivals, some consumers have paid more for contact lenses than they would have otherwise. This is so for two reasons. First, some consumers would have purchased from lower-priced sellers in the face of advertisements from lower-priced sellers.¹⁵⁰ 1-800 Contacts itself estimated that it lost \$68,604 per month in sales to rivals when those rivals advertised against search queries for "1-800 Contacts."¹⁵¹ Second, some consumers who were exposed to advertisements from lower-priced sellers would have reduced their cost by seeking a price-match from 1-800 Contacts.¹⁵²

As described earlier, Drs. Athey and Evans have each constructed various models that show a substantial decrease in advertising, and in consumer clicks on rival advertisements, as a

¹⁴⁹ CX0439 ()
(emphasis added). See CX8006 (Evans Report) ¶¶ 188-90; see also *supra* p. 20-21.

¹⁵⁰ See *supra* pp. 19-20.

¹⁵¹ CX0213 (1-800 Contacts internal spreadsheet dated Oct. 17, 2008).

¹⁵² See *supra* pp. 20-21.

result of the Bidding Agreements.¹⁵³ In response, 1-800 Contacts will not offer any alternative approaches, just insubstantial criticisms of the models proffered by Complaint Counsel's experts.¹⁵⁴

3. Market Power Analysis

No finding of market power is necessary in an inherently suspect analysis, or where direct proof of actual effects are shown.¹⁵⁵ However, a third and alternative way to prove the likelihood of harm is by showing that the parties to the challenged agreements possess market power, in combination with a finding that the nature of the restraints make them likely to result in anticompetitive effects.¹⁵⁶ A high market share in a relevant market, plus the presence of high barriers to entry, will support a finding of market power.¹⁵⁷

a. Relevant Market Consists of Online Sales of Contact Lenses in United States

A relevant market is comprised of a relevant product market and a relevant geographic market.¹⁵⁸ This case involves one antitrust product market: the market for online sales of contact lenses. The geographic scope of this market is nationwide, extending to all contact lenses sold online in the United States.

Courts determine the relevant product market by evaluating “the reasonable interchangeability of use or cross-elasticity of demand between the product itself and substitutes

¹⁵³ *See supra* pp. 20-22.

¹⁵⁴ *See, e.g.*, RX7039 (Murphy Report) ¶¶ 173-98; RX0733 (Ghose Report) ¶¶ 149-71.

¹⁵⁵ *In re Realcomp II, Ltd.*, Dkt. No. 9320, 2007 WL 6936319, at *19-20.

¹⁵⁶ *Id.*

¹⁵⁷ *E.g.*, *Microsoft*, 253 F.3d at 51-56; *Fed. Trade Comm'n v. Staples*, 970 F. Supp. 1066, 1081-82, 1086 (D.D.C. 1997) (evidence of market share and entry barriers have commonly been central to market power analysis).

¹⁵⁸ *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

for it.”¹⁵⁹ To make this determination, a court may look to “such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, sensitivity to price changes, and specialized vendors.”¹⁶⁰ Other relevant considerations include whether a company considers other products when making its pricing determinations,¹⁶¹ and any regulations that may limit the ability of end users to use substitute products.¹⁶²

As Dr. Evans will testify, a product market or submarket must be defined taking into account the competitive issue in question.¹⁶³ Here, the market for online sales of contact lenses constitutes a relevant antitrust market because many of the “peculiar characteristics” of online sales of contact lenses – which include pricing, specialized vendors, distribution mechanisms, as well as certain important regulatory barriers – all suggest that there are no reasonably interchangeable substitutes for online sales.

¹⁵⁹ *Id.* at 325; *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *see also* U.S. Dep’t of Justice and Fed. Trade Comm’n, HORIZONTAL MERGER GUIDELINES §4 (2010) (Market Definition) (hereinafter “2010 GUIDELINES”).

¹⁶⁰ *Brown Shoe*, 370 U.S. at 325. *See Fed. Trade Comm’n v. Sysco Corp.*, 113 F.Supp.3d 1, 27 n.2 (D.D.C. 2015) (“The *Brown Shoe* practical indicia may indeed be ‘old school,’ as Sysco’s counsel asserted at oral argument, and its analytical framework relegated ‘to the jurisprudential sidelines. But *Brown Shoe* remains the law, and this court cannot ignore its dictates.”) (internal citations omitted).

¹⁶¹ *See Fed. Trade Comm’n v. Swedish Match*, 131 F. Supp. 2d 151, 164 (D.D.C. 2000); *Fed Trade Comm’n v. Staples*, 970 F. Supp. 1066, 1079-1080 (D.D.C. 1997); *cf. Beatrice Foods Co. v. Fed. Trade Comm’n*, 540 F.2d 303, 309 (7th Cir. 1976) (excluding items from the product market when manufacturers did not consider them when setting their prices).

¹⁶² *See Phillip E. Areeda & Herbert Hovenkamp*, ANTITRUST LAW (hereinafter “Areeda & Hovenkamp”) ¶ 572b; 2010 GUIDELINES § 4.2.2. (example 15, describing where “[c]ustomers in the United States must use products approved by U.S. regulators The relevant product market consists of products approved by U.S. regulators”).

¹⁶³ CX8006 (Evans Report) ¶ 245. *See also, e.g., United States v. Brown Shoe Co.*, 179 F. Supp. 721, 735 (E.D. Mo. 1959) (areas of effective competition “cannot be fixed with mathematical precision,” but instead “must be determined by economic reality”), *aff’d sub nom. Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); 2010 GUIDELINES § 4 (“[r]elevant markets need not have precise metes and bounds”). *Cf. FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 455 (460-61) (1986) (market power serves only as a proxy for determining “the potential for genuine adverse effects on competition”).

Specifically:

- Online customers place a high premium on the convenience of online shopping, home delivery, and fast (and often free) shipping. No in-person visit or consultation is necessary to order contact lenses online, and the customer does not need to leave her home to either pick up her purchase, or for customer service.¹⁶⁴
- Because a prescription is required, customers must go to a brick-and-mortar ECP to get an eye exam and obtain a prescription for contact lenses.¹⁶⁵ Many such consumers buy their first set of contacts from an ECP, and thus, online retailers often can only compete for the “refill” market.¹⁶⁶
- Online retailers with material business tend to have an extensive inventory (tens of thousands SKUs), a fulfillment center, a customer service center, and a scale of operations to develop new customer retention tools.¹⁶⁷ This allows at least the larger online retailers to stock a myriad of lenses, and to fulfill and ship prescriptions rapidly, in contrast to their brick-and-mortar counterparts.¹⁶⁸
- Online retailers’ pricing tends to be significantly below independent ECP pricing, as well as brick-and-mortar pricing, with the exception of membership club

¹⁶⁴ See, e.g., CX8006 (Evans Report) ¶¶ 249-51.

¹⁶⁵ CX8006 (Evans Report) ¶¶ 47-48.

¹⁶⁶ Some, but not most, contact lens wearers purchase their entire inventory from resellers, rather than from an ECP. See CX8006 (Evans Report) ¶¶ 248-49, 251, 253. As Dr. Evans will testify, consumers may “appear to be switching between brick-and-mortar retailers and online retailers because they will make one purchase from an ECP followed by a second purchase from an online retailer,” but “[i]n reality they are choosing the different types of stores under different circumstances.” CX8006 (Evans Report) ¶ 251.

¹⁶⁷ See, e.g., CX8006 (Evans Report) ¶ 250.

¹⁶⁸ *Id.*

stores, such as Costco.¹⁶⁹ Notably, although 1-800 Contacts has a price-match policy, 1-800 Contacts excludes club stores – such as Costco – from that policy.¹⁷⁰

- Online retailers typically do not accept insurance, which distinguishes them from ECPs, thus limiting their reach to consumers who can afford to pay “out of pocket” for contact lenses, and/or who can take on the additional burden of submitting paperwork to insurance companies for reimbursement.¹⁷¹
- Other than 1-800 Contacts,¹⁷² online retailers look primarily at the online channel in setting their pricing and customer service offerings.¹⁷³
- Unsurprisingly, online retailers advertise their products online to customers looking to buy online, and, thus, rely heavily on search advertising. This is because, as described earlier, search advertising reaches users at the precise moment they are ready to buy.¹⁷⁴ This strategy is in stark contrast to independent ECPs (who represent the lion’s share of contact lens sales) and brick-and-mortar

¹⁶⁹ See, e.g., CX0429 (1-800 Contacts Management Presentation, Nov. 2013), at -015; CX9034 (Roush (1-800 Contacts) Dep. Tr.) 151:17-152:11; CX9031 (Schmidt (1-800 Contacts) Dep. Tr.) 142:6-10.

¹⁷⁰ See, e.g., CX9017 (Blackwood (former 1-800 Contacts) Dep. Tr.) 288:9-24; CX9034 (Roush (1-800 Contacts) Dep. Tr.) 151:17-152:11; *id.* at 155:19-157:9; CX9031 (Schmidt (1-800 Contacts) Dep. Tr.) 140:11-16; *id.* at 142:6-10.

¹⁷¹ See, e.g., CX8006 (Evans Report) ¶ 252.

¹⁷² 1-800 Contacts aims to bring consumers from the “offline” ECP channel into the online channel, and aims to price somewhere between 5 and 10 percent below ECPs. See, e.g., CX9032 (Schmidt (1-800 Contacts) Dep. Tr.) 234:18-235:15. Most other online sellers price significantly below 1-800 Contacts. See, e.g., CX0429 (1-800 Management Presentation, Nov. 2013) at -015; CX9034 (Roush (1-800 Contacts) Dep. Tr.) 151:17-152:11.

¹⁷³ See, e.g., CX9039 (Clarkson (AC Lens) Dep. Tr.) 92:14-93:7; CX9014 {
}; CX8003 { }.

¹⁷⁴ See *supra* pp. 10-11.

stores, most of whom either do not advertise online, or spend very little to advertise online.¹⁷⁵

This last point is particularly important because it goes directly to the nature of the restraint and why it supports the definition of an online contact lens retail market. 1-800 Contacts did not enter into Bidding Agreements with the thousands of independent ECPs across the U.S. or with most brick-and-mortar retailers *because* the sales that it was *losing* were to *online retailers* that priced significantly below ECPs and brick-and-mortar outlets, as well as below 1-800 Contacts itself.¹⁷⁶ Thus, many “practical indicia” – including 1-800 Contacts’ own strategy – supports the finding of a relevant product market for the *online* sales of contact lenses.

The evidence will also show that the “hypothetical monopolist test” supports the finding of a relevant product market for online sales of contact lenses. Indeed, consumer switching surveys conducted by 1-800 Contacts in 2014 and by its potential merger partner in 2015¹⁷⁷ suggest that “a hypothetical monopolist of online contact lens retailers could profitably increase price by at least 5 percent over existing prices.”¹⁷⁸

These surveys are consistent with data obtained from a “natural experiment” in which online retailers were forced to raise their prices for a limited time period as a result of several manufacturers’ implementation of a unilateral pricing policy (“UPP”). Specifically, prior to 2014, retailers of contact lenses could charge whatever they wanted for contact lenses they

¹⁷⁵ See, e.g., CX8004 (Salas (Costco) Dec.) ¶ 7.

¹⁷⁶ See *supra* Section II.B (describing evolution of 1-800 Contacts’ restraints against competitors).

¹⁷⁷ In 2015, 1-800 Contacts sought to purchase {
}.

¹⁷⁸ CX8006 (Evans Report) ¶ 269; see *id.* at ¶¶ 263-68 (citing CX1162 ({
}) and CX1449 {
}).

purchased from major manufacturers. In 2014, major contact lens manufacturers implemented UPPs, which prohibited retailers from reselling certain products at prices below specified levels. Because the UPP set a price floor for covered products, discount retailers (online retailers and club stores) had to increase their prices substantially, by roughly 20-25 percent, on many of these products. (By contrast, with the exception of club stores, brick-and-mortar ECPs were already pricing close to or above levels required by UPP, so their pricing did not change substantially.) Because the UPP-mandated price increases were *profitable*, this natural SSNIP test shows that brick-and-mortar retailers, other than club stores,¹⁷⁹ could not be within the relevant market. In other words, because consumers did not substitute away from online retailers in the face of a 20 percent price increase, they are unlikely to switch to brick-and-mortar retailers in the face of significantly smaller price increases.¹⁸⁰

Finally, 1-800 Contacts' application of its own price-match policy supports the finding of a relevant market for the online sales of contact lenses. 1-800 Contacts' price-match policy is targeted at rival online retailers, not at ECPs and brick-and-mortar stores. Indeed, 1-800 Contacts' price-match policy explicitly excludes club stores – the only brick-and-mortar stores that consistently offer lower prices than 1-800 Contacts.¹⁸¹ Thus, although 1-800 Contacts competes with both brick-and-mortar and online retailers, its pricing is constrained by *online* retailers. As such, a product market that consists of online sales is the appropriate relevant antitrust market in this case.

¹⁷⁹ Club stores are also not part of the relevant market, for reasons described *supra* pp. 42-45 and *infra* in text below.

¹⁸⁰ See CX8006 (Evans Report) ¶¶ 270-275.

¹⁸¹ CX8006 (Evans Report) ¶¶ 276-77. See, e.g., CX9017 (Blackwood (former 1-800 Contacts) Dep. Tr.) 288:9-24; CX9034 (Roush (1-800 Contacts) Dep. Tr.) 151:17-152:11; *id.* at 155:19-157:9; CX9031 (Schmidt (1-800 Contacts) Dep. Tr.) 140:11-16; *id.* at 142:6-10.

1-800 Contacts will likely assert that the market should not be limited to online sales because 1-800 Contacts also competes with ECPs. There is no dispute that 1-800 Contacts competes with ECPs and other brick-and-mortar retailers, in the sense that it actively tries to pull consumers from the “offline” world into the online one.¹⁸² But that does not disprove the existence of a separate market for online sales, as proved by the extensive evidence described above.¹⁸³

A relevant geographic market is the “area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies.”¹⁸⁴ Contact lenses are regulated by the Food and Drug Administration, and, with a valid prescription,¹⁸⁵ consumers can purchase contact lenses from any online seller operating in the United States. Therefore, the relevant geographic market is national in scope, encompassing all contact lens products sold online in the United States.

b. Collectively, The Settling Retailers Market Share Exceeds 80 Percent

In evaluating market share in a horizontal agreement case, courts look to the collective market share of the parties to the agreement or agreements.¹⁸⁶ Here, the collective market share of the parties to the Bidding Agreements is overwhelming. 1-800 Contacts’ market share is

¹⁸² See *supra* p. 11 & n. 30.

¹⁸³ The fact that, for purposes of analyzing 1-800 Contacts’ Bidding Agreements, the relevant market is for online contact lens sales also does not preclude a different relevant market in a completely different type of case. For example, the appropriate market in which to analyze a merger between two of the major contact lens manufacturers might look very different than the market in which it would be appropriate to analyze horizontal restraints among a particular category of sellers.

¹⁸⁴ *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 359 (1963).

¹⁸⁵ See, e.g., CX8006 (Evans Report) ¶ 47.

¹⁸⁶ E.g., *Realcomp II, Ltd.*, Dkt. No. 9320, slip. Op. at 19-20.

approximately 53 percent, and the other parties collectively representing an additional 30 percent of the market.¹⁸⁷

c. Substantial Barriers to Entry Exist

The presence of barriers to entry, in combination with high market share, supports a finding of market power.¹⁸⁸ Here, barriers to selling contact lenses online are substantial.

According to 1-800 Contacts' business documents, these barriers include, among other things,

{

}¹⁸⁹

1-800 Contacts has recognized that {

}¹⁹⁰ 1-

800 Contacts' Bidding Agreements themselves pose an additional (and substantial) barrier to entry: by systematically roping each (new) online competitor into a Bidding Agreement, 1-800 Contacts directly threatened new entrants' ability to introduce their own brands to consumers.¹⁹¹

¹⁸⁷ See CX8006 (Evans Report) ¶ 54. See also, e.g., CX1449 {

¹⁸⁸ See ANTITRUST LAW DEVELOPMENTS (7th ed. 2012), at 71-72. Entry barriers "are factors (such as regulatory requirements) that prevent new rivals from timely responding to an increase in price above the competitive level." *United States v. Microsoft*, 253 F.3d 34, 51 (D.C. Cir. 2001).

¹⁸⁹ CX1343 { }.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* { }. See also *supra* p. 34 & n.125 (describing how advertising against 1-800 Contacts' trademarked queries can be effective in promoting a rival's brand name).

D. 1-800 Contacts' Defenses

Once Complaint Counsel establishes a *prima facie* case of competitive harm, the burden shifts to 1-800 Contacts to prove that this harm is outweighed by cognizable and plausible procompetitive efficiencies, if any. 1-800 Contacts will not be able to meet its burden.

1. Trademark Defenses¹⁹²

1-800 Contacts' central justification for its Bidding Agreements is that they protect its trademark property rights by preventing "infringing" conduct by rival online sellers of contact lenses. But the Bidding Agreements go well beyond prohibiting "infringing" conduct. Indeed, the only court to directly opine on such an agreement was greatly troubled by its apparent breadth:

[1-800 Contacts] does not seek merely to preclude usage of its trademark. Instead, it wants to obliterate any other competitor advertisement from

¹⁹² During the course of this litigation, 1-800 Contacts has raised the additional trademark defense of trademark dilution. Notably, of the 13 complaints filed, only two make *any* reference to federal trademark dilution (CX1615 (complaint against Coastal); CX1614 (complaint against Vision Direct)) and one to common law dilution (CX1622 (complaint against Lensworld)). Trademark dilution comes in two flavors: "blurring" and "tarnishment." Neither has any relevance to 1-800 Contacts' claims against rival contact lens sellers, which may explain why 1-800 Contacts itself declined to allege it in the vast majority of complaints it filed against rivals. In both types of dilution claims, the key is whether the defendant has adopted an *identical* or *substantially similar name* to the plaintiff's trademark. *See, e.g., Dallas Cowboys Football Club v. Am.'s Team Properties*, 616 F. Supp. 2d 622, 643 (N.D. Tex. 2009) (finding dilution where the defendant adopted plaintiff's "America's Team" trademark to identify its own goods). We are aware of no court that has found trademark dilution in circumstances such as these, where no rival has adopted a name that is identical or substantially similar to 1-800 Contacts. CX8014 (Tushnet Report) ¶ 91. *See generally id.* ¶¶ 87-96. As noted earlier, 1-800 Contacts must have recognized this point, as it did *not* raise dilution claims in the vast majority of its underlying complaints. To defend its agreements *today* on grounds that it was protecting itself against conduct it never alleged *at the time* suggests that the defense is clearly pretextual, and should be rejected.

1-800 Contacts also broadly raises state trademark, unfair competition, and false advertising claims. *See generally* RX0734 Hogan Report ¶¶ 127-35. Although 1-800 Contacts did allege such claims against several rivals in its underlying complaints, 1-800 Contacts did not make any allegations under those claims that were independent of its trademark infringement claims. Moreover, in the only state trademark and unfair competition claim that 1-800 Contacts litigated against a rival, 1-800 Contacts lost the case. *See Lens.com*, 722 F.3d 1229 (10th Cir. 2013). Further illustrating how closely these claims are related, Respondent's expert testified that he was unaware of *any* court that had ever *rejected* liability for a trademark infringement claim, while simultaneously *granting* liability on an unfair competition claim. CX9047 (Hogan Dep. Tr.) 297:13-23. Thus, when 1-800 Contacts defends its settlement agreements based on state trademark, unfair competition, or false advertising claims, it is important to understand that *all of these claims* are subsumed by its trademark infringement claims, and are not "independent" grounds of defense.

appearing on a search-results page when a consumer types in ‘1800Contacts’ as a search term or some variation of it. . . . *A trademark right does not grant its owner the right to stamp out every competitor advertisement.*¹⁹³

a. Overview of Trademark Law

Because 1-800 Contacts asserts several antitrust defenses derived from trademark law, we begin with a brief introduction to trademark law, and, in particular, the “initial interest confusion” doctrine.

A trademark is a word, symbol, or phrase, used to identify a particular seller’s products and to distinguish them from the products of another seller.¹⁹⁴ Use of trademarks makes it easier for consumers to identify the *source* of a product and gives manufacturers an incentive to invest in developing goodwill. Trademark law furthers these dual goals by protecting uses of trademarks that provide consumers with useful information, while prohibiting certain uses that diminish the informative value of marks.¹⁹⁵

In particular, trademarks seek to prevent consumer confusion “*as to the source, affiliation, or sponsorship* of [a company’s] products or services.”¹⁹⁶ Thus, if consumers are *not* confused as to the *source, affiliation, or sponsorship* of the goods in question, there can be *no* trademark infringement.¹⁹⁷

¹⁹³ *Lens.com*, 755 F. Supp. 2d at 1188.

¹⁹⁴ 15 U.S.C. §1127.

¹⁹⁵ CX8014 (Tushnet Report) ¶¶ 7, 12-17; RX0734 (Hogan Report) ¶¶ 18, 20-22.

¹⁹⁶ *Fetzer Co. v. House of Vacuums*, 381 F.3d 477, 483 (5th Cir. 2004) (citing 15 U.S.C.A. § 1114(1); *id.* § 1125(a)).

¹⁹⁷ *See Fetzer*, 381 F.3d at 483. *See also, e.g.,* CX8014 (Tushnet Report) ¶¶ 19, 68, 72 (“Ultimately, to answer a question about actionable confusion, it is important to ask questions that reliably map onto the protections provided by trademark law: primarily, protection against consumer confusion about source or sponsorship. . . . Other connections, other sources of confusion, and other kinds of confusion are outside the purview of trademark law – and do not have the same harmful impact on competition or on consumers.”).

In that regard, a trademark is fundamentally different from a patent. Whereas a patent confers upon the patentee the exclusive right to make, use, or sell the patented invention, a trademark only provides its owner the right to prevent *confusing* uses of the mark.¹⁹⁸

b. Initial Interest Confusion

Many circuits recognize “initial interest confusion” as an actionable species of trademark infringement.¹⁹⁹ Initial interest confusion arises where a defendant uses the plaintiff’s trademark in a manner calculated to capture initial consumer attention, and diverts the now-confused consumer to the defendant’s store (or website), “even though no actual sale is finally completed as a result of the confusion.”²⁰⁰ In other words, the difference between initial interest confusion and a traditional trademark infringement claim is one of timing: in a traditional trademark claim, the consumer has *purchased* the product or service whose source, sponsorship, or affiliation she is confused by, whereas in an initial interest confusion claim, the consumer’s confusion has dissipated *prior* to the point of sale. In either case, however, the key question is whether a consumer is confused as to the source, sponsorship, or affiliation of the defendant’s product or service.

A textbook example of initial interest confusion involves a deceptive highway billboard advertising a nearby video rental store:

¹⁹⁸ Trademark law grants exclusivity as to the use of the mark to *identify* the trademark holder’s product, *e.g.*, a rival soda manufacturer cannot adopt the name “Coca-Cola” to identify itself. However, no other exclusivity attaches to the “use” of Coca-Cola’s trademark. In other words, a rival soda manufacturer (*e.g.*, Pepsi) may “use” the name “Coca-Cola” in one of its own advertisements (*e.g.*, “Take the Pepsi Challenge. You’ll like us better than Coke.”).

¹⁹⁹ However, the Fourth Circuit has explicitly rejected the doctrine. *See Lamparello v. Falwell*, 420 F.3d 309, 316 (4th Cir. 2005) (“[W]e have never adopted the initial interest confusion theory; rather, we have followed a very different mode of analysis, requiring courts to determine whether a likelihood of confusion exists by ‘examin[ing] the allegedly infringing use in the context in which it is seen by the ordinary consumer’” (quoting *Anheuser-Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316, 319 (4th Cir.1992)). The doctrine’s status is not clear in several other circuits.

²⁰⁰ *Network Automation, Inc. v. Advanced System Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011) (quoting *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1018 (9th Cir. 2004)).

Suppose West Coast’s competitor (let’s call it “Blockbuster”) puts up a billboard on a highway reading – “West Coast Video: 2 miles ahead at Exit 7” – where West Coast is really located at Exit 8 but Blockbuster is located at Exit 7. Customers looking for West Coast’s store will pull off at Exit 7 and drive around looking for it. Unable to locate West Coast, but seeing the Blockbuster store right by the highway entrance, they may simply rent there. Even consumers who prefer West Coast may find it not worth the trouble to continue searching for West Coast since there is a Blockbuster right there. Customers are not confused in the narrow sense: they are fully aware that they are purchasing from Blockbuster and they have no reason to believe that Blockbuster is related to, or in any way sponsored by, West Coast. Nevertheless, the fact that there is only initial consumer confusion does not alter the fact that Blockbuster would be misappropriating West Coast’s acquired goodwill.²⁰¹

All cases finding liability under the initial interest confusion doctrine address conduct that misdirects consumers by creating a *false association* with the trademark holder.²⁰² By contrast, where a competitor wins sales or diverts customers through comparative advertising, particularly where the ad is “clearly labeled” as to its source, there is no actionable confusion.²⁰³ In other words, a plaintiff can win an initial interest confusion case only by proving that a significant percentage of consumers are confused into thinking that the plaintiff is either the source of the defendant’s goods, or that the defendant’s goods are sponsored by, or affiliated with, the plaintiff.²⁰⁴ The fact that a consumer has merely been *diverted* is not actionable.²⁰⁵

²⁰¹ *Brookfield Commc’ns, Inc. v. West Coast Entm’t Corp.*, 174 F.3d 1036, 1064 (9th Cir. 1999) (citations omitted). *Brookfield* applied the I.I.C. doctrine to so-called “metatags” (or invisible HTML code formerly used to identify the content of websites), but did not address search advertising.

²⁰² *E.g., Storus Corp. v. Aroa Mkting, Inc.*, 2008 WL 449835 (N.D. Cal. Feb. 15, 2008), at *3; *Victoria’s Secret Stores v. Artco Equip. Co., Inc.*, 194 F.Supp. 2d 704, 729 (S.D. Ohio 2002).

²⁰³ *Network Automation*, 638 F.3d at 1148 (expressly protecting comparative advertising); 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25A:7 (4th ed. 2016) (courts caution “against stretching the initial confusion theory from confusion to mere diversion. That is ‘distracting’ or ‘diverting’ the web user by the search engine displaying ads for other sources is not the same as ‘confusing’ the web shopper.”); *see also Hearts on Fire Co. v. Blue Nile, Inc.*, 603 F. Supp. 2d 274, 284-288 (D. Mass. 2009) (denying defendant’s motion to dismiss at pleading stage, but noting that more than mere keyword bidding is necessary for confusion to be likely; “[m]ere diversion, without any hint of confusion, is not enough”).

²⁰⁴ *See* RX0734 (Hogan Report) ¶¶ 22, 37 (trademark law protects against confusion relating to *origin* of good or service); CX8014 (Tushnet Report) ¶¶ 12-19 (same).

c. Courts Have Rejected Liability Based *Solely* on Keyword Bidding, Including Those Claims Brought by 1-800 Contacts Itself

In numerous cases, trademark owners have brought trademark infringement claims where a rival has bid on a trademarked keyword in a search advertising auction in order to trigger an advertisement for the rival's product. Over the past decade, courts have consistently held that bidding for trademarked keywords *alone* is insufficient to establish a likelihood of confusion, and that an initial interest confusion analysis must take into account the content (*i.e.*, text) and appearance of the ad, as viewed by the user on the SERP.

For example, in *Playboy Enterprises, Inc. v. Netscape Communications Corp.* (“*Netscape*”),²⁰⁶ the Ninth Circuit held that Netscape could be held liable for selling the trademarked term “Playboy” to rival internet advertisers *where the ads that Netscape displayed were not labeled with the name of the rival advertiser*. Judge Berzon concurred, writing separately to clarify the state of initial interest confusion and to disavow the notion that mere diversion can constitute infringement:

Brookfield might suggest that there could be a Lanham Act violation *even if* the banner advertisements were clearly labeled, either by the advertiser or by the search engine. I do not believe that to be so. So read, [this] holding in *Brookfield* would expand the reach of initial interest confusion from situations in which a party is initially confused to situations in which a party is never confused. *I do not think it is reasonable to find initial interest confusion when a consumer is never confused as to source or affiliation*, but instead knows, or should know, from the outset that a product or web link is not related to that of the trademark holder because the list produced by the search engine so informs him. *There is a big difference between hijacking a customer to another website by making the customer think he or she is visiting the trademark holder's website (even if only briefly)*, which is what may be happening in this case when the banner advertisements are not labeled, *and just distracting a potential customer with*

²⁰⁵ *Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 354 F.3d 1020, 1034-35 (9th Cir. 2004) (Berzon, J., concurring).

²⁰⁶ 354 F.3d. 1020 (9th Cir. 2004).

*another choice, when it is clear that it is a choice. True, when the search engine list generated by the search for the trademark ensconced in a metatag comes up, an internet user might choose to visit westcoastvideo.com, the defendant's website in Brookfield, instead of the plaintiff's moviebuff.com website, but such choices do not constitute trademark infringement off the internet, and I cannot understand why they should on the internet.*²⁰⁷

In *GEICO v. Google, Inc.*,²⁰⁸ the Eastern District of Virginia further clarified this principle. There, the court considered a claim that a rival's search advertising displayed in response to keyword searches for the GEICO trademark caused confusion as to sponsorship or affiliation.²⁰⁹ The court held that GEICO "failed to establish a likelihood of confusion stemming from Google's use of GEICO's trademark as a keyword . . . [but, the evidence did] establish a likelihood of confusion regarding those Sponsored Links in which the trademark GEICO appears either in the heading or text of the ad."²¹⁰

Since *Netscape* and *GEICO*, courts have repeatedly affirmed the principle that clear labeling as to source or affiliation greatly eliminates confusion in the context of search advertising. Indeed, in 2013, the Tenth Circuit upheld a district court's rejection of 1-800's own trademark infringement claim against a rival based on this principle.²¹¹ The Tenth Circuit in *1-800 Contacts v. Lens.com* concluded:

²⁰⁷ *Id.* at 1034-35 (Berzon, J., concurring) (emphasis in original).

²⁰⁸ No. 1:04 CV 507, 2005 WL 1903128 (E.D. Va. Aug. 8, 2005).

²⁰⁹ *Id.* at *4 ("In the Internet context, [initial interest confusion] describes the distraction or diversion of a potential customer from the Web site he was initially seeking to another site, based on the user's belief that the second site is associated with the one he originally sought.") (citing *Brookfield*, 174 F.3d at 1064; *Bihari v. Gross*, 119 F. Supp. 2d 309, 320-21 (S.D.N.Y. 2000)).

²¹⁰ *GEICO*, 2005 WL 1903128, at *7 (emphasis added); see also *id.* at *2 n.5 ("Google has always allowed trademark holders to request that their trademarks not appear in Sponsored Links' headings or text. Thus, one point of dispute . . . concerns when GEICO first effectively requested that its marks be blocked in this fashion and whether Google responded appropriately.").

²¹¹ See *1-800 Contacts, Inc. v. Lens.com, Inc.*, 755 F. Supp. 2d 1151, 1173-74 (D. Utah 2010) (holding that use of trademarked keywords, divorced from the text of the resulting ads, could not result in a likelihood of confusion), *aff'd*, 722 F.3d 1229.

[T]he substantial dissimilarity between [the parties' marks] can be expected to greatly reduce the chance that the consumers will think that the parties are related enterprises; the similarity of the search term and 1-800's mark is of minor relevance.... [An] inference [that a trademark owner is the source of another webpage] is an unnatural one when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for.²¹²

Most recently, in *Multi Time Machine, Inc. v. Amazon.com, Inc.*,²¹³ the Ninth Circuit again concluded that bidding on trademarked keywords cannot constitute infringement unless the *content* of the ad gives rise to confusion. In that case, a manufacturer of military wristwatches, MTM, challenged Amazon's practice of responding to user queries containing MTM's trademark with search results containing products from rival watch manufacturers. The Ninth Circuit affirmed a grant of summary judgment for defendant Amazon because its search results clearly labeled the manufacturers of the products displayed: "Because Amazon's search results page *clearly labels the name and manufacturer of each product* offered for sale . . . no reasonably prudent consumer accustomed to shopping online would likely be confused as to the source of the product."²¹⁴ Thus, *Amazon.com* (like the cases before it) directs that, in assessing the likelihood that search advertising results in initial interest confusion, a court must consider both the use of the keyword *and* the text, appearance, and context of the resulting advertisement.²¹⁵

²¹² *1-800 Contacts*, 722 F.3d. at 1245 (following *Network Automation*, 638 F.3d at 1154); accord *CollegeSource, Inc. v. AcademyOne, Inc.*, 597 F. App'x 116, 130 (3d Cir. 2015) (unreported decision affirming grant of summary judgment for defendant AcademyOne because purchase of rival CollegeSource's trademarks did not confuse users).

²¹³ 804 F.3d 930 (9th Cir. 2015) (hereinafter "*Amazon.com*").

²¹⁴ *Id.* at 933 (emphasis added); see also *id.* at 936 (The "particularly important" factor in the analysis is "the labeling and appearance of the advertisements and the surrounding context on the screen displaying the results page.") (citing *Netscape* and *Network Automation*).

²¹⁵ See, e.g., *BPI Sports*, 2016 WL 695596, at *5 ("[T]he use of a keyword encompassing a competitor's terms does not necessarily produce an infringing advertisement; it is the content of the advertisement and/or the manner in which the mark is used that creates initial interest confusion."); *USA Nutraceuticals Group, Inc. v. BPI Sports, LLC*, No. 15-CIV-80352, 2016 WL 695596, at *5 (S.D. Fla. Feb. 22, 2016) (noting that the plaintiff had pointed to "no case indicating that the simple purchase of advertising keywords, without more, may constitute initial interest confusion").

1-800 Contacts proffers a trademark expert who cites dozens of cases that purportedly support the proposition that courts have found liability for bidding on trademarked keywords alone – or that such claims are at least “actionable.”²¹⁶ But, as 1-800 Contacts’ expert conceded at his deposition, almost none of those cases address the legality of keyword bidding standing alone.²¹⁷ Rather, they involve egregious conduct such as the counterfeit sale of products (*e.g.*, the sale of fake Louis Vuitton bags, advertised as Louis Vuitton bags);²¹⁸ defendants adopting plaintiffs’ trademarked names as their own names (*e.g.*, a foot insole manufacturer calling its product “Happy Feet” while competing with the plaintiff, another foot insole manufacturer with a trademarked product called “Happy Feet”);²¹⁹ the unauthorized sale of plaintiffs’ trademarked goods, along with advertisements that explicitly refer to such goods (*e.g.*, plaintiff’s Australian Gold suntan lotion being unlawfully sold by a retailer who advertises “Australian Gold” suntan lotion on its websites);²²⁰ or the use of plaintiffs’ trademarks in the bolded, underlined headings of advertisements in response to searches for the plaintiffs’ trademarks (*e.g.*, in response to a

²¹⁶ See RX0734 (Hogan Report) ¶¶ 104-08, 149-53. Notably, a majority of these cases are private settlement agreements (not litigated cases) and consent judgments entered by a court, where private settlement agreements have simply been submitted to the court for approval. Other cases cited by Mr. Hogan involve default judgments, where no litigation of the issue occurred. Finally, other cases cited are 12(b)(6) motions, where no liability was ultimately found. *See id.*

²¹⁷ See, *e.g.*, CX9047 (Hogan Dep. Tr.) 130:7-17; 130:21-131:10; 135:7-19; 140:8-18; 143:11-20; 144:4-13; 148:23-149:4. Two cases cited by Mr. Hogan address only keyword bidding, but these cases were not litigated to final judgment. See, *e.g.*, *FragranceNet.com, Inc. v. Les Parfums, Inc.*, 672 F. Supp. 2d 328 (E.D.N.Y. 2009) (keyword bidding complaint; motion to dismiss denied on other grounds); *Lbf Travel, Inc. v. Fareportal, Inc.*, 2014 WL 5671853, at *9 (S.D.N.Y. Nov. 5, 2014) (district judge did not rule on keyword infringement claim). See also CX8014 (Tushnet Report) ¶¶ 35-36 (describing cases).

²¹⁸ *Louis Vuitton Mallatier, S.A. v. Abags.co.UK*, 2015 WL 11197741 (S.D. Fla. Feb. 27, 2015). See also CX8014 (Tushnet Report) ¶ 76 (describing counterfeiting cases).

²¹⁹ *Happy Feet USA, Inc. v. Serenity “2000” Corp.*, No. 09-cv-1832 (M.D. Fla. Mar. 16, 2010). See also CX8014 (Tushnet Report) ¶ 78 (describing cases, including *Happy Feet*, in which defendants use plaintiffs’ marks to name their own products).

²²⁰ *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228 (10th Cir. 2006). See also CX8014 (Tushnet Report) ¶ 42 (describing cases, including *Australian Gold*, in which defendants are unauthorized distributors of plaintiffs’ trademarked products).

search for the law firm “Binder & Binder,” defendant’s ad is displayed, with the bolded, underlined headline “**Binder & Binder**”).²²¹ The unassailable reality is that 1-800 Contacts can point to “*no case* indicating that the simple purchase of advertising keywords, without more, may constitute initial interest confusion.”²²²

d. 1-800 Contacts Fundamentally Misapplies Trademark Law

1-800 Contacts contends that users whose search queries include a 1-800 Contacts trademark *expect* to see only advertisements for 1-800 Contacts, and therefore are confused by the display of a rival ad, thinking it came from 1-800 Contacts, or was sponsored by, or affiliated with 1-800 Contacts.²²³ But this argument was expressly rejected in 1-800 Contacts’ litigation against Lens.com. There, the court explicitly held that a rival’s ads were *not* confusing simply

²²¹ *Binder v. Disability Group, Inc.*, 772 F. Supp. 2d 1172 (C.D. Cal. 2011). *See also* CX8014 (Tushnet Report) ¶ 39 (describing cases, including *Binder*, stemming from confusing uses of trademarks in text).

²²² *USA Nutraceuticals Group, Inc. v. BPI Sports, LLC*, No. 15-CIV-80352, 2016 WL 695596, at *5 (S.D. Fla. Feb. 22, 2016) (emphasis added). *See also Acad. Of Motion Picture Arts & Scis. V. GoDaddy.com, Inc.*, 2015 U.S. Dist. LEXIS 120871, *150 (C.D. Cal. Sept. 10, 2015) (“There is a growing consensus in the case authorities that keyword advertising does not violate the Lanham Act.”). On the other hand, during this time frame, dozens of courts have rejected keyword bidding claims. *See* CX8014 (Tushnet Report) ¶¶ 25-28 (collecting cases).

Indeed, despite citing dozens of cases in his report, Mr. Hogan conceded at his deposition that he could think of only two (*Australian Gold* and *Soilworks*) in which he believed that liability has been found *solely* on the basis of keyword bidding. CX9047 (Hogan Dep. Tr.) 129:1-6. He is wrong on both counts. As described in text, *Australian Gold*, 436 F.3d 1228 (10th Cir. 2006), concerned a suit against an unauthorized internet distributor of a line of tanning products, which falsely represented its internet store was an authorized distributor. The Tenth Circuit expressly held that the problem was the false claims, or “diversion of the prospective customer’s interest to a source that he or she *erroneously believes is authorized*.” *Id.* at 1239 (emphasis added). Moreover, notwithstanding outright misrepresentations, the injunction affirmed by the Tenth Circuit “*does not* address purchasing the plaintiffs’ trademarks as keywords.” *Lens.com, Inc.*, 755 F. Supp. 2d at 1172 (citing *Australian Gold, Inc. v. Hatfield*, No. 5:02-cv-143, at 6 (W.D. Okla. Jul. 18, 2003)) (emphasis added). And in *Soilworks*, 575 F. Supp. 2d 1118 (D. Ariz. 2008), an Arizona district court found initial interest confusion where the defendant used the plaintiff’s “Soil-Sement” trademark to identify defendant’s products on defendant’s website. Moreover, the reasoning of *Soilworks* (a district court decision from 2008) was superseded by the Ninth Circuit’s subsequent decision in *Network Automation*, 638 F.3d 1137 (9th Cir. 2011) (finding no likelihood of confusion, and noting importance of labeling and appearance of advertisements and the surrounding context on the screen displaying the results page).

²²³ *See, e.g.*, CX9017 (Blackwood (former 1-800 Contacts) Dep. Tr.) 284:12-285:21 (when user types in search term for “1-800 Contacts” the user might be confused by resulting ads that appear for competing firms because the user “actually typed the name of the brand . . . into the Google search bar,” which creates the *expectation* that the user will get information about 1-800 Contacts, as compared to user’s expectation when “generic term” like “contact lenses” is searched for).

because they were displayed in response to a search query for “1-800 Contacts.”²²⁴ Other courts addressing infringement claims based on trademarked keyword bidding have uniformly reached the same conclusion: consumers not only understand that searches will bring ads from multiple companies, but have come to expect this variety.²²⁵

e. 1-800 Contacts Has Produced No Plausible Evidence of Confusion

Apart from a highly flawed survey commissioned by 1-800 Contacts specifically for the present litigation (discussed below), 1-800 Contacts has offered no evidence – either in its *Lens.com* litigation,²²⁶ during the Commission’s investigation,²²⁷ or during discovery in this

²²⁴ *Lens.com*, 722 F.3d at 1245-49 (“Perhaps in the abstract, one who searches for a particular business with a strong mark and sees an entry on the results page will naturally infer that the entry is for that business. *But that inference is an unnatural one* when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for.”) (emphasis added).

²²⁵ *See, e.g., Toyota Motor Sales U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1179 (9th Cir. 2010) (“When a domain name making nominative use of a mark does not actively suggest sponsorship or endorsement, the worst that can happen is that some consumers may arrive at the site uncertain as to what they will find. But in the age of FIOS, cable modems, DSL and T1 lines, reasonable, prudent, and experienced internet consumers are accustomed to such exploration by trial and error. They skip from site to site, ready to hit the back button whenever they’re not satisfied with a site’s contents. They fully expect to find some sites that aren’t what they imagine based on a glance at the domain name or search engine summary.”).

²²⁶ A study commissioned by 1-800 Contacts in its litigation against *Lens.com* was rejected by the court as unreliable. *See Lens.com, Inc.*, 722 F.3d. at 1246-47.

²²⁷ During the Commission’s investigation, 1-800 Contacts proffered a 2013 study conducted by researchers Franklin & Hyman to justify its position. 1-800 Contacts claims that the study shows that when consumers use trademarks as search terms, they *want* to see only ads for the trademarked product. David J. Franklin & David A. Hyman, *Trademarks as Search Engine Keywords: Much Ado About Something?* 26 HARV. J.L. & TECH. 481, 532 (2013) (“65% of survey respondents stated that, ‘when they use trademarks as a search term they are only interested in the brand-name product.’”). Notably, this question was asked of users in the abstract, entirely divorced from the search results process. As Professor Tushnet observes, this survey does not tell us about what a user’s actual intent when she sits down to search is, nor how her intent changes through the searching process. *See* CX8014 (Tushnet Report) ¶¶ 52-59 (describing Franklin & Hyman study as being consistent with other studies that show the “heterogeneity of searches, even brand-specific searches”). Moreover, the survey tells us nothing about whether, regardless of the user’s initial intent, the user found additional information helpful. Even if the study actually stood for the proposition that users only *want* to see ads for the trademarked product (it does not), this is irrelevant. The legal standard is likelihood of confusion. On that point, the study found low levels of confusion caused by rival advertisements. Franklin & Hyman, *supra*, at 525-26 (finding that between 10% and 14% of respondents believed the rival advertisements had a relationship with the trademark holder).

litigation²²⁸ – that users are confused by seeing rival ads whenever their search query contains a 1-800 Contacts trademark. For the purposes of this litigation, 1-800 Contacts commissioned a survey, conducted by Dr. Kent Van Liere, that purports to show such confusion. But it does nothing of the sort. Dr. Van Liere’s survey purports to determine whether a user entering a search query for “1-800 Contacts” *expects* to see *only* ads for 1-800 Contacts, and will therefore be confused by ads for firms *other than* 1-800 Contacts. To answer that question, Dr. Van Liere should have isolated the (hypothesized) causal factor. That is, Dr. Van Liere should have tested whether users who were *not* confused by ads displayed in response to a generic search query, like “contact lenses,” *were* confused by the same ads when they were displayed in response to a search query for “1-800 Contacts.”²²⁹ But he did not do that.

Instead, Dr. Van Liere had *all* respondents search for “1-800 Contacts,” but presented test respondents with one of two different SERPs: one with several ads, and one without any ads.²³⁰

²²⁸ 1-800 Contacts’ employees (current and former) have no personal knowledge of users being confused by a rival ad’s source sponsorship, or affiliation. *See, e.g.*, CX9017 (Blackwood (former 1-800 Contacts) Dep. Tr.) 276:16-20; CX9031 (Schmidt (1-800 Contacts) Dep. Tr.) 101:25-102:6; CX9034 (Roush (1-800 Contacts) Dep. Tr.) 69:14-70:13. 1-800 Contacts’ own trademark expert conceded that he was provided with no evidence of confusion by 1-800 Contacts. *See* CX9047 (Hogan Dep. Tr.) 68:9-69:7 (testifying that he was only provided with screen shots attached to various complaints filed by 1-800 Contacts). The settling parties are similarly unaware of any evidence that users were confused by their ads. *See, e.g.*, CX9003 (Clarkson (AC Lens IH Tr.) 105:9-106:9; CX9000 {
}; CX8001 {
}.

²²⁹ This theory has been explicitly spelled out by 1-800 Contacts, not just in complaints against rivals (*see, e.g.*, CX1619 (Complaint, *1-800 Contacts, Inc. v. Memorial Eye, PA*, No. 2:08-cv-00983-DN (Dec. 23, 2008) ¶ 20 (“The www.shipmycontacts.com website advertisements are triggered upon a search for 1800CONTACTS and thus, use of the 1800 CONTACTS trademark as a triggering keyword to display and promote Memorial Eye’s directly competitive goods and services. In essence, Memorial Eye is using the 1-800 CONTACTS Marks to trick consumers into visiting the Memorial Eye Website.”)), but also by its employees in their deposition and investigational hearing testimony (*see, e.g.*, CX9017 (Blackwood (former 1-800 Contacts) Dep. Tr.) 284:12-285:21 (testifying that the identical ads could be confusing when returned in response to a search for “1-800 Contacts,” but not confusing when returned in response to a search for “contact lenses”); and by 1-800 Contacts’ own experts. *See, e.g.*, CX9047 (Hogan Dep. Tr.) 132:23-133:22 (“Well, I think that’s the very premise of these cases is that by inducing a search engine to serve up a sponsored link at the top of a page in response to a search for 1-800 Contacts, these advertisers were in effect communicating to consumers that they were 1-800 Contacts or were affiliated or endorsed or sponsored by 1-800 Contacts. . . .”).

²³⁰ RX0735 (Van Liere Report) ¶ 12.

By not isolating the search term as the relevant variable, Dr. Van Liere’s survey could not possibly show whether users who type in the search term “1-800 Contacts” *expect* to see only ads for 1-800 Contacts, and are therefore confused by ads displayed for firms that are *not* 1-800 Contacts.²³¹ By not controlling for the correct variable, Dr. Van Liere failed to answer the question central to each of 1-800 Contacts’ trademark infringement claims.

Moreover, by failing to isolate *any single variable* in his “test” or “control” groups, Dr. Van Liere’s survey fails to show what, if anything, may have been confusing to users in either his “test” or “control” groups.²³² In short, Dr. Van Liere not only fails to answer the question asked, he fails to answer any question at all. Therefore, Dr. Van Liere’s survey should be disregarded by this Court.²³³

By contrast, Complaint Counsel’s expert Dr. Jack Jacoby will testify regarding his conclusion, based on the survey he conducted, that confusion resulting from the mere appearance of a rival ad in response to a search for the trademarked term “1-800 Contacts” is *de minimis*.²³⁴ Unsurprisingly, Dr. Jacoby’s conclusions are entirely consistent both with the Tenth Circuit’s *Lens.com* decision, which found that confusion was not caused by the mere presence of a non-

²³¹ See CX8011 (Jacoby Rebuttal Report) ¶¶ 3-8, 11-15 (describing the proper variable to be isolated as the search term).

²³² See CX8011 (Jacoby Rebuttal Report) ¶¶ 9, 16-19, 30 (observing that Dr. Van Liere’s “control” and “test” conditions had numerous differences).

²³³ Dr. Van Liere’s survey contained multiple additional problems, including his failure to replicate market conditions by, among other things, removing 1-800 Contacts’ *own* advertisement in the SERP, which also removes an obvious alternative explanation for the reported confusion levels in his “test” condition; his use of a search engine with minimal real-world market share, and his failure to appropriately populate or weight the results of that use; his failure to properly define his universe of respondents; his use of inappropriate survey questions; and many data and methodological problems, among other issues. See *generally* CX8011 (Jacoby Rebuttal Report) ¶¶ 20-34 (describing multiple problems with Dr. Van Liere’s survey, controls, and data collection).

²³⁴ CX8008 (Jacoby Report) pp. 8-10. Dr. Jacoby tested three different types of confusion: source, sponsorship, and business affiliation. *Id.* By contrast, Dr. Van Liere tested only source and affiliation confusion. See RX0735 (Van Liere Report) ¶ 1.

1800 Contacts advertisement in response to a search for the trademark “1-800 Contacts,”²³⁵ {

}²³⁶

f. 1-800 Contacts’ Agreements Are Overbroad

Even if 1-800 Contacts were able to produce evidence of infringement by 1-800 Contacts’ rivals, its antitrust defense fails because the Bidding Agreements are manifestly overbroad relative to the problem they purport to address. First, 1-800 Contacts’ Bidding Agreements extend to plainly non-infringing conduct. As described earlier, the agreements require parties to implement “negative” keywords, which *necessarily* broadens an agreement not to “use” trademarked keywords into a ban on the use of *generic* keywords.²³⁷ In addition, the agreements require *reciprocal* commitments from 1-800 Contacts, even where no infringement claim against 1-800 Contacts has been made.²³⁸

²³⁵ See *Lens.com, Inc.*, 755 F. Supp. 2d at 1173-74 (D. Utah 2010) (holding that use of trademarked keywords, divorced from the text of the resulting ads, could not result in a likelihood of confusion), *aff’d*, 722 F.3d 1229.

²³⁶ CX0582

²³⁷ See *supra* pp. 17-18 (explaining that “negative” keyword provisions require advertiser to affirmatively remove them from auctions for *generic* keywords where bidding on those keywords will cause the advertiser’s ad to appear in response to a search query containing 1-800 Contacts-related keywords). Even in the rare instances where courts have ordered (or approved) the implementation of “negative” keywords, courts have refused to order the implementation of *generic* negative keywords that would prevent the trademark owner’s competitor from showing legitimate comparative advertising *against search queries for that trademark owner*. See, e.g., *Rhino Sports, Inc.*, 2007 U.S. Dist. LEXIS 32970, at *18 (rejecting claim that a sports equipment company’s purchase of generic keywords “courts” and “basketball court” violated permanent injunction against use of plaintiff’s SPORT COURT trademark, concluding that “a contrary interpretation of the permanent injunction would not be reasonable because it would preclude [defendant] from using these generic terms as keywords”).

²³⁸ See *supra* p.17 (describing reciprocal commitments). As Respondent’s own expert concedes, no court has ever ordered *reciprocal* relief where no infringement claim has been made by one of the parties. CX9047 (Hogan Dep. Tr.) 197:22-198:4.

also do so significantly better than the available less restrictive alternatives.”²⁴¹ Thus, if 1-800 Contacts can achieve the claimed efficiency benefits (diminishing infringing advertising) by practical, significantly less restrictive means, then the Bidding Agreements are not reasonably necessary, and its antitrust defense fails.²⁴²

Here, even assuming the need for some remedy to address ads whose content and context are actually confusing, the relevant question is whether the broad bans on advertising engineered by 1-800 Contacts are reasonable in scope. We submit that they are not. For example, 1-800 Contacts’ settlement agreements could simply prohibit the specific conduct that was potentially misleading, such as a name that evokes 1-800 Contacts’ trademark. Its settlement agreements could vary with each defendant’s conduct to reflect the evidence and theory of each case. Or its settlement agreements could require affirmative, clear, and conspicuous disclosures that dispel any confusion, such as a caption in the ad text with the advertiser’s own name, or a non-misleading URL displaying its name, *e.g.*, coastalcontacts.com, or walgreens.com.²⁴³

²⁴¹ PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1505.

²⁴² See FEDERAL TRADE COMM’N AND U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000) (hereinafter, “*Competitor Collaboration Guidelines*”), § 3.36(b); see also *PolyGram*, 136 F.T.C. at 349 (“The plaintiff may also show that the proffered procompetitive effects could be achieved through means less restrictive of competition.”).

²⁴³ Under *Network Automation*, prominent disclosure of the advertiser’s own name goes beyond what is typically required for a defendant to avoid user confusion. 638 F.3d at 1154; accord *Toyota*, 610 F.3d. at 1177 (protecting “truthful use of a mark, even if the speaker fails to expressly disavow association with the trademark holder, so long as it’s unlikely to cause confusion as to sponsorship or endorsement.”). Accordingly, such affirmative disclosures identifying the advertising seller by name are examples of lawful fencing-in relief. Further, *Amazon* specifically instructs that disclosure of the seller’s name is sufficient to prevent confusion and avoid initial interest confusion liability. *MTM v. Amazon*, 804 F.3d 930, 933 (9th Cir. 2015).

1-800 Contacts’ naked claim that the only reasonable way to ensure that a competitor will eschew confusing advertising is to bar all trademark keyword advertising²⁴⁴ is contrary to Commission practice and experience, as well as federal court decisions in trademark cases.²⁴⁵

The Commission has substantial experience evaluating horizontal restraints on advertising purportedly aimed at eliminating consumer harm. The Commission has repeatedly concluded that it is reasonable for competitors to agree to prohibit deceptive advertising, but that a restraint on truthful advertising is overbroad and will be judged unlawful.²⁴⁶ Thus, Commission

²⁴⁴ See, e.g., RX0734 (Hogan Report) ¶¶ 43, 46. 1-800 Contacts asserts that less restrictive alternatives are simply too difficult to enforce; *i.e.*, that it should be able to prohibit all uses of its marks because it is difficult to identify which uses are infringing and which are not. According to Respondent’s expert Howard Hogan, such a remedy would itself be subject to constant revision and would invite further disputes. RX0734 (Hogan Report) ¶¶ 138, 140; CX9047 (Hogan Dep. Tr.) 270:13-21.

Notably, 1-800 Contacts’ position regarding the need for “certainty” is inconsistent with its assertion that advertisers are not prohibited from appearing in response to certain queries that include the term “1-800 Contacts.” See *id.* at 224:10-225:12. If this were the case (and, as the evidence will show, it is not), 1-800 Contacts would be in the similar position of having to determine – and potentially argue – on a case-by-case basis whether a rival advertiser *bid* on the term “1-800 Contacts” or just on the generic term “contacts” – or was simply broad-matched in by Google – on a query-by-query basis. This would do nothing more to draw a clear line in the sand as to what a rival is permitted to do, and what a rival is not permitted to do. See *id.* at 272:9-25.

²⁴⁵ Again, 1-800 Contacts’ trademark expert cites a litany of cases that he claims have resulted in “similar” relief. But, as described earlier, the cases he cites are not “similar” at all, and many are private settlement agreements or “consent” judgments never evaluated by any court. See *supra* pp. 56-57 & n.216-222. Moreover, in the only case cited by Mr. Hogan in which a court reviewed a private settlement agreement, the court was specifically asked to determine whether a violation of the agreement had occurred when the defendant comparatively advertised against search queries for the plaintiff’s trademark *by bidding on generic keywords*. The court found decisively in the *defendant’s* favor, concluding that a sports equipment company’s purchase of the generic keywords “courts” and “basketball court” *did not* violate a permanent injunction against use of the competitor’s “SPORT COURT” trademark. Specifically: “The Court concludes that a contrary interpretation of the permanent injunction would not be reasonable *because it would preclude [defendant] from using these generic terms as keywords.*” *Rhino Sports, Inc. v. Sport Court, Inc.*, 2007 U.S. Dist. LEXIS 32970, at *18 (May 2, 2007) (emphasis added).

Finally, 1-800 Contacts’ position appears to be that, if a court has ordered a particular remedy, 1-800 Contacts is within its rights to demand similar “fencing in” relief. 1-800 Contacts cites no authority for this proposition. Aside from the fact that 1-800 Contacts’ relief went beyond what *any* court *has* ordered, or would order, in similar circumstances, court-ordered relief is beyond the reach of the antitrust laws, while agreements between private parties are not. See Opinion and Order of the Commission Granting Complaint Counsel’s Motion For Partial Summary Decision, *In re 1-800 Contacts, Inc.* (Feb. 1, 2017), at 3-4.

²⁴⁶ *Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549, *45 (“Prohibiting truthful statements . . . cannot be justified on the ground that some advertising may seek to deceive the public.”); *Am. Med. Ass’n*, 94 F.T.C. 701, *234-35 (1979) (“We accept the contention that an ethical precept narrowly directed toward false or deceptive advertising and unfair solicitation may enhance competition by insuring the communication of accurate information in a manner that allows it to be processed unburdened by unscrupulous practices. Respondent’s restrictions are of a

orders in trade association cases challenging advertising restraints enjoin the association from interfering with truthful and non-misleading advertising, but include a proviso allowing the association to regulate false advertising.²⁴⁷

The Commission's Policy Statement in Regard to Comparative Advertising rejects the contention that an agreement barring a firm from using a rival's trademark in advertising is a reasonable (and not overbroad) means of avoiding consumer confusion.²⁴⁸ The Commission expressly "encourages" truthful and non-misleading comparative advertising, including "the naming of, or reference to competitors."²⁴⁹ The Commission cautions that advertising referencing competitors "requires clarity, and, if necessary, disclosure to avoid deception of the consumer." In other words, if firms are legitimately concerned about confusion, then requiring clarity of expression together with appropriate disclosure is the acceptable and less restrictive remedy.

The Commission has enforced these principles regarding comparative advertising in litigated cases and in a series of consent orders.²⁵⁰ The Commission has described this line of

different kind, however, reflecting a belief that the best way to interdict false and deceptive advertising and overreaching by physicians is to proscribe practically the full spectrum of advertising and solicitation activities.").

²⁴⁷ *E.g.*, *Mass. Bd. of Registration in Optometry*, 110 FTC at *38 ("Nothing in this order shall prevent the Board from adopting...reasonable rules...to prevent advertising that [is] fraudulent, false, deceptive, or misleading within the meaning of [state law]..."); *Am. Med. Ass'n*, 94 FTC at *251 ("Nothing... shall prohibit respondent from...adopting...reasonable ethical guidelines governing the conduct of its members with respect to representations...that would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act...").

²⁴⁸ 16 C.F.R. § 14.15.

²⁴⁹ *Id.* at § 14.15(b).

²⁵⁰ The Commission challenged and remedied (i) an agreement between two manufacturers of electronic surveillance systems restricting comparative advertising about their systems' performance and effectiveness, *Sensormatic Elecs.*, F.T.C. Docket No. 951-0023 (1998) (Commission Order); (ii) an agreement among manufacturers of protective body armor restraining truthful comparative advertising, including advertising that a rival's products have failed certification testing, *Personal Protective Armor Ass'n*, 117 F.T.C. 104 (1994); and (iii) an agreement among automobile dealers prohibiting advertising that disparages a rival, *Arizona Automobile Dealers Ass'n*, 117 F.T.C. 781 (1994).

cases as follows: “On many occasions, the Commission has prohibited groups of horizontal competitors from agreeing to refrain from making truthful, non-deceptive claims, including comparisons, criticisms, or disparaging statements in advertising. The Commission has recognized that one of the benefits of competition is that competitors may be driven to provide consumers with information that makes for better educated, effective consumers.”²⁵¹

2. Free Riding Defense

1-800 Contacts asserts that the Bidding Agreements address concerns about free riding.²⁵²

1-800 Contacts asserts that it expends millions of dollars each year promoting its trademark through television advertising and other programs; that such promotion is intended to (and does) create consumer interest in 1-800 Contacts; and that this interest drives consumers to the internet where they search for, *inter alia*, “1-800 Contacts.” According to 1-800 Contacts, any attempt by rivals to attract these consumers through search advertising constitutes free riding, which, if permitted, would diminish 1-800 Contacts’ incentives to invest in promoting its trademark and burnishing its reputation.²⁵³

²⁵¹ *Sensormatic Elecs.*, FTC Docket No. 951-0023 (1998) (Analysis of Proposed Consent Orders to Aid Public Comment). The Supreme Court’s *California Dental Association* decision is consistent with these FTC policies and precedents. There, the Court did not dispute that a trade association rule barring dentists from engaging in verifiable, truthful price and quality advertising would be *prima facie* anticompetitive. *Cal. Dental*, 526 U.S. at 771. It upheld the challenged restraints because they were “very far from a total ban on price or discount advertising.” In the Court’s judgment, they were designed to avoid false or deceptive advertising in a professional services market characterized by “significant challenges to informed decisionmaking by the customer.” *Id.* at 771-73.

²⁵² A free rider is a firm that takes advantage of a service that is valued by customers but provided by a different firm. In the face of free riding, the firm that provides the valued service does not internalize the full social benefit of its investment and may reduce its investment, thus potentially harming competition and consumers.

²⁵³ See CX9004 (Coon (former 1-800) IH Tr.) 288:21-22 (“We don’t like having competitors hijack and steal our customers before they get to checkout.”); CX9001 (Bethers (1-800) IH Tr.) 149:2-6 (“So I go out and try to advertise, but my advertising goes to 13 percent of the U.S. population. But now I have a free-rider that can come on to my search terms and my trademark and put an offer and divert some traffic”); *id.* at 124:13-17, 299:21-300:21. The hypothesized reduction in other forms of advertising, including television advertising, would harm consumers, according to 1-800 Contacts, because such advertising provides valuable information about the possibility and benefits of buying contact lenses online, rather than from an ECP or from a brick-and-mortar retailer.

Although courts have ruled that reducing free riding is a cognizable defense to certain Section 1 claims, those cases are inapposite. The elimination of free riding is potentially a legitimate defense (i) for a vertical restraint²⁵⁴ or (ii) for a horizontal restraint that is ancillary to a substantial business integration (*i.e.*, a joint venture).²⁵⁵ Free riding is not a defense to a naked horizontal restraint such as the Bidding Agreements.

The restraints at issue in this investigation are *not* ancillary to a joint venture or other collaboration; 1-800 Contacts and the other contact lens sellers are wholly independent competitors. Where an antitrust court is evaluating a naked horizontal restriction, free riding is not a cognizable defense. Indeed, in *Polygram*, the Commission considered and rejected a free riding argument essentially indistinguishable from the argument that 1-800 Contacts advances here:

The sort of behavior that Respondents disparage as “free-riding” – *i.e.*, taking advantage of the interest in competing products that promotional efforts for one product may induce – is an essential part of the process of competition that occurs daily throughout our economy. For example, when General Motors (“GM”) creates a new sport utility vehicle (“SUV”) and promotes it, through price discounts, advertising, or both, other SUVs can “free ride” on the fact that GM’s promotion inevitably stimulates consumer interest, not just in GM’s SUV, but in the SUV category itself. Our antitrust laws exist to protect this response, because

²⁵⁴ *E.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 880-99 (2007); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 757, 761-63 (1984).

²⁵⁵ *E.g.*, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986); *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-91 (7th Cir. 1985). For example, in *Polk Brothers*, the Seventh Circuit considered a joint venture between two retail chains to build a new facility, one large enough to house both stores. *Polk Bros.*, 776 F.2d at 187. The companies mainly sold complementary products (appliances and furnishings at one, and building materials and tools at the other), but some of their offerings overlapped. The co-venturers agreed not to sell overlapping products at the joint facility. *Id.* The Seventh Circuit rejected a *per se* challenge to this agreement on the basis that the restraint: (i) was ancillary to a collaboration, and (ii) contributed to the efficient functioning of that collaboration by eliminating free riding. *Id.* at 190 (“Polk spent substantial sums in advertising to attract customers to its stores, where it displayed and demonstrated the appliances. It might be tempting for another retailer to take a free ride on these efforts. Once Polk had persuaded a customer to purchase a color TV, its next door neighbor might try to lure the customer away by quoting a lower price. It could afford to do this if, for example, it simply kept the TV sets in boxes and let Polk bear the costs of sales personnel and demonstrations. Polk would not continue doing the work while its neighbor took the sales. It would do less demonstrating and promotion, to the detriment of consumers who valued the information.”).

it is in reality the competition that drives a market economy to benefit consumers. There is no doubt that GM's SUV will likely be more profitable if its competitors do not respond. Promoting profitability, however, is not now, nor has it ever been, recognized as a basis to restrain interbrand competition under the antitrust laws.²⁵⁶

The Supreme Court has similarly rejected free riding as a defense to a naked horizontal restraint. In *Fashion Originators' Guild of America v. F.T.C.*, a group of garment and textile manufacturers formed a guild ("FOGA") to address an asserted free rider problem: competing garment manufacturers were copying the FOGA members' "distinctive" garment designs and selling them for a lower price.²⁵⁷ FOGA members agreed not to sell to retailers that sold garments made with pirated designs.²⁵⁸ The Supreme Court upheld the Commission's condemnation of FOGA's agreement, concluding that the horizontal group boycott was a *per se* violation of the antitrust laws.²⁵⁹

The purported presence of trademark rights here does not change the analysis. As Professors Areeda and Hovenkamp have observed, "the following defenses to a horizontal restraint affecting price or output are unacceptable: . . . that collusion or market division is necessary to prevent firms from violating one another's intellectual property rights, or to discipline others who are violating them."²⁶⁰

²⁵⁶ *In re Polygram Holding*, 136 F.T.C. 310, 361-62 (2003); see also PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2032b, at 184 (1999) ("free riding is ubiquitous in our society"); FEDERAL TRADE COMMISSION & U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, §3.2 ("The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding *per se* condemnation.").

²⁵⁷ 312 U.S. 457, 461 (1941) (hereinafter "*FOGA*").

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 464-65; see also, e.g., *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 370 (7th Cir. 1987) (holding a horizontal price fixing agreement among contractors unlawful *per se* despite a claim that the restraint would reduce free riding; noting that "despite the incentive for firms to take free rides on the activities" of their competitors, and "despite the potential gains" from reducing free riding "this is not the sort of justification that a court may accept. To do so would abolish the *per se* rule against horizontal price fixing.").

²⁶⁰ AREEDA & HOVENKAMP, ANTITRUST LAW ¶1907b; see also *FOGA*, 312 U.S. at 468 (explaining that "even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in

Note also that there is a preferable way of addressing the free riding concern asserted here. If a search advertising platform (*e.g.*, Google) or a contact lens manufacturer (*e.g.*, Johnson & Johnson) were concerned that free riding was harming the platform or the efficiency of lens distribution, those firms could impose vertical restrictions on retailers' use of trademarks as keywords. That these companies have not sought to restrict keyword bidding (indeed, the search advertising platforms have deliberately eliminated restrictions on keyword bidding²⁶¹) suggests that 1-800 Contacts' free riding concerns are exaggerated.

3. General Confusion or “Clutter” Defense

1-800 Contacts also asserts that the SERP layout of Google and other search engines is generally “confusing,” in that “large numbers” of consumers cannot distinguish between organic search results and advertisements on the page.²⁶² 1-800 Contacts' attempt to turn this case into a referendum on Google's SERP layout misses the boat on the underlying trademark analysis. As described earlier, the gravamen of a trademark infringement claim is *not* whether a consumer recognizes that a link for a rival advertiser, like Walgreens, is an *ad* or an *organic* search result, but rather, whether a consumer recognizes the link for Walgreens *as a link for Walgreens*.²⁶³

combining together to regulate and restrain interstate commerce in violation of federal law”). 1-800 Contacts essentially seeks the right to exclusive use of its marks, akin to the breadth of protection that patent law provides, and contrary to the protection currently provided by trademark law. While this is an argument that 1-800 Contacts might choose to make to Congress, it is not a defense to an antitrust violation. *See Prof'l Engineers*, 435 U.S. at 689 (holding an argument that “because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition” is the “kind of argument [that] is properly addressed to Congress . . . but it is not permitted by the Rule of Reason”).

²⁶¹ *See supra* n.71 (Google changed its trademark policy in 2004).

²⁶² Indeed, 1-800 Contacts relies on prior letters issued by the Commission itself in discussing the issue. *See, e.g.*, RX0734 (Hogan Report) ¶¶ 89-91 (citing Letter from M. Engle, Bureau of Consumer Protection (June 24, 2013)); RX0736 (Goodstein Report) ¶ 56 (citing Letter from M. Engle, Bureau of Consumer Protection (June 24, 2013); Letter from H. Hipsley, Bureau of Consumer Protection (June 27, 2002)).

²⁶³ *See supra* pp. 50-52 (explaining that trademark law protects against *source* confusion).

Thus, 1-800 Contacts’ assertion that Google’s page is generally cluttered or confusing is irrelevant to the underlying trademark infringement analysis.²⁶⁴

Moreover, suggesting that a less-cluttered page (presumably without rival ads that might “distract” a consumer from 1-800 Contacts’ higher priced products) would be beneficial to consumers flies in the face of both trademark law and antitrust law. The “distraction” that 1-800 Contacts claims to be saving consumers from is nothing other than competition itself. Even assuming some initial intent on the part of the user to navigate to 1-800 Contacts’ website,²⁶⁵ 1-800 Contacts’ proposition that any diversion of such a user to a competitor’s website must be inadvertent and thus harmful relies on the flawed assumption that search advertising can *never* lead consumers to consider an alternative or to change their minds. Certainly, if this were true, Google’s multi-billion dollar advertising juggernaut would be in significant jeopardy. But, as Google – and other search advertising platforms – have concluded, rival search advertising is helpful to users *precisely because* it offers them different options that are highly relevant to the choices they make.²⁶⁶ In short, options do not “distract” users from consummating a desired transaction – they *help* users to do so.²⁶⁷

²⁶⁴ See CX8014 (Tushnet Report) ¶¶ 19, 72. Notably, 1-800 Contacts has never sued Google for trademark infringement.

²⁶⁵ See RX0736 (Goodstein Report) ¶ 79.

²⁶⁶ See, e.g., CX0471 (Google) (Apr. 13, 2004, email from Rose Hagan to Howard Metzenberg describing Google’s revised policy regarding bidding on trademarks as keywords) (“By preventing advertisers from using trademarked terms as keywords, Google has been reducing the relevant information about products and services users see and thus limiting user choice. We believe the right approach is to give users more choices and access to as much information as is relevant to their search or interest.”); CX0888 { }.

²⁶⁷ If 1-800 Contacts were so confident that users were *only* interested in navigating to 1-800 Contacts’ website, 1-800 could take comfort in the fact that it shows up as the number one “organic” search result *and* the number one paid ad result in response to a search for “1-800 Contacts.” See, e.g., Exhibit D (screen shot showing search results for “1-800 Contacts”). Thus, 1-800 Contacts is hard-pressed to argue that a user seeking to “navigate” to 1-800 Contacts’ website would be “distracted” by search results (organic or paid) *below* those of 1-800 Contacts. To the contrary, it supports the conclusion that the Bidding Agreements serve no purpose other than to hide *all other options* from the user who might *not* be committed to navigating to 1-800 Contacts’ website.

VI. REMEDY

The evidence introduced at trial will fully support the Court entering an order consistent with the Notice of Contemplated Relief, issued with the Complaint, which enjoins 1-800 Contacts from, among other things: (i) maintaining, entering into, or attempting to enter into an agreement with any contact lens retailer that restrains participation in or otherwise restrains competition in any search advertising auction, or prevents the dissemination of truthful and non-misleading advertising; (ii) enforcing, attempting to enforce, or threatening to enforce any provision of an agreement that restricts bidding for search advertising, that restricts the display of advertisements in response to certain search queries, or that requires the use of negative keywords in search advertising; and (iii) filing or threatening to file a lawsuit against any contact lens retailer alleging trademark infringement, deceptive advertising, or unfair competition based on the use of 1-800 Contacts' trademarks in a search advertising auction.

“[T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past . . . it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.”²⁶⁸ The remedies identified in the Notice of Contemplated Relief issued with the Complaint in this matter are reasonably necessary to ensure 1-800 Contacts' future compliance with the antitrust laws of the United States. Courts will not assume that a continuing illegal practice or an antitrust conspiracy “has been abandoned without clear proof. It is the duty of the courts to be aware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.”²⁶⁹

²⁶⁸ *Fed. Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

²⁶⁹ *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952) (internal citation omitted).

Here, the evidence at trial will establish that 1-800 Contacts has continued to send cease-and-desist letters to rival firms, to threaten lawsuits against them, to enter into Bidding Agreements with rivals, and to aggressively enforce those agreements through present day. If 1-800 Contacts is not prohibited from engaging in this panoply of conduct going forward, 1-800 Contacts will almost certainly continue to enforce its unlawful agreements and to threaten other firms if and when they attempt to comparatively advertise against 1-800 Contacts' trademarks.

VII. CONCLUSION

For the reasons stated above, the evidence at trial will establish that 1-800 Contacts has violated Section Five of the FTC Act, as alleged in the Complaint, and will justify entry by the Court of an Order granting the relief sought by the Notice of Contemplated Relief.

Dated: April 3, 2017

Respectfully Submitted,

/s/ Daniel Matheson

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Counsel Supporting the Complaint

EXHIBIT A

LIST OF ONLINE RETAILERS

In addition to **1-800 Contacts**, the following are the other major online retailers of contact lenses in the United States:¹

1. **Vision Direct.** Vision Direct (owned by Walgreens²), a “pure play” online retailer, is the { } online contact lens retailer. It had { } million in sales in 2015, representing approximately { } percent of the online contact lens market.
2. **Lens.com.** Lens.com, a “pure play” online retailer, had { } million in sales in 2015, representing approximately { } percent of the market.
3. **Walgreens.** Walgreens, which sells contact lenses only online, had { } million in sales in 2015 through its website, walgreens.com, representing approximately { } percent of the market.
4. **Lens Discounters.** LensDiscounters.com, a “pure play” online retailer, had { } million in sales in 2015, representing approximately { } percent of the market.
5. **AC Lens.** Arlington Contact Lens Service Inc., d/b/a/ AC Lens, a “pure play” online retailer, had { } million in sales in 2015, representing approximately { } percent of the market.
6. **Walmart.** From approximately 2008 to 2012, Walmart and 1-800 Contacts operated in an alliance and jointly set contact lens prices available in Walmart stores, on Walmart.com, and on 1800contacts.com. After the alliance ended, Walmart began to sell contacts on walmartcontacts.com, which is now managed by AC Lens. In 2015, Walmart had { } million in sales, representing approximately { } percent of the market.
7. **Coastal.** Coastal, a “pure play” online retailer, had { } million in sales in 2015, representing approximately { } percent of the market.
8. **Web Eye Care.** Web Eye Care, a “pure play” online retailer, had { } million in sales in 2015, representing approximately { } percent of the market.
9. **EZ Contacts.** EZ Contacts USA, Inc., a “pure play” online retailer, had { } million in sales in 2015, representing approximately { } percent of the market.
10. **Lensfast.** Lensfast, a “pure play” online retailer, had { } million in sales in 2015, representing { } percent of the market.
11. **Lens Direct.** Lens Direct, a “pure play” online retailer, had { } million in sales in 2015, representing { } percent of the market.

¹ These numbers are taken from CX8006 (Evans Report) ¶ 54, Table 1.

² { }.

Other online retailers collectively accounted for some { } million in sales in 2015, representing approximately { } percent of the online market. These sellers include: **Contact Lens King, Empire Vision (Visionworks), Lenses For Less, Replace My Contacts, and Standard Optical.**

In addition, there is at least one retailer – **Memorial Eye** – which exited the online contact lens market as a result of the challenged Bidding Agreements.

EXHIBIT B

Sample Query Search for “contact lenses”

contact lenses - Google Se... x +

https://www.google.com/#q=contact+lenses&

Google contact lenses

All Shopping News Images Maps More Settings Tools

About 30,700,000 results (0.44 seconds)

Contact Lenses \$14.99/Box - New Customers, 20% Off - coastal.com
www.coastal.com/Rx_Contacts/Online
 Find the Exact Brand Your Doctor Prescribed at Our Lowest Price Match Guarantee!
 In-house Opticians - Free Shipping & Returns
 Types: Daily Contact Lenses, Colored Contacts...
 Shop Monthly Contacts Shop Daily Contacts
 Contacts Start @14.99/Box Shop Weekly Contacts

1800CONTACTS - Lowest Prices - We Beat Any Price On Contacts
www.1800contacts.com/Contact-Lenses
 4.8 ★★★★★ rating for 1800contacts.com
 Free Shipping & No Hidden Fees. Crazy Fast Delivery. Order Now!
 24/7 Customer Service - Satisfaction Guarantee - Free Lens Replacement - Easy Ordering
 Ratings: Shipping 10/10 - Website 10/10 - Prices 10/10 - Customer service 9.5/10 - Selection 9.5/10
 Air Optix Contacts - Renew Your Rx Online - \$10 Off Coupon - All Students Get 10% Off

Contact Lenses up to 70% Off - All Major Brands In Stock - lens.com
www.lens.com/Contact-Lenses (800) 536-7266
 Find All the Major Contact Lens Brands at Unbeatable Prices. Shop Today!
 Avoid Multiple Dr. Visits - 100% Money Back Guarantee - 1-Click Reordering
 Excellent Shopping Experience - Google Trusted Stores
 Biofinity Contacts - All Brands Up to 70% Off - Dailies Total 1 - Biotrue ONEday

Contact Lenses at 1-800 CONTACTS | World's Largest Contact Lens ...
<https://www.1800contacts.com/>
 1-800 CONTACTS - Free Shipping, Guaranteed Customer Service. Order Contact Lenses Online for less. We Deliver. You Save.™

Contact Lenses | Buy Prescription Contacts | Lens.com
<https://www.lens.com/contact-lenses/>
 By purchasing your prescription contact lenses from Lens.com you'll enjoy fast delivery, our lowest price guarantee, & hassle-free ordering.

Buy Contact Lenses | Affordable Contact Lenses - LensDirect
<https://www.lensdirect.com/contact-lenses>
 Buy Contact Lenses at LensDirect. Americas leading provider of affordable contact lenses & eyewear. Free Shipping on orders over \$49. Price Match ...

Discount Contact Lenses - Order Contacts Online and Save Money ...
<https://www.coastal.com/contact-lenses>
 Order your contact lenses online and get Free Shipping, Award Winning Customer Service, and our Price Match Guarantee. Shop for Discount Contacts from top ...

Contact Lenses From Walmart Contacts
<https://www.walmartcontacts.com/>
 Buy contact lenses online from Walmart Contacts for fast, convenient service. We carry the widest selection of lenses and offer expedited shipping for all your ...
 Acuvue - Ordering Contact Lenses - ACUVUE OASYS for ... : Air Optix

Shop for contact lenses on Google Sponsored

			
Biofinity Contact Lenses \$14.94 Lens.com	Acuvue Oasys Contacts 6 Months \$19.94 EzContacts.com Special offer	Air Optix Aqua Contact Lenses \$15.03 Lens.com	DAILIES AquaComfort Plus \$31.99 EzContacts.com Special offer
			
1-Day Acuvue Moist 30 pack \$33.00 Walgreens.com Special offer	Acuvue Oasys for Astigmatism \$23.20 OptiContact.com Free shipping	Air Optix Night & Day Aqua Multifocal \$30.74 Lens.com	Air Optix Aqua Multifocal \$32.94 Lens.com

EXHIBIT C

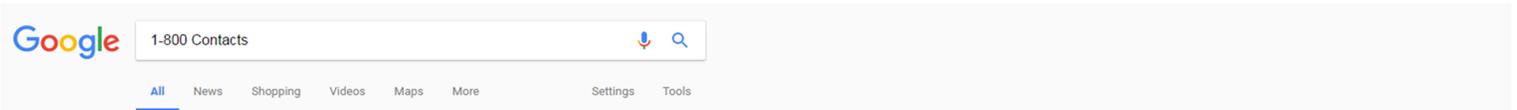
1-800 CONTACTS' BIDDING AGREEMENTS WITH COMPETITORS¹

Competitor	Agreement Date	Agreement Exhibit No.
Vision Direct	June 2004 May 2009	CX0311 CX0314
Coastal	October 2004	CX0310
EZ Contacts	May 2008	CX0313
Lensfast	December 2009	CX0315
AC Lens	March 2010	CX0317
Lenses for Less	March 2010	CX0320
Contact Lens King	March 2010	CX0323
Empire Vision	May 2010	CX0319
Tram Data (ReplaceMyContacts)	May 2010	CX0321
Walgreens	June 2010	CX0322
Web Eye Care	September 2010	CX0324
Standard Optical	February 2011	CX0325
Memorial Eye	November 2013	CX0326

¹ This list does not include 1-800 Contacts' Bidding Agreement with { }, CX0331 (Dec. 23, 2013, Contact Lens Sourcing and Services Agreement between { } and 1-800 Contacts), Section 17.10-11.

EXHIBIT D

Sample Query Search for "1-800 Contacts" (Exhibit taken from CX8011 (Jacoby Rebuttal Report, Appendix K)) -



About 16,600,000 results (0.52 seconds)

1800CONTACTS - Official Site - We Beat Any Price on Contacts.

www.1800contacts.com/
 Order With Confidence - Never Run Out Of Contacts - Free, Crazy Fast Delivery
 Satisfaction Guarantee - Easy Ordering - We Price Match - Free Lens Replacement - Free Shipping
 Types: Toric, Astigmatism, Multifocal, Bifocal, Color, Enhancing, Disposable - Daily, Disposable - 1-2 We...

\$10 Off Coupon

Get \$10 Off Contact Lenses
 Enter coupon code: DEAL10

New Customer

See How Easy it is. Find & Order
 Your Contacts in 3 Simple Steps.

Easy Re-Order

Easy Online Re-Ordering Process!
 Stress Free Ordering & Pricing.

All Students Get 10% Off

Simply Verify Your Student Status &
 Immediately Save 10% On Your Order

Contact Lenses at 1-800 CONTACTS | World's Largest Contact Lens ...

<https://www.1800contacts.com/>
 1-800 CONTACTS - Free Shipping, Guaranteed Customer Service. Order Contact Lenses Online for less.
 We Deliver. You Save.™

How to Order

Start your order or walk through these
 simple ... How to Order ...

Colored Contact Lenses

Air Optix Colors - Expressions -
 FreshLook Colorblends - ...

Contact Us

You can contact us by calling the
 phone number provided below.

[More results from 1800contacts.com >](#)

Most Popular Contact Lenses

Find your brand of contact lenses with
 free shipping and easy ...

Acuvue

Buy Acuvue Brand contact lenses, the
 world's first disposable lens ...

Careers

Want a career where you feel
 empowered? Who doesn't? Get ...

1-800 Contacts Promo Codes & Coupon Codes - Groupon

<https://www.groupon.com/coupons/contacts-glasses>
 ★★★★★ Rating: 100% - 21 votes
 Never miss a great 1800 Contacts coupon and get our best coupons every week! About 1800 Contacts
 ... 1-800 Contacts Promo Codes & Coupon Codes.

1-800 Contacts - Wikipedia

https://en.wikipedia.org/wiki/1-800_Contacts
 1-800 Contacts is a company based in Draper, Utah, United States, that sells contact lenses, including
 Johnson & Johnson Vision Care, Ciba Vision, Bausch ...

1800 Contacts - Lens Store - Android Apps on Google Play

<https://play.google.com/store/apps/details?id=com.contacts1800.ecomapp&hl=en>
 ★★★★★ Rating: 4.7 - 20,188 votes - Free
 The 1-800 CONTACTS app is the fastest, easiest, and most enjoyable way to order contact lenses.
 Where else can you reorder your contacts in 3 taps? SIMPLE ...

1-800 CONTACTS | Facebook

<https://www.facebook.com/1800Contacts/>
 I've been a long time fan of 1-800-contacts... and a loyal customer for years. But when I received a
 Valentine today with my order (Sour Patch Kids nonetheless), ...

FTC Sues 1-800 Contacts, Charging that It Harms Competition in ...

<https://www.ftc.gov/.../ftc-sues-1-800-contacts-charging-it-harms-competition-online>
 Aug 8, 2016 - The Federal Trade Commission has sued 1-800 Contacts, the largest online retailer of
 contact lenses in the United States, alleging that it ...

1-800 Contacts (@1800CONTACTS) | Twitter

<https://twitter.com/1800contacts?lang=en>
 "Lesson Learned. #NeverRunOutOfContacts #Oscars #BestPicture #Oops #
 YouThinkItWontHappenToYou #1800Contacts <https://t.co/eiq0jZQEUF>"

Searches related to 1-800 contacts

- 1 800 contacts coupon
- walgreens contacts
- cheap contacts
- contacts online
- walmart contacts
- contacts direct
- costco contacts
- coastal contacts



1-800 Contacts

Company

1800contacts.com

1-800 Contacts is a company based in Draper, Utah, United States, that sells contact lenses, including Johnson & Johnson Vision Care, Ciba Vision, Bausch & Lomb and CooperVision brands. The company was incorporated in 1995. [Wikipedia](#)

Customer service: 1 (800) 266-8228
Headquarters: Draper, UT
Founder: Jonathan C. Coon
Founded: 1995
CEO: Brian W. Bethers (Feb 2014–)
Parent organization: Aea Investors LP

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Vision Direct

AC Lens

Anthem Inc.

Coastal.co...

Costco

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2017, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

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

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Counsel for Respondent 1-800 Contacts, Inc.

Dated: April 3, 2017

By: /s/ Daniel J. Matheson
Attorney

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

April 3, 2017

By: /s/ Daniel J. Matheson
Attorney